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

In the matter of an Application under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka for mandates in the nature of Writs of Certiorari and Prohibition.

Brown and Company PLC,
481,T.B.Jayah Mawatha,
Colombo 10.

Petitioner

C.A. Writ Application No: 1046/2008

Vs

1. W.D.J.Seneviratne,
   Minister of Labour,
   Ministry of Labour,
   Labour Secretariat,
   Department of Labour,
   Narahenpita.

1A. Athauda Seneviratne,
   Minister of Labour Relations and
   Man Power.
   Ministry of Labour,
   Labour Secretariat,
   Department of Labour,
   Narahenpita.

2. The Commissioner General of
   Labour, Labour Secretariat,
   Department of Labour , Narahenpita.
3. J.R.De Silva,
   9/1, Galwala Road,
   Mount Lavinia.
4. Ceylon Mercantile Industrial &
   General Workers Union (C.M.U)
   No.3,22nd Lane, Colombo 3.
5. Browns Engineering (Pvt) Ltd.,
   33, Kurunduwatta Road,
   Rathmalana.

Respondents.

BEFORE : **S. SRISKANDARAJAH, J.**

COUNSEL : A.R.Surendran P.C with N.Kandeepan,
K.Tharshini and M.Jude Dinesh.
for the Petitioner
Sobhitha Rajakuduwa SSC
for the 1st and 2nd Respondents
S.Edirisinghe
for the 4th Respondent

Argued on : 18.11.2010

Decided on : 13.01.2011

S.Sriskandarajah J

A dispute concerning the termination of employment of eight workmen was referred to arbitration by the 1st Respondent on the 23rd of September 1999. The terms of reference is as follows:

"The matter in dispute between the aforesaid parties is whether the termination of the services of the following eight (08) employees by Brown & Company Limited is justified and to what relief each of them is entitled.

(1) T.R.Lailaden

(2) Mr.J.A.Premadasa

(3) Mrs. S.V.Balendara

(4) Mr.K.B.Weerasinghe

(5) Mr.N.Sivarajah

(6) Mr.M.I.M.Sideek

(7) Mr.E.M.Shaffie

(8) Mr.U.K.Rodrio"

It appears from the proceedings of the said arbitration bearing No A 2760 dated 27.04.2000 that both parties to the dispute namely the Petitioner and the 4th Respondent had made submissions that Browns Engineering (Pvt) Ltd is a necessary party to this dispute. Considering these submissions the arbitrator had directed the Registrar to forward the proceedings to the Commissioner of Labour for necessary amendments to the terms of reference.

The Commissioner of Labour in respect of the same dispute made the Petitioner, the Browns Engineering (Pvt) Ltd (5th Respondent) and the 4th Respondent as parties and the terms of reference is amended as follows:

"The matter in dispute between the aforesaid parties is whether the termination of the services of the following eight employees who were transferred from Brown & Company Ltd to Browns Engineering (Pvt) Ltd is justified ,and to what relief each of them is entitled. This reference was given a new Arbitration No.A2807. The arbitrator after hearing both parties decided that it is not necessary to proceed with arbitration bearing No A 2760 and to proceed with the arbitration bearing No A 2807.

The Petitioner raised a preliminary objection before the arbitrator that the reference of the dispute to arbitration by the 1st Respondent is invalid as it was made after revoking the previous reference of the same dispute for arbitration. The arbitrator rejected this preliminary objection and continued with the arbitration. The Browns Engineering (Pvt) Ltd the 5th Respondent did not participate in the arbitration even though it was noticed. Pending inquiry the employee Mr.E.M.Shaffie withdrew from the proceedings on the basis that he has received compensation from Browns Engineering (Pvt) Ltd. After the conclusion of the inquiry written submissions were filed by both parties. Thereafter the learned arbitrator made an award holding that the Petitioner was the employer of the workmen and as their services were terminated that it should make payments to the said seven employees a sum of Rs.100,000/- each for wrongful dismissal, full salaries to be paid to each employee from the date of termination up to their expected date of retirements and gratuity to be paid to each employee as per the calculation given in annexure '9'.

The Petitioner is seeking to quash the aforesaid award on three grounds. Firstly the Petitioner contended that the learned Arbitrator misdirected himself and was in error in not considering the preliminary objection of the Petitioner that the Arbitration proceedings in A2807 is vitiated by the unlawful revocation of the reference to arbitration made in A 2760 and re-referring the same to a fresh arbitration.

The 1st Respondent Minister after considering the reference of a dispute made by the 2nd Respondent the Commissioner of Labour referred the said dispute for settlement by arbitration to the 3rd Respondent. The 3rd Respondent was appointed as an arbitrator by the 1st Respondent under Section 4(1) of the Industrial Disputes Act for this purpose. It is settle law that the Minister has no power to revoke his order of reference of a dispute to an arbitrator and re-

refer to another arbitrator; *Nadarajah Ltd v Krishnathasan78 NLR 253,Piyadasa v Bata Shoe Co Ltd (1982)1 Sri L R 91* . Sharvananda J in *Nadarajah Ltd v Krishnathasan at page 259* held:

"Thus, according to the scheme of the Act, the Minister does not come into the picture once he had made a reference under section 4(1) and he cannot frustrate such reference on second thoughts. That Arbitrator proceeds with the reference without interference and directions from the Minister. Once he has acquired jurisdiction over the dispute between the parties, the Minister cannot divest him of that jurisdiction. Situations may however arise necessitating a second reference if the Arbitrator declines, resigns, dies or becomes incapable of performing his functions, or leaves Sri Lanka under circumstances showing that he will probably not return at an early date. Strictly speaking, in such an event there is no occasion to withdraw or supersede any reference from the first Arbitrator; the first Arbitrator has ceased to function and there is a frustration of the reference, and so there is in existence no Arbitrator who could act on such reference."

The rationale behind the aforesaid judgement is that once a reference is made for arbitration it should not be frustrated or it should not be revoked from one arbitrator and re-refer to another arbitrator unless in situations that necessitating a second arbitration such as the arbitrator declines, resigns, dies or become incapable of performing his functions or leaves Sri Lanka and not returning at an early date. In the present case by the 2nd reference the arbitration is neither frustrated nor it is revoked from one arbitrator and re-refer to another arbitrator. The 1st reference bearing Arbitration No A 2760 was made by the 1st Respondent to the 3rd Respondent to settle the dispute by arbitration. After the arbitration proceedings has commenced the parties to the dispute made submissions to the arbitrator that the 5th Respondent is a necessary party to the arbitration proceedings. Considering this submissions the Arbitrator referred the matter to the 2nd Respondent to make necessary

amendments to the reference in order to include the 5th Respondent as a party to the arbitration proceedings. The 2nd Respondent amended the reference which read as "Whether the termination of the services of the following eight (8) employees by Brown & Company Limited is justified" to read as "Whether the termination of the services of the following eight (8) employees who were transferred from Brown & Company Limited to Brown's Engineering Private Ltd is justified". The amended reference was given a new number Arbitration No. A 2807. The reference was made to the same arbitrator and by this amendment the 1st reference was not frustrated but it has been modified to facilitate a proper settlement of the dispute.

Hence the Petitioner's submission that the arbitration proceedings in A2807 are vitiated by the unlawful revocation of the reference to arbitration made in A 2760 has no merit.

The second ground on which the Petitioner challenged the said arbitration award was on the basis that the 1st Respondent is not the employer but the 5th Respondent was the employer of these workmen.

The facts revealed that the said employees were appointed by the 1st Respondent and while they were serving as employees of the 1st Respondent the 1st Respondent transferred the said employees to the 5th respondent Company by letter dated 16.03.1992 and inform them that they will be employees of the 5th Respondent Company with effect from 01.03.1992. The said employees protested the transfer and wrote letters individually to the 1st Respondent and informed the 1st Respondent that they cannot be transferred to the 5th Respondent Company and they are the employees of the 1st Respondent company. The 5th Respondent by its letter of 23.11.1994 terminated the employment of the said employees.

In *Cason Cumber-batch Co. Ltd v W.D.Nandasena President Labour Tribunal and two others 77 N L R 79* the Supreme Court held: "To turn to the definition of the term 'employer' in the Industrial Dispute Act, we are of the opinion that the person referred to as a person employing a workmen in each of the three limbs of the definition is intended to refer to a person who is under the contractual obligation to the workmen." In the instant case the contract of employment was constituted by the 1st Respondent offering employment to the said workmen by issuing letters of appointment and the said workmen accepting the same and worked in the 1st Respondent Company as employees of the 1st Respondent Company. The 5th Respondent at no stage had given letters of appointment to the said workmen. The said workmen have protested their transfer to the 5th Respondent Company. Under these circumstances the learned arbitrator has correctly concluded that the employer of the said workmen is the 1st Respondent Company and not the 5th Respondent Company.

The Petitioner also challenged the arbitration award on the basis that the Quantum of compensation awarded to the said employees particularly awarding full salaries computed till they reached their age of retirement is repugnant to the basic norms of computation of compensation in Industrial Law. The gratuity awarded is ultra-vires as the calculation of gratuity is based on the salaries they would have received when they reach the age of retirement.

The learned arbitrator in his award has directed that the 1st Respondent should make payments to the aforesaid 7 employees as follows:

(1) For wrongful dismissal Rs. 100,000/- for each employee,

(2) Pay full salaries from the date of termination till their retirement at the rate given in the annexture 9

(3) Pay the gratuity calculated up to their retirement age.

The duty of an arbitrator is to make an award that is just and equitable; *Stratheden Tea Co.Ltd v Selvadurai (1965) 66 NLR 06.* Rajaratnam J when explaining the requirements of just and equitable order in *Ceylon Tea Plantations Co.Ltd v Ceylon Estate Staffs' Union SC 211/72 SC minutes 15.05.1974* observed:

"A just and equitable order no doubt is an order that the tribunal is empowered and obliged to make as may appear to the tribunal just and equitable. But it is an order that can be reviewed by this court on the acceptance of the findings of the Tribunal and if this order has been made without any consideration for the employer or the management and the business efficiency of the particular industry. A just and equitable order must be fair by all parties. It never means the safeguarding of the interest of the workmen alone."

The learned arbitrator when awarding compensation has divided the compensation in different components, namely compensation for wrongful dismissal as one component and compensation for the loss of employment and gratuity as other components. The arbitrator has correctly come to the finding that the termination of the services of the 7 workmen is not justified. In these circumstances the arbitrator could have considered the relief of reinstatement with back wages or compensation in lieu of reinstatement. The arbitrator has chosen to grant compensation. In that event he should have awarded compensation that is awarded to a workman whose services are terminated in similar circumstances. In the instant case he has awarded excessive compensation and when compensation is awarded there is no necessity to award a separate sum for wrongful dismissal. The gratuity payment is a statutory payment and it has to be paid according to law. The arbitrator has no right to determine the payment of gratuity based on their retirement age. For this reasons this court issues a writ of certiorari to quash the following part of the award:

"I direct that the that the 1st Respondent should make payments to the aforesaid 7 employees as follows:

(1) For wrongful dismissal Rs. 100,000/- for each employee,

(2) Pay full salaries from the date of termination till their retirement at the rate given in the annexture 9

(3) Pay the gratuity calculated up to their retirement age.

as this part of the award is not just and equitable and as hence it is illegal.

As this court agrees with the findings of the arbitrator that the termination of the employment of the seven employees named in the reference is not justified and the Petitioner is the employer of these seven employees. In this circumstances this court award compensation to the said seven workmen calculated on the formula published by the Commissioner of Labour in the Government Gazette Extraordinary No.1384/07 dated 15th March 2005. The Court direct the 2nd Respondent the Commissioner General of Labour to calculate the compensation according to the aforesaid formula and inform the Petitioner the quantum of compensation payable to each of the seven employees to facilitate the Petitioner to pay the compensation. The said employees are entitle to the payment of gratuity according to law.

The application of the Petitioner is allowed without costs subject to the above limitation.

Judge of the Court of Appeal