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

In the matter or an Appeal against the Judgment of the Court of Appeal

Brown and Company Limited,
No. 481, T. B. Jaya Mawatha,
Colombo 10.

Petitioner

Vs

SC APPEAL No. 84/2011
SC (Spl) LA 194/2010
C. A. Application No. 777/20

1The Commissioner of Labour,
Labour Secretariat,
Narahenpita, Colombo 5.

2. A. Dissanayake,
Assistant Commissioner of Labour, (Colombo Central),
Labour Secretariat,
Colombo 5.

3. R. B. Godamunna,
Deputy Commissioner of Labour,Industrial Relations Unit, 7th Floor,Labour Sectretariat.

Respondents

M. V. Thegarajah,
23/2, Independence Avenue, Colombo 7.

Complainant Respondent

AND NOW BETWEEN

Brown and Company Limited,
No. 481, T. B. Jaya Mawatha,
Colombo 10.

Petitioner Appellant

Vs

1 The Commissioner of Labour,
Labour Secretariat,
Narahenpita, Colombo 5.

2. A. Dissanayake,
Assistant Commissioner of Labour, (Colombo Central), Labour Secretariat,
Colombo 5.

3.R. B. Godamunna,
Deputy Commissioner of Labour,Industrial Relations Unit, 7th Floor, Labour Sectretariat,

Respondents Respondents

M. V. Thegarajah,
23/2, Independence Avenue, Colombo 7.

Complainant Respondent Respondent

BEFORE : S. EVA WANASUNDERA PCJ.
BUWANEKA ALUVIHARE PCJ.
NALIN PERERA J.

COUNSEL: S.A.Parathalingam PC with RiadAmeen for the Petitioner Appellant.
M.A. Sumanthiran with ViranCorea, J. Arulanandstham and S. Samararachchi for the Complainant Respondent Respondent.
Mrs. M.N.B. Fernando PC , ASG with Rajiv Goonetilleke for the 1st to 3rd Respondents

ARGUED ON: 19. 05. 2016.

DECIDED ON: 03. 08. 2016.

S. EVA WANASUNDERA PCJ.

This Court granted special leave to appeal on 22.06.2011 on the questions of law contained in paragraph 42 (a), (c) and (f) of the Petition dated 12.10.2010. The said questions read as follows:-

42(a) Once gratuity has already been taken by the Complainant in the course of his employment, does this not clearly signify a break in his chain of employment and in such event, can such employee be said to be in continuous employment? In this context the Court of Appeal, in its judgment dated 2nd September, 2010 has erred in law in arriving at it's finding that there was no break in his period of service.

42(c) The Court of Appeal erred in law in coming to the finding that there was no break in service of the Complainant Respondent's employment.

42(f) The Court of Appeal misdirected themselves that the physical continuance of employment is the sole basis that determines the continuous and uninterrupted service under the Gratuities Law and thereby erred in law.

I would like to put down the facts which are accepted by both parties with regard to this matter.The Complainant Respondent Respondent(hereinafter referred to as the Respondent), Theagarajah commenced employment with the Petitioner Petitioner (hereinafter referred to as the Petitioner) , Brown and Company PLC with effect from the 1st of January, 1962 and continued to serve the Petitioner until the Respondent reached the age of 55 years. The Respondent was retired by letter P1 dated 18th September, 1986 which is marked by the Petitioner as an annexture to the Petition.

At the retirement, the Respondent received his gratutity of Rs. 750000/- calculated at the last drawn salary of Rs. 30000/- per month and taking into account 24 years of service. His date of retirement was 31st of October, 1986. By P1, a letter dated 18th September, 1986 the Respondent was informed that he was being retired from the services of the Petitioner Company, with effect from 31st October, 1986 and the Company had further thanked him for his services. By 4th April, 1989 the due gratuity was paid in full and accepted by the Respondent who was then the Deputy Chairman of the Petitioner Company.

On the 1st of November, 1986, the Respondent was back in temporary employment on the conditions contained in document P4 which granted employment for 9 months to end on 31st July, 1987. It was an accepted fact that such fixed term contracts were granted to him from time to time and his services ran upto 30th June,2006. He retired as Chairman of the Petitioner Company, from his second phase of employment which was on contracts on that date. His salary at the time he left in 2006 was Rs. 540,000/- per month. He was paid gratuity from 1.11.1986 to 30.06.2006 in a sum of Rs. 20,196,000/- on 3rd July, 2006. This payment had been done **on the erroneous calculation of the period of service as 44 years taking the date of employment as 1st January, 1962.** The Respondent was informed of this miscalculation and **he returned Rs. 13,104,000/- which was the erroneous overpayment.**

Later on, the Respondent had lodged a complaint with the Commissioner of Labour, the 1st Respondent on the 26th April, 2007. The 1st Respondent acting on the complaint held an inquiry. The inquiry officer was the 2nd Respondent, the Assistant Commissioner of Labour. By his order dated 17th September, 2007, the 2nd Respondent had held that **there was an interruption** in the employment of

the Complainant who is the Respondent in the case in hand and directed the Petitioner Company to pay Rs. 13,338,000/- for the second segment of the employment of the Complainant Respondent. Since the Petitioner Company had already paid that amount, it was held that no sum of money was due to the Complainant as gratuity from the Petitioner Company.

I observe that the Complainant Respondent in this case by P 18 dated 17th December, 2007 had sought to ***re-initiate the inquiry by the 2nd Respondent, the Assistant Commissioner of Labour which was concluded 3 months ago on the 17th September,2007.*** *The 3rdRespondent , the then Commissioner of Labour had* ***then inquired into the same matter which was concluded by the 2nd Respondent.*** *At the end of this inquiry, the 3rd Respondent had, after the new inquiry held by him , directed the Petitioner to* ***pay to the Complainant Respondent, a further sum of Rs. 16,575,000/- as gratuity inclusive of a 30% surcharge.***

The Petitioner challenged the said decision in the Court of Appeal. Even though the Court of Appeal granted a stay order until the final determination of the case, finally, the Court of Appeal dismissed the Application of the Petitioner on 2nd September, 2010.

This Court granted leave on the questions of law as aforementioned. To my mind the matter to be decided is whether there was an accepted break in service of the Respondent and whether physical continuance of service can be taken as continuous and uninterrupted service according to law. The written law pertinent to this matter is included in the Payment of Gratuity Act No. 12 of 1983 as amended.

Section 5 of the Act reads:

5(1) **Every employer** who employs or has employed fifteen or more workmen on any day during the period of twelve months immediately preceding the termination of the services of a workman in any industry shall, on termination (whether by the employer or workman, or **on retirement** or by the death of the workman or by operation of law, or otherwise) of the services at any time after the coming into operation of this Act, of a workman who has a period of service of not less than five completed years under that employer, **pay to that workman in respect of such services,** and where the termination is by the death of that

workman, to his heirs**, a gratuity** computed in accordance with the provisions of this Part within a period of thirty days of such termination.

Section 20 of the Act reads:

"Completed service" means uninterrupted service and includes service which is interrupted by approved leave on any ground whatsoever, a strike or lock out or cessation of work not due to any fault of the workman concerned, whether such uninterrupted or interrupted service was rendered before or after the coming into operation of this Act.

I observe that at the inquiry before the 2nd Respondent, it was admitted by the Complainant Respondent that there were two segments in his employment, one segment from 1962 to 1986 , i.e, 24 years at the end of his 55th year which was the due date to retire, according to a condition in the letter of appointment and the other segment from 1986 to 2006 which was on contract basis starting with the first period of contract being only 9 months, according to the evidence led at the inquiry. The gratuity which was paid at the end of his service at 55years was accepted by him at that time. Moreover he accepted to work on contract basis which was renewed periodically upto 2006.

I am of the opinion that having accepted the legally due gratuity at the age of 55 years the Respondent cannot make a claim to be paid gratuity for a period of time for which he was paid once. The moment gratuity is accepted for the first segment of 24 years, he accepts and concludes that he has got gratuity for that period. He is estopped in law from making any claim for that past period for which he accepted gratuity once.

Then he was the Deputy Chairman of the Petitioner Company. I further note that it was not an extension of service which was granted to him at the end of 55 years of age. He was given prior notice of sending him on retirement and he accepted it. **He never objected to that. Neither did he ask for any extensions**. He simply accepted the new fixed term contract. He was made the Chairman. He was paid a very high salary over 5 lakhs of rupees monthly with all other benefits. He enjoyed all those facilities for another 19 years. He relinquished his position as Chairman and left the Company completely at the age of 74 years.

I fail to understand how the 3rd Respondent could have ever initiated a second inquiry on the same matter which was concluded and a decision given by the 2nd Respondent. If at different times, a complainant can get the Commissioner of Labour to re do an inquiry , under the law , it would definitely create disaster. Once an inquiry is concluded, the Act does not provide for re – initiating another inquiry on the same matter. If the Commissioner of Labour could be influenced, then , it looks like he could commence inquiries again and again on the same matter.

I am of the view that the second inquiry which was conducted by the 3rd Respondent is unlawful. There is no provision in the Gratuity Act to that effect at all. He should not have touched a matter which was concluded and finalized. Having done a second inquiry on the same matter, the 3rd Respondent had reversed the findings of the 2nd Respondent without any reason.

The learned Judges of the Court of Appeal has considered ***The Finance Company VsKodippilli C.A. minutes of 23.11,2005 in case No. 1111/03.*** I find that in the Kodippili case the facts are different. In that case, the services of the Complainant was extended. At the time of retirement the Complainant was admittedly on **an extension of service**. In the case in hand, the Complainant **was retired in service** and he **had accepted a fixed term contract**.

Moreover, I observe that the Complainant Respondent has been paid gratuity for the second segment of his service at the rate of one month's salary per year (and not ½ a month's salary per year) at an enhanced rate voluntarily by the Petitioner for the second segment of his service on a fixed term contract basis.

I find that the Court of Appeal has gone wrong in its judgment by having decided that the service was not interrupted just because the Complainant Respondent had physically come to work on the very next day after the date of retirement at 55 years. The Court of Appeal had ignored the fact that he was retired and then he accepted the fixed term contract and commenced services anew according to the contract and come on the next day as a worker on contract basis.

Due to the aforementioned reasons , I make order setting aside the Judgment of the Court of Appeal and the decision of the 3rd Respondent, the Deputy Commissioner of Labour. The Appeal of the Appellant is allowed. However I order no costs.

Judge of the Supreme Court

Justice Buwaneka Aluvihare
I agree.

Judge of the Supreme Court

Justice NalinPerera
I agree.

Judge of the Supreme Court