IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal from the Judgment of the Court of Appeal

Sri Lankan Airlines Limited,
Level 19-22, East Tower,
World Trade Centre,
Echelon Square, Colombo 1.

Petitioner

SC APPEAL 79/2013

SC Spl LA Application No. 164/2010

CA Writ Application No. 1461/2006

Vs

1. Sri Lankan Airlines Aircrafts Technicians Association, No. 14, Mahawela Place, Kirulapone, Colombo 06.
2. D.S.Edirisinghe, Commissioner of Labour, Labour Secretariat, Narahenpita, Colombo 05.
3. T.Piyasoma, No. 77, Pannipitiya Road, Battaramulla.
4. Hon. Atauda Seneviratne, Minister of Labour Relations and Foreign Employment, Labour Secretariat, Colombo 05.

Respondents

AND NOW BETWEEN

Sri Lankan Airlines Limited,
Level 19-22, East Tower,
World Trade Centre,
Echelon Square, Colombo 1.

Petitioner Petitioner

Vs

1. Sri Lankan Airlines Aircrafts Technicians Association, No. 14, Mahawela Place, Kirulapone, Colombo 6.
2. D.S.Edirisinghe, Commissioner Of Labour, Labour Secretariat, Narahenpita, Colombo 5.

2A. W.J.L.U. Wijayaweera, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5.

3A. Mrs. Pearl Weerasinghe, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5.

2B. Herath Yapa, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5.

2C Mrs. M.D.C.Amarathunga, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5.

2D R.P.A.Wimalaweera, Commissioner General of Labour, Labour Secretariat,

3. T.Piyasoma, No. 77, Pannipitiya Road, Battaramulla.
4. Hon. Atauda Seneriratne, Minister Of Labour Relations and Foreign Employment, Labour Secretariat, Narahenpita, Colombo 5.

4A. Hon. Gamini Lokuge, Minister of Labour Relation and Productivity

Improvement, LabourSecretariat
Narahenpita, Colombo 5.

4B. Hon. Dr.Wijayadasa Rajapaksha, Minister of Justice and Labour Relations.

4C. Hon. S.B.Navinna, Minister of Labour, Labour Secretariat, Narahenpita, Colombo 5.

4D. Hon. John Seneviratne, Minister of Labour and Trade Union Relations, Labour Secretariat, Narahenpita, Colombo 5.

5. The Registrar, Industrial Court, 9th Floor, Labour Secretariat, Colombo 5.

Respondents Respondents

BEFORE **: S. EVA WANASUNDERA PCJ.**
H.N.J. PERERA J. &
PRASANNA JAYAWARDENA PCJ.

COUNSEL : Palitha Kumarasinghe PC with Sanjeeva Jayawardena PC and Rajeev Amarasinghe for the Petitioner Petitioner.
Faiz Mustapha PC with Keerthi Thilakarathne for the 1st Respondent

ARGUED ON : 23.01.2018.
DECIDED ON : 12 .03.2018.

S. EVA WANASUNDERA PCJ.

This matter arises from an Industrial Dispute between the Sri Lankan Airlines Aircraft Technicians Association (hereinafter referred to as SLAATA) and the Sri Lankan Airlines Ltd. Members of the SLAATA, the employees were not paid the '13th month incentive bonus for the year 2001' by the employer, Sri Lankan Airlines Ltd and SLAATA complained to the Commissioner of Labour who tried to bring about a settlement failing which the matter was referred to an Arbitrator who was appointed by the then Minister of Employment and Labour under Sec. 14(1) of the Industrial Disputes Act.

The Arbitrator T.Piyasoma on 19.06.2006 , made an award in favour of SLAATA directing that the members of SLAATA be paid the '13th month incentive bonus for the year 2001' by the Sri Lankan Airlines Ltd. the employer company within two months of the publication of the award in the gazette.

The Sri Lankan Airlines Ltd. (hereinafter referred to as the Employer Company) came before the Court of Appeal with an Application dated 22.09.2006, to get an order in the nature of a Writ of Certiorari quashing the said Arbitration Award dated 19.06.2006. The Court of Appeal dismissed the Application for a Writ and affirmed the award of the Arbitrator. Thereafter the Employer Company has come before the Supreme Court seeking to set aside the judgment of the Court of Appeal dated 21.07.2010. This Court has granted Special Leave to Appeal on 07.06.2013 on the questions of Law contained in paragraph 38(a) to (n) of the Petition dated 31.08.2010 as well as on two other questions of law at the request of the Counsel for the 1st to 5th Respondents.

The questions of law can be narrated as follows:-

1. Did the Court of Appeal fail to appreciate the fact that the learned Arbitrator fell into serious error by failing to consider in its fullness, the important fact that the Petitioner was advisedly conferred the power to decide in its discretion, as to whether the bonus should or indeed, could be paid or not, in a particular year?
2. Did the Court of Appeal fail to appreciate the fact that the Arbitrator failed to consider the true impact of Clause 13 of the Collective Agreement, wherein it is expressly stated that a ' bonus may be payable …..at the sole

discretion of the management ' and that the said provision clearly vests the management with the discretion to decide on the payment of the said bonus?

3. Did the Court of Appeal fail to compare the terms in which Clause 13 had been articulated as opposed to the manner in which the clauses pertaining to other allowances had been articulated in the very same collective Agreement?
4. Did the Court of Appeal fail to consider the fact that the said collective agreement was entered into between two contracting parties pursuant to the exercise of their independent contractual volition to govern their respective rights, duties and interests and that the said agreement clearly manifests the agreement of the parties to invest the Petitioner with the discretion to decide the payment of the bonus?
5. In any event, did the Court of Appeal fail to take due cognizance of the fact that the Arbitrator failed to consider the issue of whether the discretion was examined reasonably and in a fair manner, and upon proper considerations, given the totality of the attendant adverse exigencies, which were common public knowledge and even well known internationally?
6. In any event, did the Court of Appeal fail to take cognizance of the fact that the bonus was not referable to any additional periods that had been worked, as is borne out by the record?
7. Did the Court of Appeal err by upholding the purported conclusion of the Arbitrator that the Petitioner Company had not incurred losses in the relevant year under review and that as such, the relief sought by the workmen was justified?
8. Did the Court of Appeal fail to consider in any event, the composite losses incurred and sustained by the Petitioner Company?
9. Notwithstanding expressly classifying the interpretation adopted by the learned Arbitrator as being a "narrow interpretation" , did the Court of Appeal err by nevertheless endorsing the same without reference to objectively defensible criteria that are countenanced by law?
10. Is the judgment of the Court of Appeal bad in law in as much as the reasoning underlying the same is tantamount to according to the workmen, a bonus as a matter of an invariable right?

11. Did the Court of Appeal fail to appreciate the fact that the Arbitrator failed to evaluate the evidence placed before him properly and objectively and as required by law?
12. Did the Court of Appeal misapply the established principle that an Arbitrator's award should be just and equitable to both parties and fail to appreciate that the said failure vitiates the impugned award?
13. Did the Court of Appeal misapply the governing principles of administrative law in the course of refusing to exercise its power of judicial review?
14. In all the circumstances of the case, is the judgment of the Court of Appeal and the impugned arbitral award liable to be set aside and should the reliefs prayed for by the Petitioner, be granted?

And

15. Whether the arbitrator acted within the mandate in terms of the reference that was granted by the arbitrator?
16. Did the Arbitrator consider the financial position of the Company at the time that the 13 month bonus payment was due to be made in December, 2001?

Both the Court of Appeal and the Arbitrator held in favour of the SLAATA , the employees and the Employer Company contends that both the decisions are not justified.

The Employer Company had entered into a collective agreement in January 1999, setting out the terms and conditions of employment of aircraft technicians. The members of the 1st Respondent Union are the Aircraft Technicians. Clause 13 of the said Agreement reads as follows:-
" A 13 month incentive bonus may be payable each year in the end-December payroll as per the rules and regulations that are announced each year at the sole discretion of the management of the company to all employees."

The reference to the Arbitration as aforementioned reads as follows:-

" Whether the non payment of the 13th month incentive bonus for the year 2001 to the employees of Sri Lankan Airlines Ltd. who are members of Sri Lankan

Airlines Aircraft Technicians Association is justified, if not what relief they are entitled to".

The arguments submitted by the counsel for the Appellant Employer Company takes the stand that the wording of the Clause 13 is clear and the 13th month bonus can be given **only at the discretion** of the Employer and given the terrible financial problems of the said Company, it has chosen not to pay the said bonus for 2001 which the Company is legally entitled to do. The Company could not do so, simply because of the extremely difficult economic conditions which prevailed in the year 2001 even though it had been paying the bonus up until then for over 20 years. The Company also takes up the stand that even though there are over 4600 employees and many unions, only the 1st Respondent Union has come before Court claiming this bonus. The number of members of this Union is only 219 members.

The Arbitration was concluded and by the award dated 19.06.2006 the 3rd Respondent Arbitrator held that the non payment of the bonus is not justified and that the **Company should grant the payment** within 2 months of the publication of the award in the Gazette. The Employer Company filed a Writ Application before the Court of Appeal, seeking to quash the said arbitral award. The Court of Appeal had inquired into it and delivered judgment dated 21.07.2010 dismissing the Application of the Employer Company. When the Company appealed from the Court of Appeal judgment, Special Leave was granted on the aforementioned questions of law by this Court.

The position of the Employer Company in this regard is that due to the terrorist attack on the Katunayake Air Port on 24.07.2001 which destroyed a fleet of Aeroplanes and damaged the company so much, and the fact that US 9/11 attack had an impact of the number of tourists travelling from any country to another, the company was in a very bad way. Therefore, as it was at the discretion of the company whether to grant the bonus or not, according to the clear wording of the Collective Agreement between the employer and the employee, the company decided not to pay the bonus. The decision was made in November, 2001 at a crucial time when the company was economically down. The company argued that the decision of the company not to pay the '13th month incentive bonus' was just and reasonable and correct according to law.

The position of the Employee SLATAA is that with the change of the name of the Employer Company from Air Lanka to Sri Lankan Airlines Ltd. in 1997, the Chief Executive Officer by his letter dated 29.07.1999 had informed the employees of the company that the terms and conditions of employment that they enjoyed with Air Lanka including the already negotiated Collective Bargaining Agreement remain unaltered by the change of name to Sri Lankan Airlines. The Employee Union also took up the position that the 13th month incentive had been paid continuously from 1979 for a period of 20 years and that it was a **customary payment from the employer to the employee**. It was done so because in fact the workers had **actually worked 13 roster cycles** in the course of one calendar year and the said year was the period from 01.04.2000 to 31.03.2001 during which time there had not been any loss of income or any drastic economic downfall of the company. It was argued that the Employer Company had not used its discretion reasonably but unreasonably and unjustly.

The issue on which the Arbitrator had to hold the inquiry and decide was framed as follows:-
" Whether the non payment of the 13th month incentive bonus for the year 2001 to the employees of Sri Lankan Airlines Limited who are members of the Sri Lankan Airlines Aircraft Technicians' Association is justified and if not what relief they are entitled to."

A Collective Agreement is defined in Sec. 5(1) of the Industrial Disputes Act No. 53 of 1973 as amended, in this way. " In this Act, ' collective Agreement' means an agreement (a) which is between (i) any **employer** or employers; **and** (ii) **any** workmen or any **trade union** or trade unions consisting of workmen; and which relates to the terms and conditions of employment of any workmen or to the privileges, rights or duties of any employer or employers or any workmen or any Trade Union or Trade Unions consisting of workmen or to the manner of settlement of any Industrial Dispute." According to Sec. 8(1), the terms of the Agreement shall be implied terms in the contract of employment between the employer and workmen and they are bound by the Agreement.

Sec. 17(1) of the Act reads as follows:-

" When an Industrial Dispute has been referred under Sec. 3(1) (d) or Section 4(1) to an Arbitrator for settlement by Arbitration, he shall make all such inquiries into

the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him to be **just and equitable**…."

In the case of ***State Bank of India Vs Edirisinghe and Others 1991 1 SLR 397*** , a bench of seven judges held, at page 415 thereof, that **"An Industrial Arbitrator is not tied down and fettered by the terms of a contract of employment between the employer and the workmen."**

When an Arbitrator is at work, listening to the oral evidence, considering the documentary evidence, analyzing the evidence and concluding the inquiry with a look at the totality of evidence before him, he is duty bound to weigh all the evidence and arrive at a decision and make the award "which appears to him to be just and equitable". Parties are at liberty to point at the terms of the contract which are obvious on the first reading of the clauses of the Collective Agreement but the Arbitrator is not tied down and fettered by the terms contained therein. It is a principle of law accepted in making an award after the arbitration proceedings held with regard to an industrial dispute.

In the case in hand the question before the arbitrator was whether Clause 13.1 of the Collective Agreement which states that the payment of the 13th incentive bonus is at the **sole discretion of the employer** or whether in all the circumstances of the case as they have transpired in evidence, **the non payment is just and equitable.**

There had been no collective agreement before the year 1999. Air Lanka Ltd. existed from 1979. From 1979 to 1999 also, the payment for **an extra month for each financial year** was paid at the end of each calendar year. It was called the '13th month incentive bonus' or rather named as such, only **after** the Collective Agreement came into existence. Salaries were paid in respect of each month for **only 12** months to every employee and the members of SLATAA being workers on **roster cycles of 28 days in each month works 13 lunar months.**

Three hundred and sixty five days of the year, when divided by 28 roster cycle days is equal to 13 (365/28 = 13.04). So, in fact, the workers of SLATAA work 13 lunar months within the year. When persons work on roster cycle days , they do work , through out the calendar year including Saturdays, Sundays and Public

Holidays such as Poya days etc. They work for 365 days on roster. No single day of the year can they opt out of work for any reason whatsoever. According to **Clause 22.3** of the Collective Agreement, a workman on roster cycles have to work **160 working hours per 28 day roster cycles.** Each person on roster gets paid the monthly salary for a 28 day roster cycle. There are 13 of 28 day roster cycles per a calendar year. The workers on roster work 13 roster cycles within one year. They get paid, monthly salaries each month as all other workers but there is remaining one more roster cycle month left to be paid due from the employer but unpaid within that calendar year. That seems to be the reason for naming this 13th payment as '13th month incentive bonus'.

Clause 22.3 reads as follows under the heading **"Rosters":-**

All rosters will be constructed so that actual working hours per week (excluding breaks) are 40 hours per week or 160 working hours per 28 day roster cycle. As one illustrative example(but this is not an exhaustive list of all possible shift types):

<u>Basic Shift Pattern</u>

- Day shift time of 08.00 -19.25
- Elapsed length of 11 hours and 25 minutes
- Contains one break of 30 minutes and two breaks of 15 minutes each
- Hence actual working hours are 10 hours and 25 minutes

- Night Shift time of 19.00 – 08.25
  Elapsed length of 13 hours and 25 minutes
  Contains one break of 30 minutes two breaks of 15 minutes each
  Hence actual working hours are 12 hours and 25 minutes
- Pattern is normally 1 day plus 1 night plus 2 off, repeated 7 times in a 28 day roster
- This equates to a total of 159 hours and 50 minutes per 28 day cycle.

The witness on behalf of SLAATA , Bentarage Nandalochana de Silva in his evidence on 26.05.2006 had explained in detail the calculation of the payments as follows;-

“අපි වැඩ කරන්නේ වැඩ මුර ක්‍රමයකට. මෙම රොස්ටර් ක්‍රමය අනුව දිවා කාලයේ දින 92ට වැඩ කරන පැය ගණන පැය 958 කුත් විනාඩි 19ක්. රාත්‍රී සේවා මුර 91ක් වන නිසා වසරකට වැඩ කල පැය ගණන 2088 විනාඩි 13ක් වෙනවා. නමුත් ආයතනය සහ සංගමය බැඳි සිටින ගිවිසුමේ ප්‍රකාර ආයතනයට වැඩකල යුතු දින ගණන වන්නේ 160x12. වසරකට පැය 1920. නමුත් අපි වැඩ කර තියනවා පැය 2088 විනාඩි 13ක්. මේ 2088.13 න් පැය 1920ක් අඩුකල විට අතිරේක පැය ගණන වශයෙන් පැය 168.13 ක් වැඩ කර තියනවා. මෙය ජනවාරී මාසයේ සිට සේවකයින් වැඩකර තියෙන අතිරේක පැය ගණන .....”

I am of the opinion that this payment which SLAATA had prayed for from the Arbitrator cannot be recognized as a payment on which the employer can use its discretion and avoid payment because it is a payment the employee has earned with his sweat having worked on a roster. The Arbitrator had analysed the evidence before him on the facts and held that it is a right for payment which the members of SLAATA has earned. Even though Clause 13.1 of the Collective Agreement reads as ‘at the sole discretion of the Management of the Company’, the just and reasonable interpretation of the use of discretion of the employer should be in favour of the employee. It is nothing but reasonable for the employer to recognize that due payment as something the employee has worked and earned.

The Employer Company was not in a position economically to pay the dues at that particular time of the year, i.e. December, 2001 but it was something which the workers had earned at the end of the financial year ending in April, 2001. The Company should have realized that even though the practice had been to pay it at the end of each calendar year, at the discretion of the Company, it is a payment which **they had earned by April, 2001** but put off by practice, by the employer, purposely at a delayed stage which fact had been accepted by the employees in all the previous years. The Arbitrator had looked at the facts and determined correctly that it was just and equitable to make the award in favour of the employees. The name of the 13th month payment is surely not an incentive bonus but a payment which the employees have earned.

The Court of Appeal had quoted about discretion as defined in ***Sharp Vs Wakefield 1891, AC 173 by Halsbury L.C.*** which reads as follows:
“ Discretion means when it is said that something is to be done within the discretion of authorities ; that something is to be done according to the rules of

reason and justice not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful but legal and regular. And it must be exercised within the limit to which an honest man competent to discharge of his office ought to confine himself."

I find that the alleged discretion contained in clause 13.1 of the Collective Agreement has not been used properly by the employer, specially not having taken into account that the said payment did not arise after the economic downfall during the period when it was due, i.e. before terrorists' attack at the air port and the loss of business which followed. The employees cannot afford to loose a right which they had earned prior to that event. After all, the company had not come to a halt where no business was conducted but had continued to use the employees to build up the business. The Company should have come to a settlement with the employees when they requested for the payment, considering the fact that it was a payment due to them as they had already worked for the same. Yey the company had refused to pay and it is only then that the matter had to be arbitrated.

The Court of Appeal had quite correctly affirmed the award of the Arbitrator.

I answer the questions of law 1 to 14 in the negative against the Appellant and questions of law 15 and 16 in the affirmative in favour of the Respondent in this Appeal. The Appeal is dismissed. However I order no costs.

Judge of the Supreme Court.

H.N.J.Perera j.
I agree.

Judge of the Supreme Court.

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court.