

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

In the matter of an application for Writs of
Certiorari and Mandamus in terms of
Article 140 of the Constitution.

CA (Writ) Application No.56/2012

1. Wadduwage Muditha Saman Kumara
Perera,
No.228, Galle Road,
Thalpitiya North,
Wadduwa.
2. Gammadde Thandakkara Mala
Janithangani,
No.93, P.B. Alwis Perera Mawatha,
Katubedda,
Moratuwa.
3. Indrajith Jayawardena,
No.93, John Rodrigo Mawatha,
Katubedda,
Moratuwa.
4. Hewavitharanage Malani,
"Nirmala", Hettiyawala,
Puhulwella,
Matara.
5. Thamara Ramani Naotunna,
Kommala,
Wadumulla,
Bentara.
6. Weerahannadige Manisha Kamani
Lakshmi Chandra Fernando,
No.9, Goods Shed Road,
Panadura.
7. Kande Gamage Chandrasena,
No.17/8, Visal Uyana,
Hirana, Panadura.

Petitioners

Vs.

1. Tri-Star Apparel Export (pvt) Ltd.
No.30, Maligawa Road,
Ratmalana.
2. Sobitha Dharmawansa,
The Arbitrator
Hon. President of the Labour Tribunal
No.2, Vauxhall Street,
Colombo.
3. Gamini Lokuge
Minister of Labour
Labour Secretariat
Narahenpitiya
Colombo 05.
4. Commissioner General of Labour
Department of Labour
Narahenpitiya
Colombo 05.
5. Inter-Company Employees Union
No.100/9, Kandy Road
Dalugama
Kelaniya.

Respondents

BEFORE : S. SRISKANDARAJAH, J (P/CA)
W.M.M.MALINIE GUNARATNE, J

COUNSEL : Shantha Jayawardena,
for the Petitioner
Priyantha Jayawardena PC
for the 1st Respondent
M.Fernando DSG
for the 3rd and 4th Respondent

Argued on : 15.07.2013

Written submission on : 10.07.2013 (1st Respondent), 15.07.2013 (Petitioner)

Decided on : 31.07.2013

S.Sriskandarajah,J

The Petitioners submitted that they were employees of the 1st Respondent Tri-Star Apparel Export (pvt) Ltd. 1783 employees, including the Petitioners were laid-off by the 1st Respondent Company after obtaining permission from the Commissioner General of Labour, for a period of 3 months, subject to payment of 50% of the monthly wages. The permission granted by the Commissioner General of Labour is to lay-off employees of the 10 factories of the 1st Respondent Company, and the said permission was not covering the employees attached to the head office or to the Thalawala Complex. As the Petitioners were attached to the head office and Thalawala Complex, they were also illegally laid-off by the 1st Respondent and, thereafter, after the lapse of 3 months from the date of the lay-off, the Petitioners were not given employment by the 1st Respondent. The dispute of not employing the employees who were laid-off by the 1st Respondent Company was referred under Section 4(1) of the Industrial Disputes Act for arbitration. The industrial dispute that was formulated for resolution was as follows:-

“Whether the non-offer of employment to the employees of the factories of Tri-Star Apparel Export (pvt) Limited, situated at Girandurukotte, Nilwala, Hasalaka, Kekanadura, Ambalantota, Badulla, Buttala and Kamburupitiya, and the head office, Maliga Stores Complex and Thalawala Complex, whose names are referred by the said Company is justified and, if not, to what relief each of the said employees is entitled?”

In the arbitration proceedings, the 5th Respondent Trade Union appeared on behalf of the Petitioners as well as the other workers. In the said proceedings, the 1st Petitioner and the Deputy Chairman of the 1st Respondent Company gave evidence and documents were marked on behalf of the Trade Union and the 1st Respondent Company. The Petitioners submitted that the 1st Respondent has violated the conditions laid down by the Commissioner of Labour and has even failed to pay the half wages during the time of the lay-off and, thereafter, when the dispute was referred to arbitration, and when the arbitration proceedings were pending, the Petitioners submitted that the Petitioners and even the other employees had received letters from the 1st Respondent that certain vacancies had occurred and, therefore, to state in writing whether the Petitioners were willing to be recalled for service. The Petitioners submitted that

they accepted the offer of employment and went to the head office and to the Thalawala Complex, but the 1st Respondent refused to re-employ the Petitioners. It is the submission of the Petitioners that they were not falling within the category of employees who were laid-off, but they were, in fact, laid-off by the 1st Respondent for a period of 3 months and, even after the end of the said 3 months, the 1st Respondent failed to re-employ them. These facts were placed before the Arbitrator, and the Arbitrator, on 23/09/2011, had observed that certain employees had not taken up employment when it was offered by the 1st Respondent and some of the employees, including the 1st Petitioner, had improved their economic status since they lost their jobs with the 1st Respondent and he further observed that on the evidence it appears that there was no clear date on which the services of the workers were terminated and that an Arbitrator could not investigate as to when such termination occurred. The Arbitrator further observed that the reference for arbitration was worded improperly and did not state that the services were terminated, but instead stated that the employees were not offered employment and, as the said reference was vague, the Arbitrator had not ordered any relief for the affected employees. The said award was published in the Government Gazette on the 4th of January 2012 bearing No.1379/14. The Petitioners in this application have sought a writ of certiorari to quash the said Arbitration Award as far as it relates to the Petitioners.

The Arbitrator derives his jurisdiction from a reference made by the Commissioner or Minister, and he will assume jurisdiction if the dispute falls within the definition of Industrial Disputes in the Industrial Disputes Act. Industrial Dispute is defined in the Industrial Disputes Act as follows:-

“Industrial Dispute means, any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment or the terms of employment or with the conditions of labour or the termination of the service or the reinstatement in service of any person and for the purpose of the definition, ‘workmen’ includes, a Trade Union consisting of workmen.”

As defined in the Industrial Disputes Act, an industrial dispute includes non-employment. In this instant case, Petitioners have complained that they were workmen of the 1st Respondent Company, and this position was admitted by both parties in the arbitration proceedings, and there is no dispute that these Petitioners were not offered employment at the end of the period of lay-off, and due to this dispute, a complaint was made and a reference under Section 4(1) of the Industrial Disputes Act was made for arbitration. While the proceedings before the Arbitrator is pending, offering employment to the Petitioners or any employees will not bring the arbitration proceedings to an end or the dispute referred for arbitration to an end. The Arbitrator has a duty to make a just and equitable award. He need not confine himself to the terms of the contract of employment; he can create new rights and new obligation between parties. A just and equitable order of an Arbitrator is illustrated by Justice Wanasundera in *Tirimanne Vs. Sivanesan and others* 1981, 1 SLR at 185 as follows:-

“What the award seeks to do is to resolve the dispute of formulating a new set of terms and conditions which are fair and reasonable to both parties and imposing such terms on the parties so that the terms and conditions will supersede the original position of the parties and provide a new relationship that would henceforth guide the conduct of the parties to the terms and conditions that are statutorily made, implying the terms of the contract of employment.”

In the instant case, the dispute was referred to the Arbitrator to decide whether the non-offer of employment to the employees of the factories of Tri-Star Apparel Export (Pvt) Limited by the said Company is justified and, if not, to what relief each of the said employees is entitled. An Arbitrator, in arriving at a conclusion, has to decide whether the non-offer of employment is justified or not. Non-offer of employment can be equated or interpreted to non-employment; it is a constructive termination of employment of an employee. The Arbitrator has failed to consider this aspect and consider the circumstances in which the employees of the 1st Respondent Company were terminated, and he has also failed to consider any relief to the affected workmen. As the award was only challenged by the petitioners in these proceedings, and as the other employees or the Trade Union has not made an application challenging the said award, and as the other employees and the Tri-Star Union were not made

party to this application, this Court restricts the relief only to the Petitioners' award and issue a writ of certiorari to quash the said award in relation to the Petitioners.

The Petitioners also have sought a writ of mandamus directing the Arbitrator, the 2nd Respondent, to make a fresh award in respect of the Petitioners. Once an award is made the Arbitrator becomes defunct and, therefore, Court cannot make any direction to the Arbitrator. In these circumstances the grant of mandamus will be futile. This Court only issues a writ of certiorari to quash the said arbitral award only in relation to the Petitioners. The application for a writ of certiorari as aforesaid is allowed without costs.

President of the Court of Appeal

W.M.M.Malinie Gunaratne, J

I agree,

Judge of the Court of Appeal