

## LABOUR OFFICER

v.

## DISTILLERIES COMPANY OF SRI LANKA

COURT OF APPEAL

JAYASINGHE, J.

JAYAWICKREMA, J.

CA. (PHC) 58/98

M. C. COLOMBO 55851/5

H. C. (COLOMBO) REV. 812/96

10<sup>TH</sup> JANUARY, 2000

18<sup>TH</sup> FEBRUARY, 2000

30<sup>TH</sup> MARCH, 2000

*Conversion of Public Corporations into Public Companies - Act No. 23 of 1987 - Payment of Gratuity Act No. 12 of 1983 - Amended by Acts Nos. 41 of 1991 and 42 of 1992 - S.5(1), S.8 - Liability of Employer to pay gratuity - Should the period under the former Employer be computed? - Effect of S.15(1) of the Companies Act No. 17 of 1982.*

The Employee joined the Distilleries Corporation of Sri Lanka on 1.7.1974 and retired from service on 30.1.1993. Whilst he was in the employ of the said Corporation, it was converted into a Public Company on 17.11.1989 under Act 23 of 1987.

It was the contention of the Petitioner (Labour Officer) that the Respondent Company should pay gratuity for the entire period i. e. 1.7.1974 to 30.1.1993. The Respondent company admitted liability only for the period the workman was employed under the company i. e. from 17.11.1989 - 30.1.93.

On a certificate under S.8 of Act 62 of 1992, being filed in the Magistrate's Court, the Court held with the Petitioner, which order was reversed in the High Court.

### **Held :**

- (1) The Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act provides for the establishment of a company to take over the function of a Public Corporation or take over and carry on any business undertaking acquired or vested in the Government.

Even where a Public Corporation or Government Owned Business Undertaking is converted into a Public company the workmen still remain workmen under the company established under the Conversion Act.

- (2) Therefore by operation of Law the newly constituted company where a Certificate of Incorporation under S. 15(1) of the Companies Act 17 of 1982 is published in the gazette declaring that a Public Company is incorporated in the name specified in the Order, takes over the function of the Public Corporation.
- (3) Section 7(c) of Act No. 23 of 1987 is unambiguous in that it requires the employer to add the period of employment in the Corporation to the period of service under the Company for the purpose of gratuity.

**APPLICATION** in Revision from the Order of the High Court of Colombo.

*Uditha Egalahewa S. C.*, for Petitioner.

*Dulinda Weerasuriy* with *Ms. A. Fernando* for Respondent.

*Cur. adv. vult.*

June 23, 2000.

**JAYASINGHE, J.**

One K. D. Abeynayake joined the Distilleries Corporation of Sri Lanka on 01.07.1974 and retired from service on 30.01.1993. While the said Abeynayake was in the employ of the Distilleries Corporation of Sri Lanka the said Corporation was converted into a Public Company on 17.11.1989 under the provisions of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987. Upon the retirement of the said Abeynayake a dispute arose between Labour Officer - the Petitioner to this application and the Respondent Company regarding the gratuity to be payed to the said Abeynayake. It was the contention of the Petitioner that the Respondent Company should pay Abeynayake gratuity for the entire period he was in service i. e. from 01.07.1974 to 30.01.1993. The Respondent disputed the claim admitting liability only for

the period the workman was employed under the Respondent Company i. e. 17.11.1989 - 30.01.1993. Consequently the Petitioner filed certificate in terms of Section 8 of the Payment of Gratuity Act No. 12 of 1983 as amended by Act No. 41 of 1991 and 62 of 1992 that the Respondent had defaulted payment in a sum of Rs. 127,822.50, gratuity payable to the workman. The learned Magistrate after inquiry held that the Respondent Company was in default and made order that the said sum be recovered as a fine. Being dissatisfied with the order made by the learned Magistrate the Respondent Company moved in Revision in the Provincial High Court of the Western Province and the learned High Court Judge reversed the order made by the learned Magistrate.

The present application is to revise the order of the learned High Court Judge.

Mr. Weerasuriya referred Court to Section 5(1) of Payment of Gratuity Act No. 12 of 1983 as amended. He argued that the employer's liability to pay gratuity arises on termination of service of a workman who has a period of service of not less than five years under that employer and that Section 5(1) makes an employer liable only for the period of service under "that employer" and not for any other period of service under any previous employer of that workman. He submitted that it is a basic principle in labour law that liability of a previous employer does not pass on to the succeeding employer unless there was express agreement between the two employers; that there was no continuity of employment unless by express agreement between the employers.

According to Section 5(1) of the Payment of Gratuity Act No. 12 of 1983 the employers liability to pay gratuity to his workmen arises upon termination. There is the additional requirement that for a workman to qualify for gratuity the workman has to have a period of service of not less than five completed years under that employer. The conversion of Public Corporations or Government Owned Business

Undertakings into Public Companies Act No. 23 of 1987 provides for the establishment of a Company to take over the function of a Public Corporation or take over and carry on any business undertaking acquired by or vested in the Government. Even where a Public Corporation or Government Owned Business Undertaking is converted into a Public Company the workmen still remain workmen under the Company established under the Conversion Act. Therefore by operation of law the newly constituted Company where a certificate of incorporation under Section 15(1) of the Companies Act No. 17 of 1982 and published in the Gazette declaring that a Public Company is incorporated in the name specified in the order takes over the functions of the Public Corporation.

This arrangement to my mind has no effect on Section 5(1). Section 7(c) of the Payment of Gratuity Act provided that in determining, for the purpose of Section 5(1) of this Act whether a workman in any Company which takes over the functions of Public Corporation or takes over and carries on any Government Owned Business Undertaking has completed five years of service in such Company his period of service with the Public Corporation or Government Owned Business Undertaking shall be included. Section 7(c) therefore determines continuity of service of the workmen in the new Company for the purpose of gratuity. Section 7A(1) provides that “. . . a company is incorporated to take over the functions of a public corporation or take over and carry on a Government Owned Business Undertaking, any workman of that corporation or undertaking who becomes a workman of that company, and who becomes, upon the making of that Order, entitled to the payment of any gratuity under this Act, shall, notwithstanding anything in the preceding provisions of this Act, be paid such gratuity . . .” Section 6(2) sets out the rate and computation for the payment of gratuity. Therefore gratuity is payable upon termination on a computation set out in Section 6(2). There is no provision to pay gratuity where the Corporation changes

ownership because gratuity payable would be computed on the basis of the last drawn salary. The term last drawn salary has a specific connotation. That gratuity is payable only on termination. By the operation of Section 7A(1) read with 7(c) of Payment of Gratuity Act, without ambiguity entitles the workman for payment of gratuity even for the period of service he continued in the Company after conversion if he became an employer of the Company under Act No. 23 of 1987. Section 7(c) is unambiguous in that it requires the employer to add the period of employment in the Corporation to the period of service under the Company for the purpose of gratuity. Section 7A(1) and Section 7(c) would be without meaning if we are to accommodate Mr. Weerasuriya's argument that there was termination of the services of the workmen with the incorporation of the new Company under Act No. 23 of 1987.

It is also appropriate to mention that there is no provision in either Act to make the Corporation or the Government Owned Business Undertaking converted into a Public Company liable for the payment of gratuity.

The learned State Counsel referred us to 'P14' the conditions of sale of the Corporation where the Respondent Company the purchaser was required to continue the employment of those employed by the company as at the date of sale on terms and conditions not less favourable than those already enjoyed at least for a minimum period of two years from the date of acquisition of 60% of the shares.

We accordingly set aside the judgment of the learned High Court Judge and affirm the order made by the learned Magistrate.

The application for revision is allowed with costs.

**JAYAWICKRAMA, J.** - I agree.

*Application allowed.*