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

Ceylon Electricity Board,
No.50,
Sir Chittampalam A. Gardiner
Mawatha,
P.O. Box 540,
Colombo 2.
Petitioner

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CA CASE NO: CA/WRIT/34/2016

Vs.

1. Hon. John Seneviratne,
   Minister of Labour and Trade
   Union Relations,
   Ministry of Labour and Trade
   Union Relations,
   Labour Secretariat,
   Colombo 5.
2. Hon. Gamini Lokuge,
   Former Minister of Labour and
   Labour Relations,
   No. 157/10A,
   Mawiththara Road,
   Piliyandala.

3. M.D.C. Amarathunga,
Commissioner General of Labour,
Labour Secretariat,
Colombo 5.
4. Palitha Weerasekera,
No. 33/2,
Nimala Mariya Mawatha,
Handala,
Wattala.
5. R.D. Dhanapala,
No. 44,
Jayathillaka Mawatha,
Hali Ela.

Respondents

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Before: Mahinda Samayawardhena, J.

Counsel: Ranga Dayananda for the Petitioner.
Vikum De Abrew, S.D.S.G., for the 1st-3rd Respondents.

Decided on: 18.12.2019

Mahinda Samayawardhena, J.

The petitioner filed this application seeking to quash by way of writ of certiorari the award of the arbitrator marked P2.

There was a grievance on the part of the 5th respondent, a former employee of the petitioner, that he had not been given the due promotion from Store Keeper Grade II to Store Keeper Grade I in spite of his passing the competitive examination held on 14.07.2002.

On the recommendation of the Commissioner General of Labour, the Minister of Labour, acting in terms of section 4(1) of the Industrial Disputes Act, No. 43 of 1950, as amended, referred the dispute to the 4th respondent arbitrator for arbitration.

The arbitrator held an inquiry into the matter where both parties were fully heard. It is after the said inquiry that the impugned award was made by the arbitrator. By that award the petitioner was directed to promote the 5th respondent to Class I and place him on the relevant salary scale and pay the arrears of salary until his date of retirement and arrears of pension thereafter.

There is no complaint that the petitioner was not given a fair hearing, or the arbitrator was biased, or there was a procedural irregularity in conducing the inquiry or the like. The sole ground upon which the petitioner challenges the said award is that the arbitrator did not properly evaluate the evidence—both oral and documentary—led before him, thereby arriving at conclusions not supported by evidence. It is on this basis the petitioner states that the award is irrational and/or arbitrary and/or illegal and/or *ultra vires* and/or null and void. The petitioner also states that there is an error on the face of the record.[1]

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[1] It is interesting to note that the petitioner has cited almost all the grounds in general. Vide paragraphs 13-15 of the petition.

The 1st and 3rd respondents filed objections to this application.

At the argument before this Court, on behalf of the petitioner, brief oral submissions were made followed by written submissions. However, no submissions—oral or written—have been made on behalf of the respondents.

It is the contention of the petitioner (in the written submissions) that although the 5th respondent was successful at the competitive examination, he could not be promoted to Grade I, as he did not fulfil the criteria set out in circulars marked R1, R16 and R17.[2]

In the first place, I must state that only R1 is a circular; the other two are not.[3]

It is not the complaint of the petitioner that the arbitrator ignored the alleged circulars. The said circulars were placed before the arbitrator at the inquiry and the 5th respondent was cross examined on them at length. By reading the impugned award it is clear that the arbitrator considered them in reaching his decision.

Whilst the petitioner was serving as a Store Keeper Grade II, the 5th respondent was arrested and then indicted in the High Court for accepting a bribe. Then, the 5th respondent's services were suspended. However, he was later acquitted by the High Court and reinstated with back wages.[4] By the time he was suspended, he had passed the competitive examination for

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[2] Vide paragraph 2.3 and 2.4 of the written submissions.
[3] Vide page 417 for R1, page 434 for R16 and page 436 for R17.
[4] Vide page 401 of P1.

promotion. It appears there is a training successful officers undergo before they are given the promotion. The eleven Grade II officers who passed the examination together with the 5th respondent had been given the training during the 5th respondent's period of suspension and their promotions have been given. It appears that the training was for only one week. After reinstatement upon acquittal from the High Court case, the 5th respondent worked in the CEB (the petitioner) for more than one year and two months before retirement.

During this period, the 5th respondent made several requests to the petitioner to grant him the promotion. He complained to the Commissioner General of Labour, the Human Rights Commission etc. about this matter.

At that stage, the petitioner's only defence was that the 5th respondent could not be given the promotion because he had not undergone the training[5], which is, according to the petitioner, a *sine qua non* for the promotion to be granted. Both the Commissioner of Labour[6] and the Human Rights Commission[7] directed/recommended the promotion be granted, as it is the responsibility of the employer to give the required training to the 5th respondent.

It seems that the petitioner took up the new position, i.e. the 5th respondent has not satisfied the other requirements stated in R1, R16 and R17, for the first time before the arbitrator.

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[5] Vide page 394 of P1.
[6] Vide page 391-393 of P1.
[7] Vide pages 395-397 of P1.

The petitioner says that according to the internal circular R1, the 5th respondent should have earned all the increments during the preceding three years to be eligible for the promotion, but the 5th respondent did not get the increment for one year due to his admission of guilt involving a false medical claim.

R16 and R17 are not circulars: they are guidelines to be used in granting promotions.

According to R16, to be eligible for promotion the officer should not have been punished in the preceding three years.

It appears there has not been a consistent policy in granting promotions, and the petitioner has not been very serious in issuing guidelines. For instance, there is a vast difference between denial of an increment as a punishment in the preceding three years, and any punishment in the preceding three years.

In regard to the matter of making a false medical claim, as the arbitrator in the award has stated, there is no document which says the 5th respondent pleaded guilty to the charge. The petitioner in the written submission points to R3 in that regard.[8] This document shows that the disciplinary inquiry regarding the false medical claim was suspended because the 5th respondent expressed his willingness to pay back the money he obtained by tendering false receipts.

The arbitrator has taken the view that it is not proper to punish an officer without holding a disciplinary inquiry and also not

[8] Vide page 417 in P1.

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proper to take into account a punishment given in such circumstances when granting a promotion. The arbitrator, as I will explain below, is entitled to take such a view. It is not illegal.

The said punishment (denial of an increment and deprivation of health insurance benefits for 5 years) was given before the 5th respondent had been granted permission to sit for the competitive examination. The arbitrator in the award has taken the view that, if that punishment is a positive bar to the promotion, the petitioner should not have recommended the 5th respondent to sit for the examination.

Another allegation brought against the 5th respondent before the arbitrator was shortages and excesses in stocks in the stores. This stock taking was done in the absence of the 5th respondent when he had been under interdiction. According to the petitioner, this shows the failure on the part of the 5th respondent to properly maintain an inventory.[9] As the arbitrator has stated in the award, if the 5th respondent committed a serious offence, a disciplinary inquiry should have been held on that matter upon a charge sheet. No such inquiry was held. Some money had been deducted from the 5th respondent's salary in this regard and was later returned withholding a small amount. The petitioner states this was done on humanitarian grounds.

In reference to R17, the petitioner states that to be promoted in the service of store keeper, a person shall pass an interview.[10]

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[9] Vide paragraph 2.20 of the written submission.
[10] Vide paragraph 2.25 of the written submission.

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The 5th respondent did not have any control over this. It is the responsibility of the employer to call for interviews.

The petitioner, both in the petition and in the written submission, has stated that unless the award marked P2 is quashed, "irreparable loss and damage would be caused to the petitioner." There is no meaning to that claim. Rejection of the application will not cause irreparable loss and damage to the petitioner.

Having considered all matters, the arbitrator has decided to grant reliefs to the 5th respondent.

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

> *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.*

In *Asian Hotels and Properties PLC v. Benjamin [2013] 1 Sri LR 407 at 419*, Bandaranayake C.J. whilst referring to section 17(1) of the Industrial Disputes Act stated:

> *An Arbitrator, who has been empowered to make such award should do so, as may appear to him just and equitable. Section 17 of the Industrial Disputes Act, referred*

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to earlier, clearly had granted an unfettered discretion for the Arbitrator to mete out just and equitable relief.

In *Brown & Company PLC v. Minister of Labour [2011] 1 Sri LR 305 at 316-317*, Marsoof J. held:

> *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". 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*

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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.

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Kalamazoo Industries Ltd v. Minister of Labour and Vocational Training [1998] 1 Sri LR 235 at 249, F.N.D. Jayasuriya J. observed:

Relief by way of certiorari in relation to an award made by an arbitrator will be forthcoming to quash such an award only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently irrational or unreasonable or is guilty of an illegality. The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order and if the arbitrator's award was not set aside in whole or in part, it

> *had to be allowed to stand unreversed. It is pertinent to refer to the principles laid down by Prof. H.W.R. Wade on "Administrative Law" 12th edition at pages 34 to 35 wherein the learned author states: "Judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of the decision under appeal. But in judicial review, the court is concerned with its legality. On appeal, the question is right or wrong. On review, the question is lawful or unlawful.....judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, a court, on review, is concerned only with whether the act or order under attack should be allowed to stand or not". In the circumstances the objective of this court upon judicial review in this application is to strictly consider whether the whole or part of the award of the arbitrator is lawful or unlawful. This court ought not to exercise its appellate powers and jurisdiction when engaged in the exercise of supervisory jurisdiction and judicial review of an award of an arbitrator.*

The arbitrator is not bound to follow the alleged circulars to the extreme letter. He shall direct his attention to them, but he is free to not follow them, by giving reasons, when making a just and equitable order.

The award of the arbitrator is not perverse. It is, in my view, coherent. It may well be that the facts of this case can be interpreted in the manner suggested by the petitioner as well.

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That shall not be the yardstick to overturn or quash the decision of the arbitrator by certiorari. What the law requires the arbitrator to do is to make a just and equitable order at the end of the day. This the arbitrator has done in this case.

I dismiss the application of the petitioner without costs.

Judge of the Court of Appeal

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