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

Kahawatte Plantations PLC.,
No. 52,
Maligawatte Road,
Colombo 10.
Petitioner

CASE NO: CA/WRIT/169/2016

Vs.

1. P.N. Wilson,
   No. 29,
   Izadeen Janapadaya,
   Weligampola,
   Nawalapitiya.
2. The Commissioner General of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.
3. P. Navaratne,
   No. 570/B/1,
   Ekamuthu Mawatha,
   Off Nugegoda Road,
   Talawatugoda.

4. Mr. John Seneviratne,
Minister of Labour and Trade
Union Relations,
Labour Secretariet,
Colombo 5.

5. The Registrar,
Industrial Court,
9th Floor,
Labour Secretariat,
Colombo 5.

6. Barcaple Estate,
Ketabolla,
Nawalapitiya.

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Manoli Jinadasa for the Petitioner.

S.H.A. Mohamed for the 1st Respondent.

Decided on: 13.02.2019

Samayawardhena, J.

The petitioner filed this application seeking a writ of certiorari quashing the award (P10) made by the 3rd respondent arbitrator granting reliefs to the 1st respondent workman upon a reference of arbitration made by the 4th respondent Minister of Labour in terms of section 4(1) of the Industrial Disputes Act, No.43 of 1950, as amended.

The dispute referred to was to consider whether the suspension of services of the 1st respondent by the petitioner effective from 02.04.1998 is unjustifiable, and, if it is, what reliefs he shall be entitled to.

There cannot be any dispute that the 1st respondent had a poor past record of service and had been *inter alia* suspended previously on several occasions.

He was, according to the petitioner, transferred on administrative reasons and not as a punishment, from the Middle Division of the estate to the Lower Division effective from 01.11.1997.[1] He did not report for work at the Lower Division and instead filed an application in the Labour Tribunal alleging constructive termination of his services.

At the Labour Tribunal, the matter was settled on 23.02.1998 on the following terms:

> *(a) The petitioner agrees to provide the 1st respondent with work from 23.02.1998 in the Lower Division without a break in service. However, he is not entitled to back wages, but is, to holiday pay and incentives.*
>
> *(b) The 1st respondent shall hand over the quarters he is presently occupying (in the Middle Division) to the Superintendent before 28.02.1998 and shall move to the new quarters (in the Lower Division) provided to him.*

[1] Vide X6-A6.

(c) *The 1st respondent shall be paid Rs.8000/= as an ex gratia payment on or before 10.03.1998.*[2]

Admittedly, the petitioner fulfilled his part of obligations in respect of (a) and (c) above on or before the due dates, but the 1st respondent did not do his part, i.e. (b) above, believe it or not, up to now—nearly 21 years from the date he was supposed to handover the quarters.

It is significant to note that, in the aforesaid Labour Tribunal settlement/order, the handing over of the Middle Division quarters and moving to the Lower Division quarters before 28.02.1998 was not subject to any condition. If there were such conditions which the parties were very serious of, they could have been incorporated in the settlement/order.

However, the 1st respondent after this settlement/order sent a letter dated 24.02.1998 to the petitioner demanding that new quarters in the Lower Division be repaired as specified in that letter for him to go into occupation.[3]

The petitioner has thereafter completed all the repairs by 28.03.1998 and informed the 1st respondent to move into the new quarters on 01.04.1998.[4] But the 1st respondent did not do it because, according to the 1st respondent, although "*the quarters is completely repaired, the quarters is still lacking the necessary furniture.*"[5]

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[2] Vide X6-A9.
[3] Vide X6-A10.
[4] Vide X6-A11.
[5] Vide X6-A12.

It is clear by then that the 1st respondent was not prepared to move into the Lower Division quarters, and hence the petitioner has sent the letter dated 02.04.1998 suspending the services of the 1st respondent with immediate effect "*until you shift into the Lower Division quarters provided to you, along with the furniture of your present quarters on the Middle Division*."

The 1st respondent neither handed over the Middle Division quarters nor shifted to the Lower Division quarters, if he says that inadequate furniture is the issue, with the furniture in the quarters which he is presently in occupation. Surely, he cannot expect more or better furniture in the new quarters than he was using in the old quarters, particularly when both the quarters are of the same type.[6]

Thereafter the Labour Department has made several attempts to settle the matter and as they were unsuccessful, the Labour Commissioner has closed the file on 10.09.2007.[7]

When matters remained as such, it is baffling to learn that the 4th respondent has again referred the matter unknown to the petitioner for arbitration in 2011.[8] It is pursuant to that inquiry the arbitration award P10, which is being challenged in these proceedings, was made.

There is no dispute that the suspension of the 1st respondent came into being as a result of the defiance of the 1st respondent to hand over the Middle Division quarters and shift to the Lower

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[6] Vide Labour Officer's Report marked X6-A15.
[7] Vide X7-R17.
[8] Vide X2.

Division quarters firstly as agreed before the Labour Tribunal by 28.02.1998 and secondly as directed by the petitioner by 01.04.1998.

The 3rd respondent in the award says that "*the management failed to provide a suitable quarters and pay the salary (during suspension)*". This he says, if I understand correctly, predominantly on the Labour Officer's Report dated 19.11.2003[9] and the clauses 17 and 18 of the Collective Agreement.[10]

In the first place, is the 1st respondent entitled to quarters? In terms of the appointment letter, under "*Quarters*", it is stated that: "*Quarters if and when provided are incidental to your appointment*"[11], which means, the 1st respondent cannot demand quarters as an entitlement.

The 3rd respondent in his award has taken up the position that, according to the Report of the Labour Officer, "*the quarters were of sub-standard.*" The 3rd respondent has misdirected himself on facts on that point. "Sub-standard" when? The Labour Officer has compiled his Report based on the condition prevailed when he visited the place on 17.11.2003 and not on the condition prevailed when the 1st respondent was supposed to shift to the Lower Division quarters on 01.04.1998 at the latest. That means, more than five years have lapsed in between and therefore it is quite natural the surrounding area of the quarters as the Labour Officer has observed being overrun with weeds as nobody was living there. According to that Report the 1st

[9] Vide X6-A15.
[10] Vide X6-A25.
[11] Vide X6-A1 and X6-A2.

respondent has admitted the quarters being renovated by the petitioner (after the Labour Tribunal settlement).

The 3rd respondent says that "*the new quarters offered had no water and toilet facilities*." According to the Labour Officer's Report, water facility was not there when he went for the inspection, but the officer immediately thereafter mentions that there is evidence to confirm that water facility was there 5-6 years ago. That means, by the time the 1st respondent was supposed to move to the said quarters, water connection had been given. The explanation of the petitioner that, these being estate quarters, the management disconnects water facility in quarters which are unoccupied to avoid water being misused by other workers is acceptable.

Regarding toilet facilities, the 3rd respondent's finding that there are no toilet facilities in the new quarters is incorrect. According to the Labour Officer's Report, in the Middle Division quarters which the 1st respondent was earlier in occupation, the toilet was separated and not attached; but in the Lower Division quarters, the toilet is attached to the quarters. That means, the Lower Division quarters has better toilet facilities. Both toilets, according to the Report, have no doors.

The Labour Officer in his report has finally stated that more suitable quarters for an Assistant Field Officer such as the 1st respondent is the Lower Division quarters.

There is another important matter to be mentioned regarding occupation of quarters. That is, after the services of the 1st respondent were suspended until he hands over the old

quarters, the petitioner, instead of complying with it, had, admittedly, got some other labourers to occupy the old quarters on his behalf and left the old quarters.[12] This arrogant behavior of the 1st respondent, to say the least, is intolerable and completely unwarranted. He has no right whatsoever to give the staff quarters to labourers to occupy. But the 3rd respondent in his award to my dismay has considered this matter also in favour of the 1st respondent when he says that "*During the period of interdiction, applicant (the 1st respondent to this application) had given the quarters to a trusted person to look after who was working in the estate and once in a way he visited the house.*" The 1st respondent does not want the quarters nor does he want to hand it over to the management. Can an estate with a large number of labour force run in this fashion?

The 3rd respondent in the award has quoted section 2 of the Estates Quarters (Special Provisions) Act, No. 2 of 1971. It has no application to the present case as that section deals with the subject of "*Period during which the right to occupy quarters subsists <u>after the termination of employee's services</u>.*" As the learned counsel for the 1st respondent admits the services of the 1st respondent were "never terminated".[13]

The 3rd respondent has quoted clauses 16 and 17 of the Collective Agreement[14] may be to show that indefinite suspension without inquiry and without pay is in contravention

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[12] Vide paragraphs 10-11 of the replication of the 1st respondent dated 22.10.2012 marked X4(a), and the Labour Officer's Report marked X6-A15.
[13] Vide paragraph 29 of the written submissions dated 13.09.2018.
[14] Vide X6-A24.

of the Collective Agreement. It appears that what he meant was clauses 17 and 18 (not 16 and 17).

Clauses 17 and 18 read as follows:

17. SUSPENSION AS A MEASURE OF PUNISHMENT

1. Punishment for offences in the case of an employee may include suspension, provided however that such suspension shall not exceed fourteen days without pay and shall be in writing.

2. Punishment in excess of three days suspension without pay shall only be after a domestic inquiry. Such suspension shall be in writing.

18. SUSPENSION PENDING DISCIPLINARY INQUIRIES

1. An employee may be suspended from work without pay for a period not exceeding one month pending a disciplinary inquiry when there is prima facie evidence, in the opinion of the employer, of a charge or charges of misconduct against him.

2. Suspension of an employee on the ground referred to in sub-clause (1) above for any period in excess of one month shall be on half pay.

3. The provisions contained in sub-clauses (1) and (2) above shall not apply to the suspension of an employee pending inquiries by the police, by other public authorities or audit verifications.

Application of clauses 17 and 18 of the Collective Agreement to the facts of this case is completely a misdirection as the suspension of the 1st respondent is neither "*as a measure of punishment*" nor "*pending disciplinary inquiries*" as contemplated in those two clauses.

This is not the first time a workman's services have been suspended pending the handing over the quarters. There is a practice in the plantation sector to suspend workmen from work who forcibly occupying the quarters without handing them over when they are transferred within service. This practice has been acknowledged by the superior Courts in this country. The suspension in such circumstances, is neither a punishment nor a step taken pending a disciplinary inquiry, but is an administrative mechanism effectively implemented to take back the old quarters in order to be given to the successor and to induce the workman to shift to the new quarters without delay. It is true that the initial suspension is by the employer, but whether it shall be kept alive indefinitely or set at naught instantly is entirely in the hands of the workman and not the employer. If he wants, he can shift to the new quarters and lift the suspension immediately. Otherwise, he can refuse to shift to the new quarters and keep the suspension in operation until his retirement. Hence the pivotal argument of the learned counsel for the 1st respondent that the "indefinite suspension" without an inquiry and without pay is contrary to clauses 17 and 18 of the Collective Agreement is absolutely no merit. There is no indefinite suspension. There is no follow up inquiry either. "Indefinite suspension", if at all, is something created not by the employer, but by the employee himself.

Ceylon Workers' Congress v. Janatha Estates Development Board[15] is a similar case where a workman continued in forcible occupation of a line room in defiance of the orders of the Superintendent to get back to the line room earlier occupied by him. The Superintendent thereupon suspended him from work until he vacated the line room being forcibly occupied by him. The Supreme Court held that:

> *The suspension from work did not amount to constructive termination. In the face of the clear manifestation of the workmen's intention not to vacate the line room there was no purpose in holding a domestic inquiry. The application under S.31 (B) (1) of the Industrial Disputes Act is not sustainable.*

Atukorale J. at pages 76-77 observed:

> *He (the workman) appears to have acknowledged that the allocation of line rooms in the estate is one that appertains to the internal arrangement of the estate and is a matter within the control and discretion of its management. Unless the terms of employment provide otherwise there can be no legal foundation for a workman's claim to remain in occupation of a particular line room in defiance of an order of the management made in good faith. It is worthy of note that in the instant case both line rooms were located in the same division of the estate. The right of the management to transfer a workman from one place of residence to another in the same estate and the corresponding liability of the*

[15] [1987] 2 Sri LR 73

workman to be so transferred is incidental to and an implied condition of the workman's service. In my view it is absolutely essential that the management should be possessed of such a right and should have control over the allocation of line rooms for the purposes of efficient and proper administration of the estate with a view to achieving maximum productivity. In The Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda (1970) 73 NLR 278 this court recognised the legal right of an employer to transfer his staff from one place of work to another within his service subject to certain limitations which do not arise for consideration in the instant case. If so it must necessarily follow that an employer has the right to transfer his workman from one place of residence to another within his service. No doubt it would be open to such a workman to make representations to the appropriate authorities against the transfer but he cannot, in my view, be permitted to set the employer at defiance by blatantly refusing to comply with the order as in the instant case. The failure or refusal of the workman to comply with such an order amounts to a disobedience of the lawful order of his employer and constitutes by itself misconduct on the part of the workman. There is no necessity in such circumstances for the employer to go through the formal process of holding a domestic inquiry for ascertaining whether there has been on the part of the workman a refusal to carry out the employer's order of transfer. The conduct of the workman in continuing to remain in occupation of the line room in question from 21.9.1978 clearly manifested his intention

not to obey the transfer order. His refusal was so obvious that there was no purpose in holding a domestic inquiry.

The facts in *Superintendent, Abbotsleigh Group v. Estate Services Union*[16] are on all fours with those of the instant case. In this case the workman's services were suspended when he did not comply with the order given by the Superintendent, to act in terms of the settlement entered into in a Labour Tribunal case, and vacate the quarters given to the workman in one division of the estate and occupy quarters in another division. The workman refused to occupy the quarters allocated to him in the other division, as he alleged that some of the necessary repairs were not effected, as undertaken by the employer before the Labour Tribunal.

It may be recalled that in the instant case before me there was no undertaking given to the Labour Tribunal by the employer to do necessary repairs as seen from the recorded settlement referred to above. To that extent the facts in Abbotsleigh Group case are more favourable to the employee. Nevertheless, this Court held against the employee on the following basis:

1. *That the two grounds urged by the workman to assert that his services have been constructively terminated, do not directly relate to the duties he has to perform as Plucking Kanakapullai, or to his salary and emoluments. What is disputed is, the degree of suitability of the quarters provided for occupation of the workman, and not that quarters were not provided at all. In such a*

[16] [1991] 1 Sri LR 380

situation it would not be appropriate to infer that there had been a constructive termination of services.

2. *That ordinarily what suspension of work would mean, is that the employer caused a cessation of work of the workman, temporarily, till such time a term or condition is observed or adjusted.*
3. *That interdiction cannot be considered as termination of services either directly or constructively, in the given circumstances.*

For the aforesaid reasons it is clear that the basis upon which the 3rd respondent made the award in favour of the 1st respondent is erroneous both on fact and on law.

There is a misconception that even if an administrative or judicial decision is patently erroneous, writ of certiorari does not lie, if the decision-making process was flawless, and the deciding authority has erred on facts and not on law. Accordingly, it is thought that, error on facts by the decision maker, however much it is obvious, is not a ground to quash the decision by certiorari.

Whilst conceding that the jurisdiction to issue writs vested in this Court by Article 140 of the Constitution is supervisory and not appellate, I must state that "error of law on the face of the record", which is a well-accepted ground for certiorari, can be made use of to quash erroneous administrative or judicial decisions notwithstanding the decision-making process was flawless. For example, if the deciding authority has manifestly failed to properly evaluate the evidence led before him, the

decision can be quashed on the ground of "error of law on the face of the record".

It is important to understand that an error of fact can also be an error of law.

In *All Ceylon Commercial and Industrial Workers' Union v. Nestle Lanka Limited*[17] Jayasuriya J. explained:

> *In R. v. Northumberland Compensation Appeal Tribunal—ex parte Shaw 1951 1 KB 711 (Affirmed in 1952 1 KB 338), the Divisional Court of the Kings Bench Division held that certiorari would issue to quash the decision of a statutory administration tribunal for an error of law on the face of the record, even though that tribunal was not a court of record and although that error did not go to the jurisdiction of the tribunal. This decision pronounced by Lord Denning appeased at least to a certain extent, the public demand for better justice in the welfare state and it marked the commencement of a new era of judicial review.*

In All Ceylon Commercial and Industrial Workers' Union case (supra) the petitioner sought to quash the award made by the arbitrator wherein he has held that the termination was justifiable. Quashing the award by way of certiorari on the ground of an error on the face of the record this Court held that:

> 1. *Although Arbitrator does not exercise judicial power in the strict sense, it is his duty to act judicially, though*

[17] [1999] 1 Sri LR 343 at 350

ultimately he makes an award as may appear to him to be just and equitable.

2. *There is no evidence or material which could support the findings reached by the Arbitrator, findings and decisions unsupported by evidence are capricious, unreasonable or arbitrary.*
3. *A deciding authority which has made a finding of primary fact wholly unsupported by evidence or which has drawn an inference wholly unsupported by any of the primary facts found by it will be held to have erred in point of law.*
4. *'No evidence rule' does not contemplate a total lack of evidence it is equally applicable where the evidence taken as a whole, is not reasonably capable of supporting the finding or decision.*

In *Collettes Ltd. v. Bank of Ceylon*[18], a Divisional Bench of the Supreme Court held that "*Where there is or is not evidence to support a finding, is a question of law.*" It was also held in the same case that "*Given the primary facts, the question whether the tribunal rightly exercised its discretion is a question of law.*"

It was held in *Sithamparanathan v. People's Bank*[19] that "*Failure to properly evaluate evidence or to take into account relevant considerations in such evaluation is a question of law.*"

A similar conclusion was reached in *Fonseka v. Candappa*[20] where it was decided that:

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[18] [1982] 2 Sri LR 514
[19] [1989] 1 Sri LR 124

> *It becomes a question of law where relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or the conclusions rest mainly on erroneous considerations or is not supported by sufficient evidence.*

In *Gunasekera v. De Mel, Commissioner of Labour*[21] where the order of the Commissioner of Labour was sought to be quashed by way of certiorari, the Supreme Court held that:

> *Lack of jurisdiction may arise in different ways. While engaged on a proper inquiry the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions or may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. A tribunal which has made findings of fact wholly unsupported by evidence or which it has drawn inferences wholly unsupported by any of the facts found by it will be held to have erred in point of law. The concept of error of law includes the giving of reasons that are bad in law or inconsistent, unintelligible or it would seem substantially inadequate. It includes also the application of a wrong legal test to the facts found taking irrelevant considerations into account and arriving at a conclusion without any supporting evidence. If reasons are given and these disclose that an erroneous legal approach has been followed the superior Court can set the decision aside by certiorari for error of law on the face of the record.*

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[20] [1988] 2 Sri LR 11
[21] (1978) 79(2) NLR 409 at 426

> *If the grounds or reasons stated disclose a clearly erroneous legal approach the decision will be quashed. An error of law may also be held to be apparent on the face of the record if the inferences and decisions reached by the tribunal in any given case are such as no reasonable body of persons properly instructed in the law applicable to the case could have made.*

In *Health & Co (Ceylon) Ltd v. Kariyawasam*[22] the decision of the arbitrator was quashed by way of certiorari on the basis that:

> *No reasonable man could have...reached that conclusion on the evidence placed before him. The finding here is so completely contrary to the weight of evidence that one can only describe it as perverse.*

Conclusion was similar in *Wijerama v. Paul*[23] where the decision was quashed by certiorari *inter alia* on the premise that:

> *A tribunal which draws an inference wholly unsupported by the primary facts errs in point of law.*

In *Virakesari Ltd v. Fernando*[24] is yet another case where an application for certiorari was allowed *inter alia* when it was found that:

> *The omission of the first respondent to take into consideration the evidence touching the charge of having*

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[22] (1968) 71 NLR 382 at 384
[23] (1973) 76 NLR 241 at 258
[24] (1963) 66 NLR 145 at 150-151

> *instigated a go-slow is....a misdirection amounting to an error of law on the face of the record.*

In *Mudanayake v. Sivagnanasunderam*[25] the decision was not allowed to stand as it was the opinion of the Court that:

> *Certiorari lies not only where the inferior Court has acted without or in excess of its jurisdiction but also where the inferior Court has stated on the face of the order the grounds on which it had made it and it appears that in law those grounds are not such as to warrant the decision to which it had come.*

In *Chas Hayley and Co. Ltd., v. Commercial and Industrial Workers*[26] Senanayake J. held that:

> *It is well settled that the order of an inferior tribunal having a duty to act reasonably in determining the rights 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 (a) erroneously refusing to admit admissible material evidence (b) erroneously admitting inadmissible evidence which influence the finding (c) finding of based on no evidence (d) where the tribunal had acted with manifest or clear unreasonableness or unfairness. The misconstruction of the document becomes an error on the face of the record.*

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[25] (1951) 53 NLR 25 at 31
[26] [1995] 2 Sri LR 42 at 49-50

> *I am of the view that the Arbitrator had misconstrued the document R16b when he failed to consider that the loss depicted in the Report and speculated on the fact that it was temporary without any evidence. There was no evidence for such a finding. This was unreasonable and unfair. The evidence revealed that the employees were getting a higher wage than prescribed by the Wages Board Ordinance. They were paid more than the other competitors in the Trade. The Arbitrator failed to consider the heavy financial loss and had acted unreasonably and unfairly in granting 30 percent increase in wages with a 10% increase in productivity was an error of law on the face of the record. In the circumstances, I quash the award of the 2nd Respondent by granting a writ of Certiorari.*

The term "an error of law on the face of the record" was given a broader meaning in *Gunadasa v. Attorney-General*[27] in the following manner:

> *That the failure to give the petitioner a fair opportunity to "correct or contradict" the material witnesses when they gave evidence, has occasioned a violation of the principles of natural justice; that a man's defence must always be fairly heard. The non-observance of the said principles of natural justice, would consequently amount to an error on the face of the record, which would attract the remedy of Writ of Certiorari.*

[27] [1989] 2 Sri LR 130

> *The failure to make available the documents relevant to the defence of the petitioner, at the hearing, amounted to an error on the face of the record, and the Writ of Certiorari would lie in such situations also.*

In *Health & Co. (Ceylon) Ltd., v. Kariyawasam*[28] it was held that:

> *In the assessment of evidence, an arbitrator appointed under the Industrial Disputes Act must act judicially. Where his finding is completely contrary to the weight of evidence, his award is liable to be quashed by way of certiorari.*
>
> *In a labour dispute, the misconduct of a workman must not be condoned in the name of industrial peace, if such condonation can only lead to industrial chaos.*

For the aforesaid reasons, I quash the award (P10) made by the 3rd respondent arbitrator by way of certiorari on the ground of "error of law on the face of the record" and allow the application of the petitioner with costs.

Judge of the Court of Appeal

[28] (1968) 71 NLR 382