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

In the matter of an Application for a mandate in the nature of *Writ of Certiorari* under article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Ceylon Heavy Industries and Construction Company Limited,
Oruwala, Athurugiriya.

PETITIONER

CA/WRIT/366/2008

Vs,

1. Hon. Athauda Seneviratne,
   Minister of Labour Relations and Manpower,
   Minister of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 05.

2. D.S. Edirisinghe,
   Commissioner General of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 05.

3. P. Nawaratne,
   Arbitrator,
   Labour Secretariat,
   Narahenpita,
   Colombo 05.

4. Sri Lanka Nidahas Sewaka Sangamaya,
   301, T.B. Jayah Mawatha,
   Colombo 10.

5. W.T. Amarasinghe,
   C/O Sri Lanka Nidahas Sewaka Sangamaya,
   301, T.B. Jayah Mawatha,
   Colombo 10.

6. The Registrar,
   Industrial Court,
   9th Floor, Labour Secretariat,
   Narahenpita,
   Colombo 05.

RESPONDENTS

Before: Vijith K. Malalgoda PC J (P/CA) &

H.C.J. Madawala J

Counsel: A. Iram with Kamal Dissanayake, Sureni Amaratunga and M.P.D.A Wijesekara for the Petitioner,

Uditha Egalahewa, PC with Ranga Dayananda and Damitha Karunaratne for the 5th Respondent.

Yuresha Fernando SSC for the AG.

Argued on: 16.06.2015, 08.07.2015, 21.10.2015, 30.10.2015

Written Submissions on: 01.12.2015

Order on: 04.03.2016

Order

Vijith K. Malalgoda PC J

Petitioner to the present application Ceylon Heavy Industries and Construction Company Limited a Limited Liability Company Registered under the Companies Act has come before this court seeking inter alia,

b) To grant and issue a mandate in the nature of *Writ of Certiorari* quashing and setting aside the award of the 3rd Respondent marked P-8.

The 5th Respondent who was an employee of the Petitioner, who is the successor of the Ceylon Steel Corporation, had complained to the 2nd Respondent Commissioner General of Labour of an dispute between him and the Petitioner Company arisen as a result of sending him on retirement from 8th April 2006 on his reaching the age of 55 years.

On the recommendation of the 2nd Respondent the 1st Respondent, who is the Minister of Labour had referred the said dispute for Arbitration under section 4 (1) of the Industrial Disputes Act No 43 of 1950 (here in after referred to as the Act) and appointed the 3rd Respondent as the Arbitrator.

The matter that was referred for Arbitration by the Minister was;

> "Whether it is justified by Ceylon Heavy Industries and Construction Company Limited to retire from its service with effect from 8th April 2006 on the ground of reaching the age of 55 years of Mr. W.T. Amarasinghe who was absorbed to the service of the said Company while he was serving in the Ceylon Steel Corporation since 01.01.1975 and if not justified to what relief is he entitled to?"

The 3rd Respondent, Arbitrator, after the arbitration which was mainly based on written submissions filed by both parties made the award in favour of the employee i.e. the 5th Respondent ordering the employee be reinstated with back wages without a break in his service.

The Petitioner being dissatisfied with the said award filed the present application before this court praying for the relief, referred to above.

However during the argument before this court it was revealed that, the Petitioner had already filed notice of repudiation with the Commissioner of Labour in terms of section 20 of the Act before coming to this court.

Section 20 (1) of the Act which refers to the notice of repudiation reads thus,

> Section 20 (1) "any party, trade union, employer or workman bound by an award made by an arbitrator under this Act, may repudiate the award by a written notice in the prescribed form sent to the commissioner and to every other party, trade union, employer and workman bound by the award."

The effect and the procedure to follow after such notice is given is explained in section 20 (2) of the Act as follows,

> Section 20 (2) "where a valid notice of repudiation of an award is received by the Commissioner, then subject as herein after provided-
>
> a) The award to which such notice relates shall cease to have effect upon the expiration of three months immediately succeeding the month in which the notice is so received by the Commissioner or upon the expiration of twelve months from the date on which the award came in to force as provided in section 18 (2) whichever is the later; and
> b) The Commissioner shall cause such notice to be published in the Gazette, together with a declaration as to the time at which the award shall cease to have effect as provided in paragraph (a)"
>
> [I have not referred to the provisos to the two subsections referred to above as there is no bearing of those provisos to the present case]

The 1st and the 2nd Respondents, in their statement of objection referred to the notice of repudiation given by the Petitioner and produced marked 2R1 the Gazette notification published by the 2nd Respondent in terms of section 20 (2) (b) of the Act.

According to the said Gazette notification the 2nd Respondent had published the repudiation notice on 22nd April 2008 in the Government Gazette dated 2nd May 2008.

It was further revealed during the argument that the award of the 3rd Respondent which was made on 29.01.2008 had specifically ordered that "the re-instatement of the applicant within one month from the date of publication of this award on the Government Gazette."

Therefore it was agreed by all the parties that the effective date of the award would be 28.03.2008.

It was further argued by the Respondents that, the three months period referred to in the 1st limb of section 20 (2) (a) expired on 22.07.2008 and the one year period referred to in the 2nd limb of section 20 (2) (a) expired on 28.03.2009. Therefore it was submitted that "the later date" on which the said award to cease to have effect, as specified in section 20 (2) (a) falls on 28.03.2009 and therefore argued that since the award shall cease to have effect from 28.03.2009 that the matter before this court would effectively be rendered academic after the said date. It was further argued by the Respondents that the relief prayed by the Petitioner in prayer (b) seeking to quash the award does not arise as the award is rendered null and void with effect from that date.

However it was revealed before us that the 2nd Respondent instituted proceedings before the Magistrate's Court of Kaduwela to enforce the award of the Arbitrator prior to 28.03.2009, i.e. before the order becomes null and void by the publication of the said repudiation by the 2nd Respondent.

The argument by the Respondents before this court was that by notice of repudiation which was properly Gazetted, the award becomes null and void from 28.03.2009 as submitted above and therefore there is no award to be quashed before this court but, the proceedings filed in the Magistrate's Court will not become nugatory since the said proceeding in the Magistrate's Court were instituted within the effective period of the said award under section 20 (2) (a) of the Act.

In this regard both parties i.e. the Petitioner as well as the Respondents relied upon the land mark case of ***Thirunavakarasu V. Siriwardena and Others 1986 (1) Sri LR 185*** but this court prefers to consider two contradictory views taken by our courts on the effect of Repudiation.

In the case of ***Obeysekera V. Albert and Others 1978-1979 (2) Sri LR 220*** the Court of Appeal held that, "Certiorari is a discretionary remedy and will not normally be granted unless the plaintiff has exhausted other remedies reasonably available and equally appropriate. Section 20 (1) of the Industrial Disputes Act conferred the right on the aggrieved party to repudiate the award and accordingly he cannot seek, a discretionary remedy like Certiorari."

In contrary to the above decision Supreme Court in the case of ***E.S. Fernando V. United workers Union and Other 1989 (2) Sri LR 199*** held that,

> "The availability of an alternative remedy by repudiation of the award under section 20 of the Industrial Disputes Act, it is wrong to regard section 20 (1) as an alternative remedy in relation to proceedings for a *Writ of Certiorari.* Assuming that repudiation of an award in terms of section 20 is a remedy yet it is an adequate and effectual remedy so as to the disentitled an

aggrieved party to the remedy by way of Certiorari. Obeysekara V. Albert and Others has been wrongly decided,

In the said case G.P.S de Silva (J) (as he was then) observed,

"In that case (Thirunavukarasu V. Siriwardena and Others) Wanasundera J considered the effect of the repudiation of an award in terms of section 20 of the Industrial Disputes Act said the learned Judge "The question that has been posed is whether or not an award once it is repudiated has the effect, as it were, of wiping the slate clean so that the award and its effects will disappear altogether as if they had never existed from the inception. I must confess that I find it difficult to accept this argument both on principle and practice the award will be bringing on the parties and is made operative in its character of an award for a minimum period of 12 months. During that period and in respect of that period when the award will subsist, all rights and liabilities pertaining to the award in its character as an award can be enforced as an award. The law no doubt allows a repudiation of the award any time after the required minimum period. What then is the effect of such repudiation? In my view such repudiation can have only prospective application and cannot affect any right and obligations that have already accrued to the parties and have become terms and conditions of service..."

It seems to me that the view the award is operative for a minimum period of 12 months is supported on a plain reading of the section. On the other hand, if the Petitioner succeeds in his application for a *Writ of Certiorari* the award is rendered null and void *ab initio*. It would therefore appear that, assuming that the repudiation of an award in terms of section 20 is "a remedy.' Yet it is not an adequate and an effectual remedy. To disentitle the Petitioner-Appellant to the remedy by way of Certiorari, the alternative remedy must be an adequate and effectual remedy"

In the said case G.P.S de Silva J (as he was then) has clearly discussed a situation which is similar to the present case and find the answer to it as "*on the other hand if the Petitioner succeeds in his application for a Writ of Certiorari the award is rendered null and void ab initio*" (emphasis added)

It is therefore observed by this court that the notice of repudiation given by the Petitioner and the subsequent publication of the said repudiation by the 2nd Respondent in terms of the Act has not made the award made by the arbitrator null and void for the reason that the 2nd Respondent had initiated proceedings in the Magistrate Court of Kaduwela within the 12 months period stipulated under section 20 (2) of the Act.

Under these circumstance I observe that the argument raised by the Respondents to the effect that,

a) That the matter before this court would effectively be rendered academic after the said date (i.e. 28.03.2009)
b) The relief prayed by the Petitioner in prayer (b) seeking to quash the award does not arise as the award is rendered null and void with effect from that date, (i.e. 28.03.2009)

were raised without a valid basis and therefore reject the said argument.

According to the Petitioner the 5th Respondent had joined the Ceylon Steel Corporation (the predecessor of the Petitioner) on 1st January 1975 on a casual basis until 30th June 1975. On 05.05.1977 he was issued with a letter appointing him to the permanent post of Engineering Assistant. The fifth Respondent had continued with his service until 8th April 2006 when he completed 55 years. According to the version of the Petitioner before this court, the 5th Respondent retired from his service with effect from the said date based on the retirement policy of the Petitioner Company.

However the said retirement was challenged by the 5th Respondent through the 4th Respondent Trade Union on the basis that it was a premature retirement implemented by the Petitioner before reaching the retirement age.

As observed by me earlier in this judgment, the said dispute was referred for Arbitrator by the 1st Respondent and it is the said decision of the Arbitrator which is challenged before this court.

At the said Arbitration the 5th Respondent was represented by the 4th Respondent Union as the 1st party to the said Arbitration and the Petitioner was the second party before the said Arbitration. It was revealed during the argument that, there were several sitting of the said Arbitration and as agreed by both parties the submissions were limited to written submissions which were exchanged at the sittings. We observe that none of the parties have objected to the said procedure adopted at the Arbitration but voluntarily took part in the said process. At the conclusion of the said Arbitration the award was made on 29.01.2008 and published is the Government Gazette on 28.02.2008.

During the Argument before us, the Petitioner has relied mainly on two grounds. Firstly he argued that the Arbitrator has made his decision without jurisdiction. Secondly he challenged the decision of the Arbitrator on the ground, error of law on the face of the record.

I would first deal with the 1st ground relied by the Petitioner. In support of his first ground the Petitioner submitted,

a) Whether the present dispute is a minor dispute in the meaning of section 4 (1) of the Act

b) Whether there was a live dispute between the parties for the Minister to refer it for Arbitration

However before going in to the said issues raised by the Petitioner, it is important to note that these are issues not raise by the Petitioner at any stage prior to the Arguments before us, either before the Arbitrator or in his pleadings before this court. As observed by me earlier in this judgment Petitioner neither challenged the appointment of the arbitrator no refused to take part in the said proceedings. Instead the Petitioner went before the Arbitrator and agreed to rest the Petitioner's case on written submissions tendered on behalf of him. As a third ground the Petitioner further submitted that the Petitioner was not allowed to lead evidence at the Arbitration but we see no merit in the said argument since the Petitioner had agreed before the Arbitrator to the said procedure.

Section 4 (1) of the Act reads thus;

> Section 4 (1) "the Minister may, if he is of the opinion that an industrial dispute is a minor dispute, refer it, by an order in writing for settlement by arbitration to an arbitrator appointed by the Minister or to a Labour Tribunal notwithstanding the parties to such dispute or their representative do not consent to such reference."

In the present case the Minister acting in terms of the above provisions of the Act has decided to refer the dispute as identified by him in the reference he made, to an arbitrator, since he was of the opinion that the said dispute was a minor dispute-

In this regard the powers of the Minister under section 4 (1) of the Act had been discussed in the case of ***Chas P. Hayley and Company V. Commercial and Industrial workers and others 1995 (2) Sri LR 42*** by the Court of Appeal, as follows;

> "The powers conferred on the Minister of Labour in terms of section 4 (1) are wide. The Minister acts solely in an administrative capacity, and not judicially or quasi judicially. The concluding words in section 4 (1) highlight the amplitude of the powers vested under section 4. Even if the two parties to the collective agreement do not want the matter referred to arbitration, the Minister is vested with the power under section 4 (1) to refer the Matter for arbitration.

In the said case Senanayake J observe that "To my mind the Legislature has prudently and advisedly entrusted amplitude of power in the Minister, in the large interest of Industrial Peace."

Under these circumstances, this court observe that the Minister was correct when he decided to refer the dispute between the Petitioner and the 4th Respondent (on behalf of the 5th Respondent) for Arbitration by concluding the said dispute a 'Minor Dispute" under section 4 (1) of the Act.

This court further observes that the two arguments raised by the Petitioner before this court with regard to the jurisdictions are contradictory to each other. Petitioner in one argument submitted that the Minister is wrong when deciding the present dispute a "Minor Dispute" since it involves the retirement age of the employees of the Petitioner Company. However in contrary to the said argument, the Petitioner had argued that there was no live dispute before the Minister since the retiring age was not a disputed issue for him to act under section 4 (1) of the Act. Therefore it is clear that the Petitioner has admitted before this court that there was a dispute between the Petitioner and the 4th Respondent (on behalf of the 5th Respondent) even though he argued that there was no live dispute.

For the reasons discussed above I see no merit in the 2nd Argument of the Petitioner.

Role of the court in a writ application when the parties alleged that the impugned decision was arrived while there was an error of law on the face of the record was discussed by WADE and FORSYTH as follows "The fact that the tribunal's order appears good on its face can avail nothing. It will be quashed in Certiorari if the applicant can show that the true facts do not justify it. For this purpose, accordingly any available evidence may be put before the court" (Administrative Law H.W.R Wade and C.E. Forsyth 10th edition page 212)

In the case of ***Chas P. Hayley and Company Limited V. Commercial and Industrial Workers and Other 1995 (2) Sri LR 42*** Court of Appeal decided that "A finding a fact may be impugned on the grounds of error of law on the face of the record; the misconstruction of documents become error on the face of the record."

As admitted before this court by all parties the 5th Respondent had joined the Ceylon Steel Corporation (the predecessor of the Petitioner) on 1st January on a casual basis until 30th June 1975. In the first two paragraphs of the said letter of appointment reads as follows (R-2)

1975 ජනවාරි 31 වෙනි දින පවත්වන ලද පරීක්ෂණයට අනතුරුව ඔබ 1975 ජනවාරි 01 වෙනි දින සිට 1975 ජූනි 30 දින දක්වා ලංකා වානේ සංස්ථාවේ අනියම් කාර්මික ශිල්පී ලෙස තෝරා පත්කරගෙන ඇත.

අනියම් කාර්මික ශිල්පී ලෙස සේවය කරන කාලය තුලදී ඔබගේ හැකියාව පරීක්ෂණයට භාජනය කරනු ඇත. මෙම කාලය තුල ඔබ රාජකාරී ඉටුකරන අන්දමත් පැවැත්ම හා පැමිණීමත් යනාදී කරුනු උඩ ඔබේ සේවය ස්ථිර කිරීම රදාපවතිනු ඇත."

The final paragraph of the said letter reads thus,

"මෙම තනතුර නිත්‍යවශයෙන්ම අනියම් වන අතර සංස්ථාවේ හෝ ඔබගේ හෝ මනාපය පරිදි ඔබගේ සේවය එක්දිනක කල් දීමකින් අවසන් කල හැක."

According to the submissions placed before us the services of the 5th Respondent were made permanent by letter dated 05.05.1977. The said letter was produce at the arbitration marked R-3. The heading and the first paragraph of letter read as follows,

"ඉංජිනේරු සහකාර තනතුර

උක්ත තනතුර සම්බන්ධයෙන් 1977 මාර්තු 07 වෙනි දින පැවති සම්මුඛ පරීක්ෂණයට අනතුරුව ඔබ 1977.05.09 වෙනි දින සිට එකී තනතුරට තෝරා පත්කිරීමට තීරණය කර ඇතිබව දන්වමු කැමැත්තෙමු."

It is observed by this court that the above letter refers to an appointment to the post of Engineering Assistant to which the 5th Respondent was selected after an interview. If this is the only letter of appointment issued to the 5th Respondent making his post permanent, the following issues will become relevant in considering the employment status of the 5th Respondent.

1. Was the 5th Respondent continued to be a casual employee until he faced another interview on 7th March 1977 for the post of Engineering Assistant which is different to the post of "Casual Technicians" to which the 5th Respondent was 1st taken
2. If the above position is correct, was the 5th Respondent continued to work as "Casual Technicians" on the same terms and conditions of the 1st letter of appointment including the final paragraph of the said appointment letter I have referred to above

As observed by this court during the argument, the date of appointment of the 5th Respondent was the most important issue to be decided by the Arbitrator, since it would decide whether the 5th Respondent was entitled to continue with his employment beyond 55 years.

In this regard the Petitioner was relying on a Board decision which was produced at the Arbitration marked R-1. In the said document item 77 reads as follows;

77. Retirement Policy of CHICO

Board Paper No. 2002/18/02,

The covering approval of the Board of Directors was granted for the implementation of the following procedure for retirement of Employees of CHICO

1. The employees who joined company service before 4th April 1975 after reaching 55 years of age can request extension annually.
2. The employees, who joined company service before 4th April 1975, shall retire on completion of 58 years of age.
3. Those employees who joined in service before 4th April 1975 and retired on completion of 58 years should be offered contract employment and continue till they reach the age of 60 years. These contracts will be renewed every year. This condition was in force as per the collective agreement signed on 1st February 2002 by CHICO and SLNSS.
4. With regard to the employees who joined after 4th April 1975 they should retire on reaching the age of 55 years.
5. In relation to retirement, it is considered that the company service commences from the date of permanent appointment in the company.

However it was further referred to a notice issued to the employees of the Petitioner dated 28th October 2004. In the said notice which was also referred to as the retirement policy of the Petitioner, the final paragraph reads as follows,

> "In determining the date of retirement the date of confirmation in employment would also be taken into account."

Whilst considering the above facts placed before the arbitrator he has identified the most important issue to be decided in the said Arbitration as follows,

> "5 (b) the matter in issue narrows down, as to the casual employment preformed by Amarasinghe, and determination rests there

After referring to the 1st and 2nd paragraphs of the letter of appointment dated 12th March 1975 he concludes as follows,

> "It is crystal clear from the wording in this paragraph that his-
>
> 1) Performance of duties
> 2) Conduct and punctuality during the period of casual employment would be considered for permanency in employment, which means that a permanent employment position existed in the organization. Factually it was so, in that immediately on completion of the casual period of employment, he was enlisted in to the permanent cadre, wherein he continued until the forced retirement at 55 continuity in employment existed.

When looking at the above findings of the Arbitrator, this court is of the view that the Arbitrator had considered irrelevant facts and failed to consider the most important facts appeared on the letter dated 05.05.1977 which I have considered carefully in this judgment.

As observed by me earlier in this judgment it is well settled that the order of an inferior Tribunal having a duty to act reasonably in determining the right of the parties is liable to be quashed by *Writ of Certiorari* for an error of law appearing on the face of the record. A finding of fact may be impugned on the ground of error of law on the face of the record.

I am of the view that the Arbitrator had misinterpreted the document R-1 as, that there was a permanent employment position existed in the organization and immediately on completion of the casual period of employment he was enlisted into the permanent cadre without considering the contents of the document R-2, which clearly indicates that the 5th Respondent was appointed to a deferent positions with effect from 09.05.1977 after a due interview conducted on 07.03.1977.

The Arbitrator had also failed to consider the importance of the document R- 2 and therefore this court is of the view that the above conclusion by the arbitrator was an error of law on the face of the record.

I therefore make order quashing the award marked P-8 of the 3rd Respondent by granting a *Writ of Certiorari* as prayed in paragraph (b) to the prayer of the Petition I refrain from making an order for costs.

Application allowed.

Award quashed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL