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

Anura Abeysinghe alias
Abayasinghe,
Mahagedarawatta,
Pathiragoda, Thalagaha,
Akmeemana.
Petitioner-Petitioner

CA CASE NO: CA (PHC) APN 104/2016
HC GALLE CASE NO: 19/2015/WRIT

Vs.

Galle Co-operative Hospital Limited,
No.65, H.W. Amarasuriya Mawatha,
Galle.
And 17 Others
Respondents-Respondents

Before: K.K. Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Chandana Wijesooriya for the Petitioner.
Pulasthi Hewawamanna for all the Respondents except 13th and 14th.
Maithree Amarasinghe, S.C., for the 13th and 14th Respondents.

Argued on: 06.03.2019

Decided on: 20.06.2019

Mahinda Samayawardhena, J.

The petitioner filed this revision application from the order of the learned High Court Judge of Galle dated 20.05.2016 whereby the application of the petitioner for writ of certiorari to quash the arbitration award and the appeal decision made thereon was dismissed *in limine* even without issuing notice on the respondents. This the learned High Court Judge has done on two grounds.

1. In the exercise of writ jurisdiction the Court cannot look into the merits of the application.
2. The petitioner has not acted with *uberrima fides*.

I am unable to agree with both grounds.

Let me first take the first ground.

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.

I must straightaway 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*[1] 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 that there was "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 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*

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

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.*

Referring to *Northumberland Compensation Appeal Tribunal—ex parte Shaw case (supra),* in *Hayleys Ltd. v. Crossette-Thambiah*[2], it was stated that:

> *In the Northumberland case (1951) 1 K.B. 721, affirmed in (1952) 1 K. B. 338 C.A., the King's Bench Division held, for the first time, that the Writ of Certiorari would issue to quash the decision of a statutory administrative tribunal, for error of law on the face of the record, although such a tribunal was not a court of record and although the error did not go to the jurisdiction of the tribunal. This decision may be regarded as a landmark in the development of administrative law, and it has already led to a modest extension of the scope of judicial review both in England and in other common law jurisdictions. (See Judicial Review of Administrative Action by S. A. de Smith (Stevens) p. 295.)*

Accordingly, in Hayleys Ltd. case (supra) it was held:

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[2] (1961) 63 NLR 248 at 257

> *Certiorari may be granted not only when an inferior tribunal has acted without or in excess of its jurisdiction, but also in the case of a "speaking order", when an error of law appears on the face of the record or when the tribunal bases its decision on extraneous considerations which it ought not to have taken into account.*

In *Collettes Ltd. v. Bank of Ceylon*[3], 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*[4] 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*[5] where it was decided that:

> *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*[6] where the order of the Commissioner of Labour was sought to be quashed by way of certiorari, the Supreme Court held that:

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[3] [1982] 2 Sri LR 514
[4] [1989] 1 Sri LR 124
[5] [1988] 2 Sri LR 11
[6] (1978) 79(2) NLR 409 at 426

> *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. 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*[7] 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*

[7] (1968) 71 NLR 382 at 384

> *completely contrary to the weight of evidence that one can only describe it as perverse.*

Conclusion was similar in *Wijerama v. Paul*[8] 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*[9] 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 instigated a go-slow is....a misdirection amounting to an error of law on the face of the record.*

In *Mudanayake v. Sivagnanasunderam*[10] 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*[11] Senanayake J. held that:

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[8] (1973) 76 NLR 241 at 258
[9] (1963) 66 NLR 145 at 150-151
[10] (1951) 53 NLR 25 at 31
[11] [1995] 2 Sri LR 42 at 49-50

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.

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*[12] in the following manner:

[12] [1989] 2 Sri LR 130

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.

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.

It is on the aforesaid basis I state that the view taken by the learned High Court Judge that in the exercise of writ jurisdiction the Court cannot look into the merits of the application is untenable.

It is not the task of this Court to consider whether the arbitration award and its appeal decision are correct. The task of this Court, at this juncture, is to consider the correctness of the impugned order of the High Court.

Let me now consider the second ground on which the petitioner's application was dismissed *in limine*. That is on the premise that the petitioner failed to act with *uberrima fides*. This the learned High Court Judge says on the basis that, it appears to him, the petitioner has agreed to the decision taken after the inquiry regarding shortage of goods. (හාණ්ඩ අඩු වීම සම්බන්ධයෙන් වගඋත්තරකරුවන් විසින් පරීක්ෂණ පවත්වා තීරණයට එළඹ ඇති බව පෙනී යන අතර, ඒ ගත් තීරණයට පෙත්සම්කරු විසින් එකඟ වී ඇති බවද පෙනී යයි. එහෙත් පෙත්සම්කරු එකී කරුණු අධිකරණයට සැල කිරීම වසන් කොට උපරිම විශ්වාසය කඩ කර ඇත.

එලෙස අසද්භාවයෙන් අපිරිසිදු දැතින් යුතුව අධිකරණය ඉදිරියට පැමිණෙන අයෙකුට අධිකරණය සතු අභිමතානුසාරී සහනයන් ලබා ගැනීම මුල් අවස්ථාවේදීම ප්‍රතික්ෂේප කළයුතු බව අපගේ නීතියේ මූලධර්මයකි.) The High Court Judge is not certain of what he says. He says, it appears to him that the petitioner has accepted the decision. He does not say where and when the petitioner has accepted the decision. If the petitioner has accepted the decision taken after the inquiry, there is no case for the petitioner, and if it so, in my view, it is obligatory on the part of the learned High Court Judge to have exactly pointed it out in the order the place where he has accepted the decision, for the benefit of the petitioner and the Appellate Court. It is regrettable that the learned High Court Judge failed to do that, which goes to the root of that finding.

The learned counsel for the respondent reading the mind of the learned High Court Judge submits that in 11R3(a) there is a minute to that effect (i.e. the petitioner accepted the decision), and quotes that portion as "එම ඉතිරි අඩුව පිළිගන්නා බව කමිටුව ඉදිරියේ ප්‍රකාශ කරන ලදී." 11R3(a) is dated 12.11.2009 and the arbitration decision marked P6 is dated 26.01.2013. I cannot understand how the petitioner agreed the P6 decision dated 26.01.2013 by 11R3(a) dated 12.11.2009.

If the respondent says that the petitioner admitted the liability for shortage of goods during the course of inquiry, there would not have been any reason to proceed with the inquiry any further. The decision could have been given instantly.

Most importantly, if the petitioner admitted the liability during the course of inquiry, it would have definitely been stated in the arbitration decision P6. It may be surprising for the learned

counsel for the respondents that there is not a word about such admission in P6.

Furthermore, although the learned High Court Judge speaks of suppression, the petitioner has tendered that document 11R3(a) as P4 with the petition.

There is no suppression of material facts, and there is no failure to act with *uberrima fides* by the petitioner.

The counsel for the respondent says that no exceptional circumstances have been shown to exist for this Court to entertain this revision application and no reason has been adduced why the petitioner could not exercise his right of appeal against the order of the High Court.

According to paragraph 23 of the petition, the petitioner has also filed an appeal against the impugned order of the High Court. It is not clear what happened to the appeal.

In any event, if the order is palpably wrong, in my view, that itself is an exceptional circumstance to set aside the order by exercising the extraordinary jurisdiction of this Court by way of revision.

In *Sinnathangam v. Meeramohideen*[13] T.S. Fernando J. held that:

> *The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security.*

[13] (1958) 60 NLR 394

In *Marian Beebee v. Seyed Mohamed*[14] Sansoni C.J. stated:

> *The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice.*

In *Rasheed Ali v. Mohamed Ali*[15] the Supreme Court—Weeraratne J., Sharvananda J. (later C.J.) and Wanasundara J.—held that:

> *The powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies.*

In *Saheeda Umma v. Haniffa*[16] the application for *restitutio in integrum* filed by the plaintiff-petitioner could not be successful as it was prescribed. Nevertheless, as there was a serious injustice caused to the petitioner, Asoka de Silva J. (later C.J.) with Weerasuriya J. agreeing *ex mero motu* granted the relief invoking the revisionary jurisdiction of the Court:

> *Powers of Revision of this Court are wide enough to embrace a case of this nature. Even though the plaintiff-petitioners have not invoked the revisionary jurisdiction we propose to exercise the Revisionary powers in favour of the 2nd plaintiff-petitioner.*

Where a miscarriage of justice has occurred, as in this case, the Court of Appeal can, under Article 138 of the Constitution, exercise revisionary powers of the Court to undo the injustice.

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[14] (1965) 69 CLW 34
[15] [1981] 1 Sri LR 262
[16] [1999] 1 Sri LR 150

The order of the learned High Court Judge dated 20.05.2016, in my view, is *ex facie* erroneous. I set aside that order and direct the incumbent High Court Judge to formally issue notice on the respondents and take further steps in accordance with law.

Application allowed. No costs.

Judge of the Court of Appeal

K.K. Wickremasinghe, J.
I agree.

Judge of the Court of Appeal