

DISTILLERIES COMPANY OF SRI LANKA
v
DEPUTY COMMISSIONER OF LABOUR

COURT OF APPEAL

IMAM, J.

SARATH DE ABREW, J.

CA (PHC) 76/2005

HC GALLE (REV) 91/2001

MC GALLE 52480

Payment of Gratuity Act, 12 of 1983 – Section 5 (1) Amendment 62 of 1992 – section 5 (1) section 5(4) – Companies Ordinance – Conversion of Public Corporations or Government owned Business Undertakings into Public Companies Act No. 23 of 1987 – section 2 – Corporation converted into a company – Liability to pay surcharge on gratuity payable to an employee – Is it mandatory? Alternative remedies available – Exceptional circumstances? Rule 3(1) a of the Court of Appeal Rules 1990 – stare decisis.

The petitioner company sought to revise the order of the High Court which held that the petitioner company was liable to pay a surcharge under the Payment of Gratuity Act. The employee concerned was employed by the Distilleries Corporation which was later converted into the petitioner company in terms of the provisions of Act 23 of 1987. The petitioner company contended that, the employee was not entitled to gratuity for the period he served as a workman under the Corporation. The Magistrate's Court held that, the petitioner is liable to pay. The High Court rejected the revision application on technical grounds. The petitioner sought to revise the said orders. It was contended by the respondent that under section 3 2(1)b of Act 23 of 1987 the petitioner is liable in law to pay gratuity for the entire period of service in both the Company and Corporation, and the liability to pay the surcharge is a mandatory provision.

Held:

- (1) Section 5(1) of the Payment of Gratuity Act, No. 12 of 1983 imposes on employees' liability to pay gratuity to workman employed under them. The liability arises on termination of the services and gratuity has to be paid within a period of 30 days. Section 5(A) introduced by the amending Act 62 of 1992 makes an employer liable to pay a surcharge if gratuity is not paid as provided under section 5(1).

- (2) Section 3 2(1)b of Act 23 of 1987 clearly envisages that the petitioner is liable to pay gratuity for the entire period of service in both the Company and the Corporation.

Per Sarath de Abrew, J.

"Where the Superior Courts interpret the provisions of the Payment of Gratuity Act to mean that the petitioner company is liable to pay gratuity to its employees on termination even for the period they served under the Corporation, the liability to pay arrears is not from the date of the correct interpretation but from the due date – that is within one month of the termination."

- (3) Invoking revisionary powers of an appellate court is a discretionary remedy and its exercise cannot be demanded as of right unlike a statutory right of appeal.
- (4) The doctrine of *stare decisis* would mean that people in arranging their affairs are entitled to rely on a decision of the Highest Court which appears to have prevailed for a considerable length of time.

APPLICATION in Revision from an order of the High Court of Galle.

Cases referred to:

- (1) *Abeyundara v Abeyundara* – 1998 – 1 Sri LR 185.
- (2) *T. Varapragasam and another v S.A. Emmanuel* – CA (Rev) 931/84 - CAM. 24.7.1991.

Dulinda Weerasuriya with Amila Vithana for respondent-petitioner-petitioner.

Ganga Wakistarachchi SC for appellant-respondent-respondent.

November 30, 2007

SARATH DE ABREW, J.

The Respondent-Petitioner-Petitioner (hereinafter sometimes referred to as the petitioner), namely Distilleries Company of Sri Lanka Ltd, has filed this application to revise and set aside the respective orders of the learned High Court Judge of Galle dated 21.02.2005 (P16) in case No. Rev. 91.2001 and of the learned Magistrate of Galle dated 20.09.2001 (P9) in case No. 52480 holding that the petitioner company was liable to pay surcharge amounting to 14,917.50 under the provisions of Payment of Gratuity Act No. 12 of 1983 as amended by Acts No. 41 of 1990 and 62 of 1992. The Applicant-Respondent-Respondent (hereinafter sometimes referred

to as the respondent), namely the Deputy Commissioner of Labour has filed action against the petitioner to recover surcharge on gratuity payable to an employee of the petitioner company one J.A.D. Peter. As the learned Magistrate has upheld the application for recovery and determined that the petitioner was liable to pay, the petitioner has sought to revise this order in the High Court of Galle where the learned High Court Judge has refused relief upholding a preliminary objection that the petitioner had violated Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990, by failing to submit originals or duly certified copies of the documents. The present application to this Court of the petitioner is to challenge the above impugned orders by way of revision.

A perusal of the petition dated 17.02.2005 unravels the factual background to this application. The Distilleries Corporation was converted into the petitioner company namely the Distilleries Company of Sri Lanka Ltd. on 17.22.1989 under section 02 of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987. The employee material to this application, one J.A.D. Peter joined the service of the aforesaid Corporation on 27.03.1974 and on reaching age of 55 years, retired from the service of the aforesaid petitioner company on 20.11.1998 with a last drawn salary of Rs. 6630/- and was entitled to receive gratuity as a retrial benefit.

The question arose for determination as to whether J.A.D. Peter was entitled to gratuity for the period he served as a workman under the Corporation too under the provisions of Payment of Gratuity Act No. 12 of 1983. Around this time, in a similar matter involving another employee who had retired earlier, one K.A.D. Abeynayake, the High Court of Colombo in Case No. HCA 812/96 (P2) had given an interpretation to the provisions of the Payment of Gratuity Act on 03.04.1998 holding that the petitioner was liable to pay gratuity to a workman only for the period such workman had served the petitioner company and not for the period he served under the Corporation. Guided by this authority, the petitioner therefore has paid gratuity to J.A.D. Peter only for the period he served under the company.

However, the Labour Department moved in revision and in the Application No. C.A. 58/98, the Court of Appeal had overturned the

aforesaid High Court judgment and held on 23.06.2000 that the petitioner company was also liable to pay gratuity to the workman concerned for the period he had served under the Corporation as well (P3). As the Application for Special Leave to Appeal to the Supreme Court has been refused (P4), the aforesaid latter interpretation of the provisions of Payment of Gratuity Act became settled law on the matter.

Henceforth, the petitioner Company has belatedly taken steps to pay gratuity to J.A.D. Peter for the period he has served under the Corporation on 20.10.2000. Arising out of this situation, the respondent has filed action in the Magistrate Court of Galle in case No. 52480 to recover unpaid gratuity amounting to Rs. 64,642.50 on the basis that gratuity has not been paid to J.A.D. Peter for the total period 27.03.1974 to 19.11.1998 (P5). However the respondent has later limited the claim to Rs. 14,977.50 being the amount due on the surcharge. The learned Magistrate allowed the application and made order holding the petitioner liable for recovery of the surcharge. The revision application to the High Court was rejected on technical grounds. Hence arose the petitioner's present application in revision to this Court.

I have carefully perused the petition, statement of objections, counter objections filed in this case together with all the annexed documentation. In addition to the oral arguments presented by both parties I have also perused the illuminating written submissions tendered by both the petitioner and the respondent.

The solution to the dispute basically rests on the correct interpretation that should be given to the provisions with regard to the mechanics as to the generation of liability in respect of surcharge on gratuity as contained in the provisions of Payment of Gratuity Act and its amendments.

The main contention of the petitioner company is that it paid gratuity to the employee concerned within 30 days the petitioner company became liable to pay gratuity and therefore as there is no default, a surcharge cannot be imposed. Accordingly, the petitioner has argued as follows:

- a) The key words in section 5(4) of the Act are the words "liable to pay any sum as gratuity."

- b) For the period of service under the petitioner company, J.A.D. Peter has been paid gratuity within 30 days of the due date, namely the date of retirement.
- c) For the period of service under the Corporation, the petitioner company became liable to pay gratuity only after the delivery of the Supreme Court order (P4) on 29.09.2000 refusing Special Leave, and accordingly within 30 days from the date liability arose, namely on 20.10.2000, the petitioner has paid the gratuity and therefore the petitioner is not liable for payment of surcharge.

In support of its arguments with regard to the question as to how and when the liability arises, the petitioner has chosen to adduce *Abeyundara v Abeyundara*⁽¹⁾ where I had the good fortune of pronouncing the original judgment in the Magistrate's Court of Galle in 1992.

On the other hand, the learned State Counsel appearing on behalf of the respondent has raised the following contentions.

- a) the issue that has to be decided is the liability to pay surcharge on payment of gratuity which is a mandatory statutory provision and is not a question of law.
- b) No exceptional circumstances are urged by the petitioner to attract revisionary jurisdiction.
- c) Section 3(2)(1)(b) of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987 clearly envisages that the petitioner is liable in law to pay gratuity for the entire period of service in both the Company and the Corporation.
- d) The attempt on the part of the petitioner to seek refuge under the defence that it paid gratuity in conformity with the order of the learned High Court Judge (P2) cannot succeed as the High Court order was only persuasive and not binding, as the petitioner was well aware that the matter has been challenged in the higher forum, namely the Court of Appeal.
- e) There is no discretion attached in law in determining the applicability of the surcharge as it is a mandatory provision of the law.

- f) The petitioner has not exercised the alternative remedy available to him in law. (paragraph 13 of the statement of objections).
- g) The petitioner has suppressed material facts (paragraph 13 of the objections)

Before dealing with the several contentions raised by both parties it must be reiterated that invoking revisionary powers of this Court is a discretionary remedy and its exercise cannot be demanded as of right unlike the statutory remedy of Appeal. Certain pre-requisites have to be fulfilled by a petitioner to the satisfaction of Court in order to successfully invoked the exercise of such discretionary power. This is best illustrated in *T. Varapragasam & another v S.A. Emmanuel*⁽²⁾ where it was held that the following facts have to be applied before the discretion of the Court of Appeal is exercised in favour of a party seeking the revisionary remedy.

- a) the aggrieved party should have no other remedy.
- b) if there was another remedy available to the aggrieved party, then revision would be available if special circumstances could be shown to correct it.
- c) the aggrieved party must come to Court with clean hands should not have contributed to the current situation.
- d) the aggrieved party should have complied with the law at that time.
- e) the acts complained of should have prejudiced his substantial rights.
- f) The acts or circumstances complained of should have occasioned a failure of justice.

In the above context, the following features in this application militate against the successful invoking of revisionary jurisdiction.

- a) Failure on the part of the petitioner to seek the alternative remedy of Appeal against the impugned order of the High Court. (P16).
- b) The refusal of relief by the High Court is on a technical ground and not on a consideration of the substantive merits

of the application. No exceptional circumstances have been urged in relation to the Order of the learned High Court Judge.

- c) The failure of the aggrieved party to comply with the mandatory provisions of the Payment of Gratuity Act and its amendments has contributed to the current situation.
- d) The petitioner has suppressed a very material fact and has failed to show *uberima fides* towards the Court due to the following reasons. J.A.D. Peter has retired from service on 20.11.1998 according to the petition. Paragraph 13(iv) of the statement of objections by the respondent alleged that the petitioner has paid gratuity for the first time on 24.12.1998; which is more than one month from the due date of retirement and is therefore liable for a surcharge to be imposed. This averment in the statement of objections is not specifically denied in the counter objections filed by the petitioner. Therefore the contention of the petitioner that there was no default even on the first occasion of payment of gratuity appears to be a myth. On the above ground enumerated (a) to (d) above alone this application is liable to be dismissed.

However, in her written submissions, the learned State Counsel has taken up the position that the argument in this case by the petitioner would only be confined to the question whether the petitioner is liable to pay the surcharge on the gratuity paid as demanded by the respondent. The learned Magistrate in his Order on 20.09.2001 (P9) has answered this question in the affirmative but apparently has not adduced good and sufficient reasons. As the present application before this Court is also to revise and set aside the Order of the learned Magistrate, based on an important question of law, the above could be construed as sufficient special circumstances for this Court to explore and analyse the several contentions and come to a finding.

Section 5(1) of the Payment of Gratuity Act No. 12 of 1983 imposes liability on employers to pay gratuity to workman employed under them. The liability arises on termination of the services and gratuity has to be paid within the period of 30 days.

Section 5(4) introduced by the Amending Act No. 62 of 1992 states "Any employer who being liable to pay any sum due as gratuity to a workman or his heirs, as the case may be under subsection (1), fails or defaults to pay that sum on or before the due date, he shall be liable to pay that workman or his heirs, as the case may be, in addition to the sum due as gratuity, a surcharge on that sum calculated in the following manner

The key words in this section are "he shall be liable to pay a surcharge on that sum". The liability arises on the failure to pay the sum due on or before the due date, that is within one month of the termination of employment of the workman concerned, and not within one month of the correct interpretation of the statute by a Superior Court. The petitioner cannot seek refuge behind an erroneous order made by a single Judge in the High Court as the decision of such a single Judge is only persuasive and has no binding effect as a compelling authority. No finality can be attached to such a decision. Once the Supreme Court has interpreted the statute correctly, the correct interpretation operates not from the date of interpretation but from the date where liability arises in the first place, that is within one month of the termination of employment. The petitioner should have been well aware that the order of the learned High Court Judge (P2) has no binding effect as the matter was being canvassed in a higher forum. The doctrine of *stare decisis* would mean that people in arranging their affairs are entitled to rely on a decision of the highest Court which appears to have prevailed for a considerable length of time. Therefore the contention of the petitioner in this regard should fail.

In the interpretation of statutes the final arbiter is the Superior Court by virtue of its appellate and supervisory jurisdiction. Once the meaning of an Act of Parliament has been authoritatively interpreted, that interpretation become law unless it is thereafter changed by Parliament. Even though it is the function of Court alone to declare the legal meaning of an enactment, the legal effect of the proper construction or interpretation of the statute concerned will take effect not from the date of the interpretation but from the date of the operation of the said statute. Therefore where the Superior Courts interpret the provisions of Payment of Gratuity Act to mean that the petition company is liable to pay gratuity to its

employees on termination even for the period they served under the corporation, the liability to pay arises not from the date of the correct interpretation but from the due date, that is within one month of the termination.

On the basis of the above findings, the question of law raised by the petitioners has to be decided in favour of the respondent. Therefore, the contentions raised by the petitioner company with regard the liability to pay surcharge on gratuity cannot succeed.

In view of the above finding, and for the reasons set out earlier in this judgment, this Court is of the view that this is not a fit case to invoke the discretionary revisionary powers of this Court in favour of the petitioner. Therefore, I refuse to grant any of the reliefs sought by the petitioner in the prayer to the petition. Therefore the application of the petitioner is dismissed. In all circumstances in this case I make no order as to costs.

The Registrar is directed to forward copies of this order to the learned High Court Judge and learned Magistrate of Galle.

IMAM, J. - I agree.

Application dismissed.