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අති විශේෂ

The Gazette of the Democratic Socialist Republic of Sri Lanka

EXTRAORDINARY

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No. 1658/16 - TUESDAY, JUNE 15, 2010

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PART I : SECTION (I) — GENERAL

Government Notifications

My No. : IR/16/03/2007.

In the Matter of an Industrial Dispute Between :

THE INDUSTRIAL DISPUTES ACT, CHAPTER 131

THE Award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Mr. L. W. Chandraratne, No. 255A, Sunethra Mawatha, Papiliyana, Boralasgamuwa/L. M. N. Hettiarachchi, No. 32, 2nd Lane, Courts Road, Weligampitiya, Ja-ela/ W. A. C. S. Perera, No. 199A, Kasagahawatta, Kotugoda/ M. W. A. Lionel, No. 30A, Watinapaha Road, Dewalapola of the one part and Volanka Limited, No. 193, Minuwangoda Road, Kotugoda of the other part was referred by order dated 23.05.2008 under Section 4(1) of the Industrial Disputes Act, Chapter 131 (as amended) and published in the *Gazette Extraordinary*, of Democratic Socialist Republic of Sri Lanka No. 1553/9 dated 10.06.2008 for settlement by Arbitration is hereby published in terms of Section 18(1) of the said Act.

W. J. L. U. WIJAYAWEERA,
Commissioner General
of Labour.

Department of Labour,
Labour Secretariat,
Colombo 05,
20th May, 2010.

1. (i) L. W. Chandraratne,
No. 255A, Sunethra Mawatha,
Papiliyana, Boralasgamuwa.
- (ii) L. M. N. Hettiarachchi,
No. 32, 2nd Lane, Courts Road,
Weligampitiya, Ja-ela.
- (iii) W. A. C. S. Perera,
No. 199A, Kasagahawatta,
Kotugoda.
- (iv) M. W. A. Lionel,
No. 30A, Watinapaha Road,
Dewalapola.

Who are employees of Volanka Limited
of the One Part (First Part)

and

2. Volanka Limited,
No. 193, Minuwangoda Road,
Kotugoda of the *Other Part (Second Part)*

Case No : A/3244

THE AWARD

The Hon. Minister of Labour Relations and Manpower by virtue of the powers vested in him by Section 4(1) of the Industrial Disputes Act, Chapter 131 of the Legislative Enactment of Ceylon (1956 Revised Edition) as amended by Act, Nos. 14 of 1957, 4 of 1962 and 39 of 1968, (read with Industrial Disputes (Special Provisions Act, No. 37 of 1968), appointed me as the Arbitrator by his order dated 23.05.2008 and referred the dispute between the aforesaid parties to me for settlement by Arbitration.

The matters in dispute between the aforesaid parties are :-

“Whether the non-granting of bonus for the financial year 2005/2006 by Volanka Limited to the four (04) employees namely L. W. Chandraratne, L. M. N. Hettiarachchi, W. A. C. S. Perera and M. W. A. Lionel who are employed by the said Company is justified and if not justified to what relief each of them is entitled”

Appearances :

L. W. Chandraratne, L. M. N. Hettiarachchi, W. A. C. S. Perera and M. W. A. Lionel, the party of the *1st part* appeared by Mr. Srinath Perera, Attorney-at-Law

and

Mr. Vajira Ellepola, Attorney-at-Law appeared for the party of the *2nd part*

In the terms of Regulation 21(1) of the Industrial Dispute Regulation, 1958 parties, namely the four employees party of the 1st part (hereinafter referred to as First Part) and party of the 2nd Part (hereinafter referred to as Second Part) namely the Volanka Limited were noticed and required to file their statements of claim. In response, both parties referred to above submitted their respective detailed statements. On the very first date of inquiry that is on 11.08.2008 an attempt was made by me to bring about an amicable settlement between parties but proved a failure.

Thereafter 2nd Part commenced the proceeding leading in evidence of only witness Kuruppuarachchige Tilak Abeyruwan, Director - Volanka Exports Limited with documents marked from 2X1 to 27X1 (B) and concluded his case; whereas 1st Part adduced the evidence of Lelwala Muditha Nandana Hettiarachchi marking in evidence A1 to A6 and closed abruptly without leading evidence of the other three employees and the employees, whose names are reflected in the document A2

Though an undertaking was given, the said three employees were not called by the 1st Part to give evidence. Then on both parties filed of record their respective written submissions 1st Part on 22.03.2010 and 2nd part on 19.03.2010.

The industrial dispute at issue is whether the 1st part entitled to receive the bonus for the financial years 2005/2006. It is pertinent to state the legal position as to Bonus benefit.

There are different types of bonuses ; namely

- *The Incentive Bonus* is but the payment of extra wages to workman of some particular section or department. In short, incentive bonus paid to workman with a view to help up production may be described as ‘Production Bonus’. In the case of incentive bonus which is paid irrespective of loss or profit. It has double advantages;

- (a) it enhances the earnings of workman and
- (b) it enhances the production of the unit.

Customary Bonus depends on four conditions:

- (i) that the payment has been made over on unbroken series of years.
- (ii) that the payment has been so made for a sufficiently long period.
- (iii) that the payment has been made at a uniform rate throughout.
- (iv) that it has been paid even in years of loss and does not depend upon the earnings of profits.

Thus customary bonus is a bonus that is paid, usually of a fixed quantum irrespective of profit or loss. Bonus payments are also made in respect of regular attendance, good conduct and productivity.

- *Attendance Bonus.*— This bonus which is entirely linked with attendance is generally paid in terms of an arrangement with a trade union or the employees and payable irrespective of profit or loss.
- *Profit Bonus.*— This a bonus is paid based on profits. it is contingent on there being sufficient profits. These profit-sharing bonus is something else than productive bonus.

The Demand for Bonus is Justifiable :

- If it had been paid regularly irrespective of losses incurred by the establishment or estate on particular occasions;
- If wages fall short of living standards; *or*
- If the industry makes huge profits of which is due to the workers’ contribution to production.

In fact, discrimination in the payment of bonus to only some employee, and difference in the quantum paid have not obtained judicial sanction. Moreover that a bonus is based on the contribution by labour to the profits of the industry and that it would be irrelevant to inquire as to which section of the employees contributed to what those of profits. Thus in *KANKESAN CEMENT WORKS EMPLOYEES' SANGAM V CEYLON CEMENT CORPORATION (ID 287 CGG 12, 321 of 17 March 1961)*

The court rejected an argument executives and clerks should not be paid bonus at the same rate as manual workers as the former received higher salaries and contributed less towards the profits of the undertaking.

The application of the principal laid down here will be considered shortly.

In fact 2nd part raised a preliminary objection that the employees referred to in this Arbitration are not employees of *Volanka Limited*, as at the date of purported dispute, an Industrial Dispute cannot arise against an employer who denies employment of the above said 1st part and that the reference is bad in law and this matter should be dismissed *in limine*.

It is to be analyzed first for the reason that one must know who one's employer is? In this respect 2nd part has to establish that the 1st part employees are employees of *Volanka Exports Limited*, led the evidence of sole witness Abeyruwan and explained that around 1998 Board of Directors of *Volanka Limited*, decided to float a company by the name of "*Volanka Exports Ltd*" and it was established and the business of *Volanka Limited* continued under the new company and the 1st part was absorbed by *Volanka Exports Limited* and discharged their duties under this company. As against this the 1st part adamantly demonstrated that they were recruited by *Volanka Limited*, their names are still maintained in the said staff payroll system (22X2 and 23X2) and moreover the statutory payments namely EPF and ETF and continued under *Volanka Ltd* and their *status quo* remain the same.

The proceedings of 28.08.2008 at pages 9, 10, 11, 12 and 13 may be noted.

Court :

- Q. If the employees say that from the time they joined the company and upto now, they are still in Volanka Ltd., what have you got to say?
- A. In fact, including these 4 employees, about 150 employees were absorbed into Volanka Exports in the year 2000 and their salaries were also paid through the new Company Volanka Exports Limited.

Q. If the employees say that they did not know that they were employees of Volanka Exports Limited but they are still in Volanka Ltd, what will be your answer?

A. We Explained to all these employees including these 4 employees in the year 2000 that they will be absorbed into Volanka Exports Ltd. and therefore they cannot make statements like that,

Q. In their statement they insist that they are employees of Volanka Ltd. and they are unaware of Volanka Exports Ltd. and they are still the employees of Volanka Ltd. and therefore they are entitled to bonus, what have you got to say?

A. From the year 2000 bonus was paid to all the employees under Volanka Exports Ltd. including these 4 employees.

Q. At the Central Bank you are depositing the Employees Provident Fund contributions in Volanka Ltd.?

A. Yes.

Q. Did you bring to the notice of the Central Bank that there is a subsidiary company under the name of Volanka Exports Ltd.?

A. We have informed the Central Bank and the employees who joined this company after the year 2000, their EPF contributions are remitted under Volanka Exports Limited.

Q. If the employees here produce the EPF document stating that their EPF contributions are made under Volanka Ltd. What have you got to say?

A. That is true. We have been continuing to deposit under Volanka Ltd.

Q. You informed this Court the reasons for the continuation of those payments under Volanka Ltd.?

A. Yes.

Q. Can you repeat that answer?

A. We continue EPF and ETF payments under Volanka Ltd. When Volanka Exports Ltd., was established and when these employees were informed about the changes, they had the fear of change of employment from Volanka Ltd. to Volanka Exports Ltd. will have an adverse effect on their balances and interest of EPF and ETF and also in relation to gratuity, we decided to continue the payments under Volanka Ltd.

Q. When a company is separate entity, why did you not give fresh letters of appointment when the new company came into existence?

A. We wanted to give new letters of appointment, but as all the employees did not agree to that, we did not go ahead with those new letters of appointments.

Q. These employees you said continued in Volanka Exports Ltd. under the same capacity?

A. Yes.

Moreover the same witness gave the following evidence on Cross Examination on 24.02.2009 pages 2,3,4,6 and 7.

Q. According to your evidence-in-chief now you are working both in Volanka Limited and Volanka Export Limited?

A. Yes.

Q. Volanka Export Limited was established in year 2000?

A. Yes.

Q. But in your statement to the Court you have stated that these employees were transferred to Volanka Export Limited on or around 1998?

A. Actually Volanka Export Limited is established in 1998 but operation started from April 1999.

Q. When were these employees transferred to Volanka Export Limited

A. That is with effect from April 1999.

Q. Then again in your evidence-in-chief on the first day that is 28.08.2008 at page 3 you have stated that "in the year 1998"

A. Yes.

Cross Examination re-commenced

Q. witness the management of your company decided to establish a new company in the name of Volanka Export Limited?

A. Yes.

Q. And have the functions of these two companies officially defined in any document?

A. No.

Q. Then it appears that Volanka Export Limited has been established in order to export business?

A. It was established to do the production as well as the exports.

Q. What are the productions carried out by the Volanka Export Limited?

A. This is coconut fibre products

Q. Then where were these production activities carried out in the new Company?

A. In the same factory.

Q. That means the factory which was functioning under the Volanka Limited?

A. No.

Q. Now it seems that from your answers Volanka Export Limited and Volanka Limited functions at the same premises?

A. No. Volanka Export Limited took over the functions of categories and Volanka Limited was handling only the financial matters.

Q. Were they functioning from same premises or difference places?

A. Factories were functioning at Different places and the officers were functioning separately but in the same building for Volanka Export Limited and Volanka Limited.

Q. Where were those factories situated ?

A. They were at Ekala and Naththandiya.

Further Cross-Examination

Q. During that period these factories were run by Volanka Limited ?

A. Before Volanka Exports Limited was established these factories were run by Volanka Limited.

Q. Then what type of financial and investment business did the Volanka Limited engage in after 1999 ?

A. After 1999 Volanka Limited leased its buildings on rent to Volanka Exports Limited. In addition Volanka Limited invested in Hayley's Group of Companies and generated income.

Q. Was there any agreement signed between Volanka Exports Limited and Volanka Limited for this purpose?

A. Agreement was not signed but payment based on floor area was agreed upon.

Q. Agreed upon between whom ?

A. Between the management of Volanka Export Limited and Volanka Limited.

Q. Were the two Management different ?

A. Yes. The personnel were different.

Q. Then you mean that the personal management in these two companies verbally agreed to lease out these buildings ?

A. Not only verbally but when the prices were mentioned agreement was communicated in writing.

and further Cross Examination in Sinhala dated 26.03.2009 at pages 8and 9 appended below :-

ප්‍ර. ඒකල සහ නාත්තන්ඩියේ පිහිටි කර්මාන්තශාලා වොලන්කා එක්ස්පෝට් ආයතනයට පැවරීමක් සිදු කළා ද ?
 උ. පැවරීමක් සිදු කළා.

ප්‍ර. එම පැවරීම සිදු කළේ මොන ආකාරයට ද ?
 උ. පැවරීම සිදු කළ 1999.04.01 වැනි දින සිට වොලන්කා ලිමිටඩ් ආයතනය වොලන්කා එක්ස්පෝට් ආයතනයෙන් එම කර්මාන්ත ශාලා භූමිය වෙනුවෙන් කුලියක් අය කිරීමට පටන් ගත්තා.

ප්‍ර. වොලන්කා ලිමිටඩ් සමාගමේ තිබුණ ආයතන වොලන්කා එක්ස්පෝට් ආයතනයට පැවරීම වෙනුවෙන් කිසිම ආකාරයක නෛතික ලියවිල්ලක් සකස් කෙරුවේ නැද්ද ?
 උ. පැවරීම වෙනුවෙන් කිසිම ආකාරයක නෛතික ලියවිල්ලක් සකස් කෙරුවේ නැහැ.

ප්‍ර. තමා දන්නවාද කර්මාන්තශාලාවක පිහිටා තිබුණ භූමියේ නෛතික අයිතිය කා වෙතද තිබුණේ කියා ?
 උ. දන්නවා.

ප්‍ර. කාටද අයිතිය තිබුණේ ?
 උ. වොලන්කා ලිමිටඩ් ආයතනයට.

ප්‍ර. අද වන තුරු ඒ අයිතිය තිබෙන්නේ වොලන්කා ලිමිටඩ් ආයතනයට ද ?
 උ. ඔව්.

ප්‍ර. වොලන්කා ලිමිටඩ් ආයතනය අඩු වශයෙන් එම දේපළ බදු දීම සඳහාවත් නෛතික ලේඛනයක් සකස් කරනු ලැබුවේ නැහැ?
 උ. නැහැ.

ප්‍ර. 1999 අප්‍රේල් මාසයේ දී කර්මාන්තශාලා වොලන්කා එක්ස්පෝට්ස් ආයතනය විසින් පවරා ගැනීම. හේතුවෙන්, තමා කියන විධියට ඒ වකවානුවේ දී කිසියම් කුලියක් වොලන්කා ලිමිටඩ් ආයතනයට වොලන්කා එක්ස්පෝට්ස් ආයතනය විසින් ගෙව්වා ද ?
 උ. මෙම ගෙවීම් කලේ මාසික කුලිය වශයෙන්, පාවිච්චි කළ ගොඩනැගිලි වල වර්ග ප්‍රමාණය අනුව මගේ මතකයේ හැටියට ආරම්භයේදී වර්ග අඩියකට රු. 15 ක පමණ මුදලක් ගෙවීමට සිදු වුණා.

ප්‍ර. අද වන විට කොපමණ ගෙවනවාද ?
 උ. මම දන්නා තරමින් එය රු. 20ක් දක්වා වැඩි වී තිබෙනවා.

ප්‍ර. තමා දන්නා තරමින් කීවේ තමාට අඩමාන නිසා ද ?
 උ. එම තොරතුරු තිබෙන්නේ මුදල් කළමනාකරු ළඟ නිසා එය ස්ථිර වශයෙන් මට කියන්න බැහැ.

ප්‍ර. මුදල් ගෙවීම වෙනුවෙන් රිසිට් පතක් නිකුත් කරනවා ද?
 උ. කම්පැණි දෙක අතර මුදල් හුවමාරු වන ක්‍රමයක් තිබෙනවා. ඒ අනුව වොලන්කා එක්ස්පෝට් ආයතනයෙන් එම මුදල් අය කර ගන්නවා ඉන්වොයිස් එකක් ඉදිරිපත් කර. ඒ අනුව වොලන්කා එක්ස්පෝට් ආයතනය මෙම ගොඩනැගිලි සඳහා ගෙවීම් කරනවා.

2nd part Position was while admitting above facts and contended that salaries and EPF and ETF (statutory dues) continued under the company "Volanka Ltd", as the employees feared, if not, continuity of employment would get disturbed. It is a matter of convenience as it appears. According to the sole witness, the said payments continued under the name of "Volanka Ltd" at the request of the employees though actually the payments were made by Volanka Exports Ltd. in support "22 X 1", "22 X 3", "23 x 1" and "23 X 3" were marked. One could question the validity of this arrangement and if one considers that a company is a separate legal entity it should be divorced from all activities of the parent company as regard every other thing also. In as much as it is an independent company it should not interfere with the official matter of its employee.

Even if one admits that the 1st part employees of Volanka Exports Limited they are singled out as a special group of four. The explanation tendered by the 2nd part was after the restructuring process in 2004 the 1st part was asked to accept the Voluntary Retirement Scheme to which they flatly refused, as a result they had been categorized as an excess element and set under the charge of Financil Manager who was not called as a witness to enlighten on that point, Moreover the 2nd part argued that the Volanka Exports Ltd did not make an application under the Termination of Employment of Workmen (Special Provisions) Act to the Department of Labour as the company is a member of Hayley's Group of Companies and consider the future prospects of its employees. It must be noted that this is not the fault of the 1st part and also that keeping them in Volanka Ltd. register for the purposes of statutory contributions is also no concern of the said employees and therefore they still maintain and that they are the employees of Volanka Limited (A3a, A3b, A4, A5A and 5X in 23X2). That argument does not hold water.

In short according to the evidence of 2nd part reiterated in the year 1998 the Board of Directors decided to establish a company under the name of Volanka Exports Ltd. to export coir to other countries

and at this stage Volanka Ltd. the parent company was transformed into an Investment Company and Volanka Ltd. did not engage in, manufacturing process or exporting of coir after, 2000. It must be noted that there were about 150 factory workers and about 40 employees of Executive, Supervisory and Clerical grades and in totality the employees were transferred or absorbed into Volanka Exports Ltd. and but only 26 employees who were in that Executive and Clerical grades including the Managing Director –I. Piyasena - (Who was not called as a witness) were all well entrenched there.

Above fact when taken in its proper Perspective one may doubt the genuineness of the total transaction between Volanka Limited and Volanka Exports Ltd. Copious documents were marked namely 2 X 1 to 5 X 6, 6 X 1 to 22 X 1, 23 X 1 and 24 X 1 to 27 X B headed Volanka Exports Limited to show that 1st part is the employees of Volanka Exports Limited. In fact on the face of it may appear to be so but not so in reality. Any prudent individual will discover a fishy situation in this connection. In that sense, what has been discussed and discovered above is the true scenario of the plight of the 1st part, I decline to accept the position that the 1st part is the employees of Volanka Exports Limited but conspicuously they are truly and legally employees of Volanka Limited for the reasons stated above. Therefore the reference is valid in law and the preliminary objection is overruled.

Now turning to issue under reference to me as to non-payment of bonus for financial year 2005/2006 ; on a strict scrutiny of evidence *in toto* the 1st part must stand or fall on the strength of evidence of Hettiarachchi alone who vehemently contended that they namely under reference.

- (iii) W. A. C. S. Perera – Supervisor (now retired)
- (iv) M. W. A. Lionel – Peon (now retired)
- (i) L. W. Chandraratne – Clerk and
- (ii) L. M. N. Hettiarachchi – Supervisor

all of whom are to be included in the list marked and produced in court A2 – which contained 15 names only, which document was admitted by 2nd part without any question. In A2 there is no name of the employer or under which company they received

the bouns. As I mentioned earlier none of the employees in A2 was summoned as a witness to corroborate and to strengthen the position of 1st part. That is a fatal below to the 1st part. Having undertaken and threatened to lead evidence to be given in the list in A2 and abandoning it altogether is a serious mistake. Had the 1st part substantiated their contention Court could have to come to an appropriate conclusion in their favour.

It is now unnecessary to go into detail analysis of the copious documents and evidence led in respect of Volanka Exports Limited as it is of no avail in law.

On assessing and evaluating the evidence of 1st and 2nd parts respectively, both parties are of the same level in the balance and the weight of evidence never tilted on either side.

Taking Hettiarachchi first he failed to demonstrate affirmatively that Volanka Limited in fact paid the bonus. In the absence of any substantial and concrete evidence it is nothing but fair to decline any relief to him and in turn other three employees under reference ; whereas witness Abeyruwan's evidence was not without any infirmity but laced with inconsistencies and contradictions as tabled as above.

It is a matter of interest incidentally to note that the 1st part merely Marked A1 which is the findings given by Commissioner of Labour (Industrial Relations) to which I am inclined to disagree.

In the circumstances I hold that the workmen are not entitled to any bonus for the financial year 2005/2006. And thus they are not entitled to any claim in terms of reference.

Therefore I make no award.

T. EDMUND SANTHARAJAN,
Arbitrator.

Dated at Colombo on
this 27th day of April, 2010.

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