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EXTRAORDINARY

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PART I : SECTION (I) — GENERAL
Government Notifications

My No. IR/10/66/2010.

Ref. No. IR/10/66/2010.

THE INDUSTRIAL DISPUTES ACT, CHAPTER 131

In the matter of Industrial Dispute

THE award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between J. M. M. Mr. Mahinda Bandara, No. 403/2, Horagalawatte, Beruketiya, Kiriwattuduwa of the one part and Asha Shipping Limited, No. 35, Edward Lane, Colombo 3 of the other part was referred by order dated 20.03.2013 made under Section 4(1) of the Industrial Dispute Act, Chapter 131 (as amended) and published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 1807/26 dated 26.04.2013 for Settlement by Arbitration is hereby published in terms of Section 18(1) of the said Act.

M.D.C. AMARATHUNGA,
Commissioner of Labour.

Department of Labour,
Labour Secretariat, Colombo 05.
21st February, 2017.

Between

Mr. J. M. M. Mahinda Bandara,
No. 403/2, Horagalawatte,
Beruketiya,
Kiriwattuduwa.

Case No. A/3507

of one Part.

and

Asha Shipping Limited,
No. 35, Edward Lane,
Colombo 03.

of other Part.

AWARD

The Honourable Minister of Labour and Labour Relations
by virtue of the powers vested in him by Section 4(1) of the



Industrial Disputes Act, Chapter 131 of of the Legislative Enactments of Ceylon (1956 Revised Edition) as amended by Acts 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 Arbitrator by his order dated 20th March 2013 and referred the following disputes to me for settlement by arbitration.

The matter in dispute between the aforesaid parties are-

Whether Mr. J. M. M. Mahinda Bandara who was recruited to the post of Accounts Executive of Asha Shipping Limited from 01.08.2000 has been caused injustice by the non payment of an additional salary or an allowance for his service at Feteship Shipping (Pvt) Ltd, (Trinity Logistics (Pvt) Ltd at present). And Pership Integrated Solution (Pvt) Ltd from July 2002 to March 2010 in accordance with the instructions of the authorized officers of his institutions and if so, what relief he is entitled to

Appearance

Mr. Daya Senaratna,
Retired Labour Commissioner for the party of the First Party

Mr. S. J. Gunasekera,
Attorney's-at-Law for the Part of the Second Party.

Both parties have filed the statements under Regulations 21(1) and 21(2) of the Industrial Dispute Regulations of 1958 as amended.

On behalf of the Party of the First Part documents marked P1, P2, P3, P4, P18, P18A, P5, P10, P10B, P8A, P8B, P8C, P8D, P8E, P9, P15, P15A, P6, P13, P11, P11A, P11B, P12, P14, P13, R2 and P19.

On behalf of the Party of the Second Part documents marked X1, X2, X3, X4 and X5.

Mr. J. M. M. Mahinda Bandara Applicant in his evidence stated as follows :

(1) Applicant stated in his Evidence he has a Special Degree in Business Administration from Sri Jayawardenapura University and he is also a partly qualified Chartered Accountant. He joined Asha Shipping (Pvt) Ltd and Accounts Executive and marked his Letter of Appointment as P1. He said According to his letter of appointment he could be transferred to any other Subsidiaries of the Asha Shipping Ltd. He stated that he was not transferred to any other Company, but he was assigned further accounting work of

Water Bottling Company under Pership Integrated Solution. He was not paid any additional allowance for his work in those Companies.

Applicant stated that he was employed as an Accounts Executive of Asha Shipping Limited since 01.08.2000. He further stated as per the instruction received from the higher authorities he was assigned to do accounting work for Freightship Shipping (later Trinity Logistics) and Pership Integrated Solution.

He stated that he was not paid any allowance for the additional work. The applicant stated that Attendance Register (P05) submitted by the Respondent Company cannot be accepted. The applicant further stated during his entire period of employment with the Respondent Company he was late maximum of 10-15 days.

According to P06 he was assigned Audit, Income Tax, Payment Vouchers File of Trinity Logistics Private Limited for the period of 2002-2009.

The applicant said the Respondent Company has provided him with an Insurance Cover. After he complained to the Commissioner of Labour, the Insurance Cover has been terminated. He marked the complaint made to Commissioner of Labour as P07.

The applicant stated at the Inquiry the Respondent Company has refused to pay an additional allowance for extra work done. Applicant marked document P02 in which he has requested additional remuneration for extra work done for Trinity Logistic (Pvt) Ltd.

The applicant further marked document P03 in which he has requested additional payment of Rs. 25,000/- for the extra work he was doing from the Chief Financial Officer. (The document P03 was not attached to the written submission.). The reply applicant received was marked as P04. In which the chief financial officer has stated that he is not entitled to any additional payment for the extra work.

Applicant marked attendance sheet as P05 with the heading Pership Group. He disputed the late attendance appear in the attendance sheet.

The applicant marked the documents P06 in which he was assigned Annual audit files for the period 2002-2007 of the Trinity Logistics.

Applicant marked the Complaint made to the Commissioner of labour as P7. At the inquiry the Respondent Company refused to pay an additional payment for the extra work. The applicant further stated that document marked P10 cannot be accepted as he has signed an attendance register in which if he was late he had to sign below the red line. That register was not produced by the Respondent Company.

The applicant has marked documents P11, P11A, P11B where he was authorized by the Freightship Shipping (pvt) Ltd to appear in the Colombo Magistrate court on behalf of the Company.

He further said in his evidence that Miss Shyamali Samarasinghe, Ebert Fernando was paid additional payment for the extra work they did for Freightship Shipping Company.

The applicant attached an email marked as P12 in which he has signed as the Accounts Executive Freightship Shipping (Pvt) Ltd sending a debit note to a customer on behalf of the Company.

The Applicant stated that document marked as P10 contained false information with regard to his attendance. He further stated that on 15th 4, 2008 the applicant took annual leave and it was approved as well. But in the documents marked P05 and P10 it was shown as that he was absent. Applicant further stated there is discrepancy in his attendance when compared with his private leave register and the report produce by the company (P8, P10, P9).

The applicant marked his salary sheet for January 2008 as 15 and 15A. According to P15 there was no deduction for his absents. But according to P10 (The attendance report produce by the respondent) the applicant was absent for 26 days.

During the cross examination applicant that his starting salary was Rs. 12,000/- According to his letter of appointment has marked as P01 and he further stated there was no provision for salary increments in his letter of appointment. According to R01 his last salary for the year, April 2010 was Rs. 29,750/-. He has got salary increments 2001 to 2010.

He said he agreed to do all the accounting work for Freightship Shipping Company since 2002 as per the instruction received by the superior. But that time he did not asked for any additional remuneration for the extra work he was doing for Freightship Shipping Company. According to P02 he has requested additional allowance for the services

tendered to Trinity Logistics (Pvt) Ltd. (Earlier Freightship Shipping (Pvt) Ltd.).

Applicant stated that in 2009 he made a written request to the Respondent Company for a additional allowance for services tendered for Trinity Logistics.

The applicant further stated that his leave records defers from what he maintained and what the Company provided to the courts. He further stated that as an executive he has to sign a separate registry for his attendance. The Company has not provided these records to the courts. He stated for the period 2002-2009 September he has worked not only for the Asha Shipping but also for Trinity Logistics and Pership Intigrated solution.

He further stated in the Trinity Logistics there was a Manager and other employees who was given a large salary and vehicle allowance around 25,000-35,000 Rupees. But applicant was not given any allowance for the additional work he did for Trinity Logistics. The applicant stated that Manager, Lawrence who was employed by Asha Shipping Company but paid mobile telephone allowance and 100 liters of petrol for his extra work for Trinity Logistics. In the same manner Rachini another employee was given Rs. 30,000 as vehicle allowance and 200 liters for petrol and mobile phone allowance of Rs. 2,500.

The witness further stated that he was not paid additional salary allowance granted by Act, No. 36 of 2015 (Budgetary special allowance) which was given to employees who was drawing a monthly salary of less than Rs. 20,000. Further applicant stated that he was not given salary increment for the year 2008, 2009 and 2010. Applicant stated he gave resignation in March 2012 with effective from June 2012.

During the Re examination the applicant stated as follows :

The applicant stated according to his letter of appointment issued by Asha Shipping Limited being an Executive Grade Officer he has to do the overtime. He further stated in his letter of appointment there was nothing mentioned for him to work for Freightship Shipping and Pership Integrated Solution. The Applicant stated according to X05 he was paid and settle in full. The applicant further said in X05, it was shown only gratuity settlement and at that time his complain to the Labour Department has been inquired in to.

Miss Ramani Perera, Chief Financial Officer, Pership Group in her evidence stated as follows :

She stated there are 18 companies under Pership Group. Some of the companies under the group are Asha Shipping Limited, Trinity Logistics Limited (Freightship Shipping), Pership Integrated Solution. She stated according to applicant's letter of appointment (P01) he has joined Asha Shipping in the year 2000. She further stated while applicant working for Asha Shipping Limited he has also worked for Trinity Logistics Company Limited till September/October 2009. Further applicant has worked for Pership Integrated Solution during the period 2006-2007. She further stated there were some other employees of Asha Shipping Limited who worked for Trinity Logistics Limited as well. She stated there was no payment made for extra work done by these employees.

During the cross examination the witness stated the applicant J. M. M. Bandara was appointed to Asha Shipping Company on 14th August 2000. She further stated that Asha Shipping Company had the separate legal identity and there was no joint Companies under Asha Shipping Company. The applicant marked P07/email message forwarded to the witness as P07, P07a and P07b.

The witness admitted that additional payment was made to Ebert and Shyamali for the extra work they did for Trinity Logistics Company. The witness further said when the applicant requested for additional payment for the extra work for Trinity Logistics Company since 2002. In March 2010 a separate Accountant was hired for Trinity Logistics Company.

She was shown P19 and Email send by the applicant to the witness. Accordingly, it was suggested to that the applicant was doing additional work till March 2010.

Both parties have filed written submission.

The applicant stated in his letter of appointment there was a condition that he would be transferred to a subsidiary or an associate company during his employment. Such a transfer was not taken place. What happened was the applicant was asked to do the Accounting work for Pership Integrated Solution (Pvt) Ltd and Freightship Shipping (later Trinity Logistics (Pvt) Ltd without any additional payment.

The document P05 and P10 marked by the Respondent Company with regard the attendance of the applicant found to be irregular and contained the wrong information. According to P10B filed by the respondent, the applicant has not reported to work entire month of January 2008, But the applicant has stated that he has taken only one day leave on 18th January 2008.

According to P06 and P13 on 18.03.2010 on the request of Finance Manager applicant has handed over all the Audit and Income Tax Files of Freightship Shipping (later Trinity Logistics (Pvt) Ltd.)

According to document P11, P11A and P11B applicant has appeared in court on behalf of Freightship Shipping.

On the instruction of the management in addition to the applicant's duties in Asha Shipping Company he had to work for Freightship Shipping (later Trinity Logistics (Pvt) Ltd) for the period 2002-2010 March.

That applicant further submitted following employees of Asha Shipping Company was paid extra payment for the additional work done by them.

- A. Shyamali Premasiri, Sales Executive was paid Rs. 20,000
- B. Ebert Fernando, peon was paid Rs. 5,000.

The applicant submitted during the cross Examination of Chief Finance Officer Ms. Ramani Perera that she has admitted that additional work should be paid.

“මගේ දැනුවත්කම හා සමාගමේ විදියට කිව්වේ දැන් දන්නවා අතිරේක සේවයකට ගෙවන්න ඕනෙ කියලා” (Evidence dated 19.05.2015 in page 15)

The employer in his written submission stated that :

A. There was no agreement or condition for extra payment for work done for Freightship Shipping but the employee agreed to perform such functions as it could help his career advancement.

B. Applicant's oral request for remuneration had not borne fruit, the applicant wrote to the General Manager on 2nd September 2009 requested for an allowance from Trinity Logistics for extra work done (P02)

C. Applicant also wrote to group Chief Financial Officer (P03) asking for an allowance for Rs. 25,000 for month.

D. The Employer submitted that there was no evidence to show the applicant's time was spent working for Freightship/Trinity.

E. The Respondent submitted that applicant did not make a complaint with regard to non receipt of budgetary allowance.

An overall analysis of evidence I have come to following conclusions.

- I. The Respondent Company has acted maliciously towards the applicant by asking him to work for Trinity Logistics and Pership Integrated Solution while employed by Asha Shipping Company and denying him extra payment.
- II. The Respondent Company has acted malice towards applicant by not paying additional allowance for the services tendered to Trinity Logistics (Earlier Freightship Shipping (Pvt) Ltd) and Pership Integrated Solutions (Pvt) Ltd and where as other employees. *Eg* : Ebert and Shyamali was paid additional allowance for the extra works.

In the circumstances, I wish to quote majority decision of the Supreme Court in State Bank of India vs. Edirisinghe (1991) that the arbitrator has to make and award which is just and equitable, he is not tied down and fettered by the terms of the contract to employment. He can create new rights and introduce new obligations between the parties. The effect of the award is to introduce terms which become implied terms of the contract. It was pointed out that as industrial arbitrator creates a new contract for the future in contrasts to a judge who enforces rights and liabilities arising out an existing contract. An industrial arbitrator settles disputes by dictating new conditions of employment to come into force in the future when he cannot get the parties to agree to them in contrast to a judge who determines the existing right and liabilities of the parties.

For the reasons aforesaid it is my finding that the Respondent Company (party of the second part) has caused injustice to the applicant (party of the First part).

in the circumstances taking into consideration the totality of evidence led before me I make award that the party of the First part. Be paid an allowance for the additional work performed for Trinity Logistics (Pvt) Ltd and Pership Integrated Solution (Pvt) Ltd for the period 2002 July to 2010 March computed Rs. 10,000 per month total of 93 months - Rupees Nine Hundred and Thirty Thousand Only (Rs. 930,000).

And the aforesaid money should be deposited by the Party of the Second Part at the office of the Colombo East Labour Commissioner.

I, further make order that this award should be implemented within 21 days of the publication in the Government *Gazette* of the Democratic Socialist Republic of Sri Lanka.

I consider this award just and equitable.

KAPILA M. SARATHCHANDRA,
Arbitrator.

15th December, 2016.

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