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

In the matter of an application for the grants of mandates in the nature of writ of *Certiorari* in terms of Article 140 of the Constitution.

C. A. WRIT APPLICATION NO. 111/2014

TEA SMALL HOLDING DEVELOPMENT AUTHORITY,

No. 70, Parliament Road, Pelawatta, Battaramulla

PETITIONER

VS.

1. **MINISTER OF LABOUR RELATION AND MANPOWER**, Ministry Minister of Labour Relation and Manpower, Narahenpita

2. **MAHINDA RALAPANAWA**,

   No. 194, Sri Jayawardenapura Mawatha, Walikada, Rajagiriya.

3. **V. B. P. K. WEERASINGHE,**

3A. M. D. C. AMARATHUNGA

COMMISSIONER OF LABOUR,

Industrial Relation Unit,
7th Floor,
Labour Secretariat,
Colombo 05

4. **S. R. GUNAWARDANA**, No. 28/3/A, 4th Lane, Epitamulla Road, Pitekotte

RESPONDENTS

BEFORE: **M. M. A. Gaffoor, J.**

COUNSEL: A. S. Weragoda with Nilantha Kumarage and Arjun Perera for the Petitioner

Vikum de Abrew DSG for the 1st and 3rd Respondents

Eranda S. Wanasinghe instructed by L.C.J Senadheera for the 4th Respondent

WRITTEN SUBMISSIONS TENDERED ON: 29.08.2018 (by the Petitioner)
07.09.2018 (by the 1st and 3rd Respondents)
10.03.2016 (by the 4th Respondent)

DECIDED ON: **07.02.2019**

M. M. A. Gaffoor, J.

The Petitioner is an authority incorporated under the Tea Small Holdings Development Law No. 35 of 1975 as amended and the 4th Respondent (hereinafter referred to as the "Respondent") above named was an employee of the Petitioner Authority who has now retired. While the Respondent was serving as a Regional Manager in Kaluthara and Ratnapura Regional offices of the Petitioner Authority, on 04.11.2004 he was interdicted due to some allegations of misconducts and financial irregularities committed by him.

Subsequent to interdiction, a disciplinary inquiry was held after four charge sheets were served on replacing the other last of which was dated 29th March 2005 (*vide pages 57-79 of the case record*). The said inquiry was conducted by an independent inquiring officer appointed by the Petitioner including a retired Public Officer of Petitioner's choice.

On conclusion of the said inquiry, the Respondent had been found guilty for only 8 charges while 38 charges framed against him. Thereafter, the Board of Directors of the Authority decided to revert back the salary scale which he was drawing at the time of interdiction and it was further decided that the Respondent is disentitled for arrears of salary and the increments for the period of interdiction. Accordingly, the Respondent was reinstated with effect from 07.05.2007 and the said decision was conveyed to him by letter dated 07.05.2007.

Having received the said letter, the Respondent appealed to the Board of Directors of the Petitioner Authority seeking his arrears of salary, increments, and other allowances for the period of interdiction from 04.11.2004 to 09.05.2007. The Board of Directors refused to grant such reliefs and apart from the Board of Directors of the Petitioner Authority, the Respondent had sent a formal petition to the Commissioner of Public Petitions Committee and the Commissioner of Labour.

After inquiry, both the Secretary for the Commissioner of Public Petitions and the Commissioner of Labour directed and requested all such arrears as claimed to be paid but the Petitioner was not satisfy with these directions.

Thereafter, the 1st Respondent, Minister of Labour, having been satisfied that an industrial dispute was in existence, by an order, referred the dispute to the 3rd Respondent Arbitrator for settlement by arbitration under Section 4(1) of the Industrial Disputes Act of 1956.

The Arbitrator commenced his inquiry into the matters in dispute between the Respondent and the Petitioner Authority on the following reference:

> *"Whether Mr. S. R. Gunawardhana (Respondent) is entitled to receive the salaries, salary increments and other allowance for the period of interdiction of his service from 04.11.2004 to 09.05.2007 by the Tea Small Holdings Development Authority if so, what relief he should be granted".*

At the conclusion of the inquiry, on 27.03.2013 the Arbitrator held that the Respondent is entitled for arrears of salary and increments for the period of interdiction from 04.11.2004 to 09.05.2007 (the award marked as **'P2'**). The award dated 27.03.2013 was published in the Gazette by the 3rd Respondent (marked as '**P3'** by the Petitioner).

Being aggrieved by the said award of the Arbitrator, the Petitioner Authority has filed this writ application, seeking a mandate in the nature of a writ of *Certiorari* quashing the said award **P2** and Gazette notification dated 05.06.2013 which contained in the document marked **P3** and costs.

It is an important fact to note that when this matter remains at the initial stage in this Court, on or about 02.06.2014 the 3rd Respondent Commissioner of Labour instituted an action bearing Case No. 55230/Labour in the

Magistrate's Court of Kaduwela seeking an order to implement the aforesaid impugn arbitral award.

When the above matter was taken up before the learned Magistrate of Kaduwela on 24.07.2017, the learned Magistrate had directed the parties to conclude the matter since there is no stay order issued by this Court. Therefore, the Petitioner by way of a separate petition dated 12.10.2017, sought this Court to issue an interim order staying further proceedings of the application bearing No. 55230/Labour in the Magistrate Court of Kaduwela until final determination of this application.

However, on 04.12.2017, Counsel for the Petitioner submitted that an order was given by the learned Magistrate in the application bearing No. 55230/Labour to the Petitioner to deposit the amount of Rs. 1,363,693.02 in the Magistrate's Court of Kaduwela. Therefore, Counsel for the Petitioner further submitted that the Petitioner is willing to deposit the ordered amount. Thus the learned Deputy Solicitor General for the State submitted that since the Petitioner agreed to deposit the money in Magistrate's Court, the State is agreeable to stay the proceedings in the Magistrate's Court until the final conclusion of the matter and if the matter is decided in favour of the Respondent, he is entitled to withdraw the money. Counsel for the 4th had also no objection to this settlement. Accordingly, this Court directed the Petitioner Authority to deposit the ordered amount within one week from 04.12.2017 in the Magistrate's Court of Kaduwela. Also, this Court informed the Petitioner that if the Petitioner fails to deposit that money within the prescribed period, the Magistrate's Court case can be proceeded; if the money is deposited within the prescribed period of time the proceedings in the Magistrate's Court is stayed until the final conclusion of this matter.

Accordingly, the Petitioner was adhered the above, and thereby, this matter has been proceeded further and fixed for judgment.

In this application, the Petitioner stated that in the circumstances of the award of the 2nd Respondent dated 27.03.2013 is illegal, arbitrary, unreasonable, violative of the principles of natural justice and contrary to the principle of reasonableness. The Petitioner Authority further stated that as a result of the purported award of the Arbitrator no punishment could be imposed on the respondent despite of the fact that the respondent was found guilty for 8 charges including financial irregularities.

Furthermore, the Petitioner was in a position that after an extensive disciplinary inquiry held against the Respondent for submitting forged documents to the Petitioner, the services of the Respondent had been terminated and therefore the Respondent in any event is not entitled to claim any sum of amount from the Petitioner Authority.

In contrast, in Both Industrial Court (before Arbitrator) and this Court, the Respondent stressed that he is the most Senior Manager of the Petitioner Authority and had been stagnating in the post of Regional Manager for 20 years and the Management had taken steps to conduct a disciplinary inquiry in order to deprive his next promotion to the post of General Manager as he was the officer due for promotion. Thus the respondent stated that Petitioner's management had taken to steps to issue charge sheets and disentitle Respondent of salary and increments are acts of *malafide* the Petitioner Authority.

However, Counsel for the Petitioner submitted that for all these reasons set out by the Application of the Petitioner, the alleged award of the Arbitrator ought to be quashed on the ground of "violation of natural justice and unreasonableness".

Unreasonableness and natural justice tests have acquired the celebrated decision of Green MR accorded to irrationality as a major ground for judicial review of administrative action in the now famous decision in **COUNCIL OF CIVIL SERVICE UNIONS vs. MINISTER FOR THE CIVIL SERVICE** [(1985)] AC 374]. Lord Diplock in the later case of **COUNCIL OF CIVIL SERVICE UNIONS vs. MINISTER FOR THE CIVIL SERVICE** [(1985) AC 374] identified illegality, irrationality and procedural impropriety are the three grounds for such review, and went on to describe Wednesbury unreasonableness at page 410 thus:

> *"It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." (page at 410)*

In **BROWNS & COMPANY PLC vs. MINISTER OF LABOUR AND 6 OTHERS** [SC Appeal No. 108/2008, Supreme Court Minutes dated 17.03.2011], Justice Saleem Marsoof, P.C., J. observed that the words of the Lord Diplock in **COUNCIL OF CIVIL SERVICE UNIONS vs. MINISTER FOR THE CIVIL SERVICE** *(supra)* are applicable with equal force to the discretionary powers

exercised by an arbitrator in an industrial arbitration under Section 4(1) of the Industrial Dispute Act.

It is noteworthy that the said Act provides for the resolution of industrial disputes in various ways. Such disputes may be settled through collective agreements in terms of Sections 5 to 10 of the said Act, and may also be referred under Section 4(2) of the Act to an Industrial Court for settlement. Industrial disputes may also be settled by the Commissioner of Labour (which term includes a Labour Officer) by conciliation or any other means under Section 2 read with Section 3(1)(b) of the Act, or may be referred by the Commissioner to an authorized officer for settlement by conciliation under Section 3(1)(c) read with Sections 11 to 15 of the Act. An industrial dispute, irrespective of whether it is a minor or major dispute, may be referred for arbitration by the Commissioner with the consent of the parties to the dispute as contemplated by Section 3(1)(d) read with Sections 15A to 21 of the Industrial Disputes Act. In terms of Section 4(1) read with Sections 15A to 21 of the said Act, the Minister may also refer a minor industrial dispute for arbitration to a Labour Tribunal or to an Arbitrator nominated by the Minister "notwithstanding that the parties to such dispute or their representatives do not consent to such reference".

The parameters of judicial review of these arbitrations have been explored by the Supreme Court in decisions such as **ASIAN HOTELS & PROPERTIES PLC vs. BENJAMIN AND OTHERS** [(2013) 1SLR 407] **THIRUNAVAKARASU vs. SIRIWARDENA AND OTHERS** [(1981) 1SLR 185], and **BROWN & CO. LTD., AND ANOTHER vs. RATNAYAKE, ARBITRATOR AND OTHERS** [(1994) 3SLR 91].

In **ASIAN HOTELS & PROPERTIES PLC vs. BENJAMIN AND OTHERS** *(supra)* it was held that:

> *"When an industrial dispute is referred to an Arbitrator to adjudicate upon it, such an order has to be based on just and equitable relief. For the purpose of granting such relief there is no necessity for the Labour Tribunals to follow the rigid rules of Law."*
>
> *"As the Labour Tribunal should dispense just and equitable relief, to arrive at their decisions, they would not require strict degree of proof that is required in a Court of Law since there is no necessity to comply with the provisions of the Evidence*

Ordinance. Further Sections 36(4) of the Act specifically states that strict compliance with the provisions of the Evidence Ordinance is not required." (per Dr. Shirani A. Bandaranayake, C.J.)

In **THIRUNAVAKARASU vs. SIRIWARDENA AND OTHERS** *(supra)* Justice Wanasundera, J held that:

"...An industrial arbitrator has much wider powers both as regards the scope of the inquiry and the kind of orders he can make than an arbitrator in the civil law. In short we can fairly say that arbitration under the Industrial Law is intended to be even more liberal, informal and flexible than commercial arbitration." (at page 191)

Rajaratnam, J. when explaining the requirements of just and equitable order in **CEYLON TEA PLANTATIONS CO.LTD vs. CEYLON ESTATE STAFFS' UNION** [SC 211/1972 Supreme Court minutes dated 15.05.1974] observed that:

"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."

In all the tags from above, it is crystal clear that Arbitration under the Industrial Disputes Act is intended to be even more liberal, informal, and flexible than commercial arbitration, primarily because the Arbitrator is empowered to make an award which is "just and equitable". When an industrial dispute has been referred under Section 3 (1)(d) or Section 4(1) of the Industrial Disputes Act to an Arbitrator for settlement by arbitration, Section 17(1) of the said Act requires such Arbitrator to "make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable".

Section 17(1) of the Industrial Dispute Act reads as follows:

> *(1) When an industrial dispute has been referred under section 3 (1) (d) or section 4 (1) to an arbitrator for settlement by arbitration, he shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable. A labour tribunal shall give priority to the proceedings for the settlement of any industrial dispute that is referred to it for settlement by arbitration.*

When His Lordship Saleem Marsoof, P.C., J. giving an eclectic interpretation to Section 17(1) of the act, he observed as follows:

> *"In my view, the word "make" as used in the said provision, has the effect of throwing the ball in to the Arbitrator's court, so to speak, and requires him to initiate what inquiries he considers are necessary. The Arbitrator is not simply called upon "to hold an inquiry", where the ball would be in the court of the parties to the dispute and, it would be left to them to tender what evidence they consider necessary requiring the arbitrator to be just a judge presiding over the inquiry, the control and progress of which will be in the hands of the parties themselves or their Counsel. What the Industrial Disputes Act has done appears to me to be to substitute in place of the rigid procedures of the law envisaged by the "adversarial system", a new and more flexible procedure, which is in keeping with the fashion in which equity in English law gave relief to the litigants from the rigidity of the common law. The function of the arbitral power in relation to industrial disputes is to ascertain and declare what in the opinion of the Arbitrator ought to be the respective rights and liabilities of the parties as they exist at the moment the proceedings are instituted. His role is more inquisitorial, and he has a duty to go in search for the evidence, and he is not strictly required to follow the provisions of the Evidence Ordinance in doing so. Just as much as the procedure before the arbitrator is not governed by the rigid provisions of the Evidence Ordinance, the procedure followed by him need not be fettered by the rigidity of the law." (Saleem Marsoof, P.C., J.* in **BROWNS & COMPANY PLC vs. MINISTER OF LABOUR AND 6 OTHERS***)*

It is in this light that I proceed to examine the findings of the disciplinary inquiry and the Arbitrator.

A perusal of the said charge sheets of the Petitioner Authority at the inquiry shows that the Respondent had been found guilty for 8 charges, the charge No. 38 is a common charge and other seven are non-compliance of procedure with hardly an impact on financial mishandling. Also, it is vital to note that, the finding of the Inquiring Officer was that the Respondent had been found guilty of charges due to negligence of Respondent and no mere financial fraud. It is also observed that the said disciplinary inquiry had commenced on an audit inquiry even without conducting a preliminary inquiry which is an essential feature of a disciplinary inquiry, and it was in those circumstances, the Industrial Court has reached a conclusion that notable prejudice had been caused to the Respondent.

In the Industrial Court, in order to decide whether the Petitioner had acted reasonably and fairly in deciding in disentitle the Respondent from salary and salary increases for the period of interdiction when he was reinstated, the arbitrator also drew his careful attention to the observation made by the Inquiring Officers at the disciplinary inquiry. Most importantly, the Arbitrator has express an important fact that the Inquiring Officer in his report had stated that 'lengthlyness of charge sheet itself displays that the Petitioner had acted to convict the Respondent somehow''

It is important not to lose sight of the fact that the Arbitrator has reached a conclusion, after considering not only the both parties' statement and oral evidence, but also he concentrate on the initial findings of the inquiry and the other attendant circumstances too.

The following excerpt of the award is noteworthy:

> *"Although increments are to be earned, I find that the Applicant had been prevented from earning them due to the malafide conduct of the Respondent of interdicting the Applicant. Therefore, I hold the Applicant is entitled to increment for the period of interdiction. In this regard my attention was drawn to the fact that the Applicant had being a person who had earned his increments regularly in the period prior to the interdiction"*

In this context, it is important to recall the following words of Green MR in **PROVINCIAL PICTUREHOUSE vs. WEDNESBURY COPERATION** *(supra),* at page 229:

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'……"*

In all the circumstances of this case, I am of the considered view that the award is not vitiated by a failure to consider relevant facts or taking into consideration irrelevant facts.

I am of the opinion that the impugned award of the Arbitrator is just and equitable, and there are no errors on the face of the record to justify intervention by way of writ of *certiorari.*

Therefore, I dismiss this application with costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL