

KOTAGALA PLANTATIONS LTD
v.
KULARATNA AND OTHERS

COURT OF APPEAL
FERNANDO, J. AND
AMARATUNGA, J.
CA (PHC) APN NO. 52/2000
HC REV. NO. 47/99
MC MATUGAMA NO. 76221
FEBRUARY 02, 2001
DECEMBER 20, 2001
JUNE 11 AND 20, 2002

Employee of estate managed and controlled by Sri Lanka State Plantation Corporation (SLSPC) – Conversion of public Corporations and Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987 – S. 2 (2), 3 (1), and 3 (2) (b) – Liability of company to pay gratuity to the Employees – Payment of Gratuity Act, No. 41 of 1983 – S. 5 (1), 8 (1) – Amending Act No. 41 of 1990 – S. 7 A (1) – Deeming provisions.

The workman was an employee of 'U' estate managed and controlled by the SLSPC. By virtue of an Order published by the Registrar of Companies in terms of section 2 of Act No. 23 of 1987 a company was formed (petitioner) to take over the functions and carry on the business of the SLSPC in the said 'U' estate.

On a complaint made by the employee, that his gratuity has not been paid the Magistrate Court held that the petitioner company was liable to pay the amount claimed. The SLSPC was discharged.

Held:

- (1) The petitioner company came into existence on 22. 06. 1992. Prior to that date 'U' estate was managed by the SLSPC. The employee's services were terminated on 31. 01. 1992 prior to the petitioner company coming into existence. Therefore, in terms of s. 5 (1) of Act No. 12 of 1983, the liability to pay gratuity was on the SLSPC.

- (2) However, in terms of s. 3 (2) (b) of Act No. 23 of 1987, all liabilities of the Corporation subsisting on the date immediately preceding the appointed date and specified in the order, shall be deemed to be liabilities of the company.
- (3) By the use of the word 'deemed' the statute has made the company liable to pay gratuity.

Per Amaratunga, J.

"Under section 8 (2) a certificate is issued not against the 'employer' but against the 'defaulter', this latter term is wider in meaning than the term employer. Accordingly, a company liable under s. 3 (2) (b) of Act No. 23 of 1987 is liable to be brought to Court by way of a certificate issued under s. 8 (1) of the Payment of Gratuity Act, No. 12 of 1983."

APPLICATION in Revision of the Order of the High Court of Kalutara.

Case referred to :

1. *Jinawathi v. Emalin* – 1986 2 Sri LR 121.

Gomin Dayasiri for petitioner.

Ms. B. Jayasinghe Tilakaratne. DSG for 1st respondent.

Cur. adv. vult.

July 04, 2002

GAMINI AMARATUNGA, J.

The workman named G. Suppiah was an employee of the USK Valley Estate, Baduraliya, managed and controlled by the Sri Lanka State Plantations Corporation (SLSPC). He ceased to be an employee of the said estate with effect from 31. 01. 1992. By virtue of an order dated 22. 06. 1992, published by the Registrar of Companies, in terms of section 2 of the Conversion of Public Corporations and Government-Owned Business Undertakings into Public Companies Act, No. 23 of 1987 declaring the formation of a company to take over the functions and carry on the business of the SLSPC in the said USK Valley Estate,

the functions and the business of the said estate was vested in the petitioner company with effect from 22. 06. 1992. 10

On a complaint made by the workman that his gratuity has not been paid, the 1st respondent Assistant Commissioner of Labour filed a certificate in terms of section 8 (1) of the Payment of Gratuity Act, No. 12 of 1983 as amended in the Magistrate's Court of Matugama against –

- (1) The Superintendent of the USK Valley Estate;
- (2) Sri Lanka State Plantations Corporation; and
- (3) Kotagala Plantations Company Limited (the petitioner) for the recovery of a sum of Rs. 12,624/54 as gratuity payable to workman Suppiah. 20

The petitioner, Kotagala Plantations Limited, took up the position that it was never the employer of workman Suppiah and that it was not liable to any gratuity to the workman. The fact that the workman concerned was not an employee at any time under the petitioner company and that Suppiah had been employed by the SLSPC was never in dispute. However, having taken into account the order made by the Registrar of Companies under section 2 (2) of the Conversion of Public Corporations and Government-Owned Business Undertakings into Public Companies Act, No. 23 of 1987 and published in the *Government Gazette* dated 22. 06. 1992, the learned Magistrate held 30 that the petitioner company was liable to pay the amount set out in the certificate and made order accordingly. The SLSPC was discharged from the proceedings.

A revision application filed by the petitioner in the High Court, Kalutara, against the decision of the Magistrate was dismissed by the High Court. On an application made on behalf of the petitioner for leave to appeal to the Supreme Court, the learned High Court Judge granted leave to appeal on 08. 06. 2000. However, subsequently the

petitioner having discovered that he had a right to prefer a direct appeal to the Court of Appeal from an order made by the Provincial High Court in the exercise of its revisionary jurisdiction had preferred this revision application to this Court as it was out of time to prefer an appeal against the order of the learned High Court Judge. 40

When this application came up before this Court, we inquired from the learned counsel for the petitioner whether the erroneous view held by the petitioner that leave to appeal was necessary to prefer an appeal to the Supreme Court against the order of the learned High Court Judge when in fact a direct appeal to this Court was available as a matter of right, is an exceptional circumstance warranting the exercise of revisionary powers of this Court. On this question both parties have filed written submissions. However, in view of the important question of law raised in this application we have decided to deal with the merits of the application without dealing with the preliminary question. 50

According to section 5 (1) of the Payment of Gratuity Act, No. 12 of 1983 it is the employer who is liable to pay gratuity to its workman upon the termination of the latter's services. The petitioner company came into existence on 22. 06. 1992. Prior to that date the USK Valley Estate was managed by the SLSPC. The workman's services were terminated on 31. 01. 1992, prior to the petitioner company coming into existence, and at all times relevant SLSPC was the employer of Suppiah. Therefore, under section 5 (1) of the Payment of Gratuity Act the liability to pay gratuity was on the SLSPC. 60

In terms of section 3 (1) of Act No. 23 of 1987, with effect from the date of publication of an order under section 2 (2) in the *Government Gazette*, the Corporation or a part thereof shall absolutely vest in the company referred to in the order. Section 3 (1) (b) states that the corporation means all rights, privileges and interests arising in or out of such property and all the liabilities of that corporation. This provision thus sets out the general effect of an order made under section 2 (2). Section 3 (2) (b) of Act No. 23 of 1987 enacts that without prejudice 70

to the generality of subsection (1) "all liabilities of the corporation . . . subsisting on the date immediately preceding the appointed date and specified in the order made under section 2 (2) shall be deemed to be liabilities of the company with effect from the relevant date.

According to this section, for the liabilities of the corporation to become liabilities of the company two conditions must be satisfied. **Firstly**, the liability of the corporation must be a liability subsisting on the date immediately preceding the relevant date. The relevant date means the date of publication of the order under section 2 (2) ⁸⁰ in the *Gazette*. [*vide* section 3 (1)]. In this instance the corporation's liability to pay gratuity to Suppiah subsisted on the date immediately preceding the relevant date. Therefore, the first condition is satisfied. **Secondly**, it has to be a liability specified in the order made under section 2 (2). Item (d) in part I of the schedule to the order made under section 2 (2) specified 'All liabilities of the estate specified in part II of the schedule including gratuities payable to labour in respect of services provided prior to the relevant date' as a function of the corporation to be taken over by the company. This satisfied the 2nd condition. Accordingly, by the operation of section 3 (2) (b) liability ⁹⁰ to pay gratuity to labour in respect of services provided prior to the relevant date is deemed to be a liability of the company.

The meaning of the word 'deemed' was considered and explained by Ranasinghe, J. at 130 - 131 (as he then was) in *Jinawathie v. Emalin*⁽¹⁾ in the following words : "In statutes, the expression deemed is commonly used for the purpose of creating a statutory function so that a meaning of a term is extended to a subject-matter which it properly does not designate. . . Thus, where a person is deemed to be something it only means that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he ¹⁰⁰ were'. Ranasinghe, J. went onto explain the legal effect and consequences of such a legal fiction in the following terms: "Thus, where in pursuance of a statutory direction a thing has to be treated as something which in reality it is not or an imaginary state of affairs is to be treated as real, then not only will it have to be treated so

during the entire course of the proceedings in which such assumption is made but all attendant consequences and incidents, which if the imagined state of affairs had existed would inevitably have flowed from it have also to be imagined or treated as real". (p 130).

By the use of the word 'deemed' the statute has made the company ¹¹⁰ liable to pay gratuity which in reality it is not liable to pay. Accordingly, the company cannot contend that it is not liable to pay gratuity to workman Suppiah as the company was not his employer within the meaning of the Payment of Gratuity Act. The petitioner's written submissions do not in anyway deal with the legal liability imposed on it by section 3 (2) (b) of Act No. 23 of 1987.

Another submission made on behalf of the petitioner is that since section 8 (1) of the Payment of Gratuity Act confers jurisdiction on the Magistrate to recover the payment from the "employer" proceedings by way of a certificate in terms of section 8 (1) of the Payment of ¹²⁰ Gratuity Act cannot be initiated against the petitioner. (Paragraph 3.12 of the written submissions of the petitioner). However, under section 8 (2) a certificate is issued not against the 'employer' but against the defaulter. This latter term is wider in meaning than the term employer. According to section 5 (2) of the Payment of Gratuity Act when the employer is dead, his legal representative is liable to make the payment. His failure to discharge his liability would make him a defaulter though he was not the employer. Any other person who is also under a legal duty to pay would become a defaulter if he fails to make payment. Accordingly, a company liable under section 3 (2) ¹³⁰ (b) of Act No. 23 of 1987 is liable to be brought to Court by way of a certificate issued under section 8 (1) of the Payment of Gratuity Act if such company fails or neglects to make the payment.

The petitioner has submitted that even if the petitioner is liable to pay gratuity to Suppiah, the proper procedure is to proceed under the provisions of the Industrial Disputes Act without invoking the special procedure set out in section 8 (1). In view of what I have stated above, I am unable to accept this argument.

Section 7A (1) brought into the Payment of Gratuity Act by amending Act No. 41 of 1990 is not relevant to the present case as the new section is applicable in respect of workmen who become workmen of the company by virtue of the order made under section 2 (2) of Act No. 23 of 1987. ¹⁴⁰

The Memorandum dated 18. 01. 1993 issued by the Chief Executive Officer of the Plantation Restructuring Unit of the Ministry of Finance (marked 'C' in the Magistrate's Court) dealing with the question as to who should pay gratuity payment due to employees who had left employment prior to the date of formation of Regional Plantation Companies is also not relevant to the issue before Court. Arrangements set out in such memoranda may operate as internal arrangements but cannot operate to limit or to vary the legal obligation created by section 3 (2) (b) of Act No. 23 of 1987. ¹⁵⁰

In view of what has been set out above I hold that the petitioner company is liable to pay gratuity to employee Suppiah for his services under the SLSPC in USK Valley Estate before the appointed date and the Assistant Commissioner has the power to issue a certificate under section 8 (1) of the Payment of Gratuity Act to enforce payment. Accordingly, I affirm the order of the learned Magistrate, Matugama, dated 11. 12. 1998 and the order of the learned High Court Judge of Kalutara dated 01. 06. 2000 and dismiss this application. ¹⁶⁰

It was agreed by the parties that the decision of this case will apply to CA (Revision) Applications No. 54/2000 and 55/2000. Accordingly, those two applications are also dismissed. In view of the question of law involved in this application I make no order for costs.

FERNANDO, J. – I agree.

Application dismissed.