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

In the matter of an application for mandates in the nature of a Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 350/2018

Sri Lankan Catering Limited,
No. 07, Airline Centre,
Bandaranaike International Airport,
Katunayake.

PETITIONER

Vs.

1) T.D. Sunil Dayaratne,
No. 52/121, Keenagahalanda Watta,
Kalagedihena.

2) K.D.K.Jagath Kamalpem. (deceased)

2A. K.M.S. Hasanthi Perera,
No. 8/1B, Nayaka Road,
Katunayake

3) W.N.P.Fernando,
No. 36, Sri Sumangala Road,
Kalutara South.

4) W.A.A. Donald Raaj Kumar,
Temple Road,
Mahena, Warakapola.

5) Commissioner General of Labour.

6) S. Kariyawasam,
No. 28, Abeyratne Mawatha,
Boralesgamuwa.

7) Minister of Labour and Trade Union Relations.

8) The Registrar,
Industrial Court.

5th, 7th and 8th Respondents at
Labour Secretariat, Colombo 5.

RESPONDENTS

Before: **Arjuna Obeyesekere, J / President of the Court of Appeal**

Counsel: Ms. Manoli Jinadasa for the Petitioner

Viraj Vithanage for the 1st, 2A, 3rd and 4th Respondents

Manohara Jayasinghe, Senior State Counsel for the 5th and 7th Respondents

Argued on: 20th October 2020

Written Submissions: Tendered on behalf of the Petitioner on 5th October 2020 and 15th December 2020

Decided on: 7th June 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner, Sri Lankan Catering Limited has filed this application seeking *inter alia* the following relief:

(a) A Writ of Certiorari to quash the arbitral award dated 17th August 2018 marked '**X10**' delivered by the 6th Respondent under and in terms of the Industrial Disputes Act, as amended (**the Act**);

(b) A Writ of Certiorari to quash the publication of the said award in Extraordinary Gazette No. 2090/43 dated 28th September 2018 marked '**X10a**'.

In terms of the said award, the Petitioner was required to pay the 1st – 4th Respondents a sum of Rs. 1,016,199, Rs. 1,419,836, Rs. 844,410 and Rs. 847,183 respectively, being the bonus, salary increment and the extra gratuity that the

Arbitrator had decided that the 1st – 4th Respondents are entitled to in terms of a Collective Agreement that the Petitioner had entered into with Sri Lanka Nidahas Sevaka Sangamaya on 28th November 2014.

The facts of this matter very briefly are as follows.

The Petitioner admits that it entered into a Collective Agreement on 28th September 2010 marked '**X7(R4)**' (**the 2010 Collective Agreement**) with the Sri Lanka Nidahas Sevaka Sangamaya, a registered Trade Union for the period 1st April 2010 to 31st March 2013.

In terms of Section 5(1) of the Act, a *" 'collective agreement' means an agreement –*

(a) which is between –

(i) any employer or employers, and

(ii) any workmen or any trade union or trade unions consisting of workmen, and

(b) which relates to the terms and conditions of employment of any workman, or to the privileges, rights or duties of any employer or employers or any workmen or any trade union or trade unions consisting of workmen, or to the manner of settlement of any industrial dispute."

Section 5(2) goes onto state that:

"Reference shall be made in the collective agreement to the parties and trade unions to which, and the employers and workmen to whom, the agreement relates."

According to Clause 4.2 of the '2010 Collective Agreement', the Sri Lanka Nidahas Sevaka Sangamaya represented at least 51% of the Graded Staff employed on a permanent capacity in Grades 1-7 at the Petitioner company. It is admitted that the '2010 Collective Agreement' had expired on 31st March 2013 and that the parties did not enter into a fresh Collective Agreement soon thereafter.

The Petitioner states that pursuant to negotiations with the Sri Lanka Nidahas Sevaka Sangamaya, the Petitioner entered into a fresh Collective Agreement on 28th November 2014 marked '**X7(R5)**', with the effective date of the new Agreement being back dated to 1st April 2013. The new Agreement (**the Collective Agreement**) was valid for a period of three years from 1st April 2013 to 31st March 2016.

The 1st – 4th Respondents, having joined the Petitioner between 1982 – 1991, had retired from service on the following dates:

Respondent	Date of retirement
1st Respondent	27th August 2014
2nd Respondent	26th August 2014
3rd Respondent	04th March 2014
4th Respondent	23rd September 2014

It is therefore admitted that by the time the new Collective Agreement was entered into, all four Petitioners had retired from service, on the aforementioned dates.

In terms of Clause 3.2 of the Collective Agreement, all paid up members of the said Sri Lanka Nidahas Sevaka Sangamaya who are employees of the Petitioner in a permanent capacity in Grades 1-7 of the Graded Staff structure were covered by the said Collective Agreement. In addition, in terms of Clause 3.4 thereof, the said Collective Agreement was extended to '*Other individual employees who are employed on a permanent capacity in Grades 1-7 of the Graded Staff structure who are not members of the SLNSS but who nevertheless wish to accept the terms and conditions of this Agreement by signing on an individual basis.*' It is admitted that the Petitioner complied with Clause 3.4 and that even the President and the Secretary of the Jathika Sevaka Sangamaya, the trade union to which the 1st – 4th Respondents belonged had accepted the terms and conditions of the Collective Agreement – vide declarations marked '**X7-R6a**' and '**X7-R6b**' signed a few days after the Collective Agreement had been signed.

The learned Counsel for the Petitioner also submitted that the said Collective Agreement has been published in the Gazette by the Commissioner General of

Labour in terms of Section 6 of the Act. She submitted that as provided for in the proviso to Section 6, the Commissioner shall not cause such agreement to be so published unless he is satisfied that those terms and conditions are not less favourable than those applicable to any other workmen in the same or a similar industry in such district.

It is admitted that those employees of the Petitioner who were members of the Sri Lanka Nidahas Sevaka Sangamaya and those who had agreed to the terms of the said Collective Agreement were eligible to the following benefits:

a) Clause 10.1 – Guaranteed salary increments from 2013 – 2016;

b) Clause 11 – Payment of bonus

c) Clause 12 – Payment of allowances

d) Clause 19 – Payment of overtime.

As the 1st – 4th Respondents had retired from service by the time the said Collective Agreement was executed, the question of them agreeing to the terms and conditions of the said Collective Agreement did not arise. Thus, on the face of it, the said Collective Agreement did not apply to the 1st – 4th Respondents. However, the 1st – 4th Respondents claimed that they are eligible to the payment of the above benefits provided for in the said Collective Agreement and to have their gratuity re-calculated on the revised salary that they should have received, on the basis that they were employees of the Petitioner during the operative period of the said Collective Agreement – i.e. the period starting from 1st April 2013 until the date that each of them retired from service of the Petitioner.

This claim of the 1st – 4th Respondents had been rejected by the Petitioner. The 1st – 4th Respondents had thereafter lodged a complaint with the Department of Labour in this regard. In the absence of a resolution of the said dispute, the Minister of Labour, acting in terms of Section 4(1) of the Industrial Disputes Act and by an Order dated 2nd September 2016, referred the following dispute for resolution by arbitration:

"Whether the claim made by Mr. T.D. Sunil Dayaratne, Mr. K.D.K.Jagath Kamalpem, W.N.P.Fernando and Mr. W.A.A. Donald Raaj Kumar who worked at Sri Lanka Catering Limited to be given bonus, increases in salary and arrears of gratuity for the period 1st April 2014 to the retirement date of each employee, following the backdating of the Collective Agreement signed on 28th November 2014 to 1st April 2013 is just, and if so, to what reliefs each of them is entitled."

The inquiry before the 6th Respondent arbitrator had been held over several days, with each of the Respondents and an employee of the Petitioner giving evidence. By his award marked '**X10**' the 6th Respondent had directed the Petitioner to pay the 1st – 4th Respondents the aforementioned sums of money. Aggrieved by the said award, the Petitioner filed this application seeking a Writ of Certiorari to quash the said award and the award that had been published in the Gazette.

Before I proceed to consider the arguments presented to this Court by the learned Counsel for the Petitioner, it would be useful to lay down the role of the arbitrator, as provided for in Section 17(1) of the Act in the following manner:

"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****."*

In **Brown & Company v. Minister of Labour**[1], the Supreme Court, having analysed the duty conferred on an arbitrator to make an award which is "just and equitable" held as follows:

"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

[1](2011) 1 Sri LR 305; Marsoof, J.

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 into 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."

In **Municipal Council Colombo vs Munasinghe**[2] it was held by Chief Justice H.N.G.Fernando as follows:

"I hold that when the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is 'just and equitable', the Legislature did not intend to confer on an Arbitrator the freedom of a wild horse. An award must be 'just and equitable' as between the parties to a dispute; and the fact that one party might have encountered 'hard times' because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other party to make undue concessions. In

[2] 71 NLR 223 at page 225. Referred to with approval in Standard Chartered Grindlays Bank Limited vs The Minister of Labour [SC Appeal No. 22/2003; SC Minutes of 4th April 2008].

addition, it is time that this Court should correct what seems to be a prevalent misconception. The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily an award which favours an employee. An Arbitrator holds no licence from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin."

In **Ceylon Tea Plantations Company Limited vs Ceylon Estate Staff Union**, Rajaratnam, J held that:[3]

"*A just and equitable order must be fair by all parties. It never means the safe guarding of the interest of the workman alone*."

I shall now proceed to consider the arguments of the learned Counsel for the Petitioner in order to decide whether the award made by the Arbitrator is supported by the evidence that was available to him and whether the award is just and equitable by both parties.

The learned Counsel for the Petitioner submitted that the 1st – 4th Respondents are not eligible to receive any benefits under the said Collective Agreement, as they were not employees of the Petitioner on the date that the said Agreement was executed and therefore was not in a position to accept the terms thereof, as provided by Clause 3.4. As noted earlier, the position of the 1st – 4th Respondents was that irrespective of the date of execution of the Collective Agreement, they were employed at the Petitioner for periods extending from 11 – 18 months during the validity period of the said Collective Agreement, and therefore they are eligible to receive the benefits conferred by it.

The learned Counsel for the Petitioner thereafter drew my attention to the following clauses of the Collective Agreement, which are re-produced below.

Clause 6.4 – '*This agreement shall specifically exclude all those who have ceased to be employees of the company prior to the date of signing this Agreement.*'

---

[3] SC Appeal 211/72; SC Minutes of 15th May 1974.

Clause 9.3 - *'The above salary scales, applicable allowances and other enhanced benefits given in this Agreement will be applicable to those staff who are in employment at the date of signing the Agreement.'*

Clause 9.4 (Eligibility) – *'All permanent employees (confirmed as well as probationers) actively in service as at 1st April 2013 and who are still actively in service on the date of signing of the agreement are eligible to enjoy the benefits of the CBA.'*

Clause 10.2 – *'The actual individual monthly basic salaries after the performance based increment in April each year for all employees who are covered by this Agreement and in active service at the time of execution of this Agreement will be increased as per the schedule below effective 1st Aril 2013 ....'*

Clause 10.3 - *'The above salary scales and grades will only be applicable to employees covered by the Agreement and in employment as at the date of signing of the Agreement....'*

To my mind, the above provisions make it extremely clear that the 1st – 4th Respondents, who admittedly were not in active service on the date of execution of the Collective Agreement are not eligible to receive any benefits thereunder, even though the 1st – 4th Respondents may have served a period covered by the said Collective Agreement.

The above provisions are consistent with the provisions of Section 8 of the Act, which reads as follows:

(1) *"Every collective agreement which is for the time being in force shall, for the purposes of this Act, be binding on the parties, trade unions, employers and workmen* ***referred to in that agreement*** *in accordance with the provisions of section 5(2); and the terms of the agreement shall be implied terms in the contract of employment between the employers and workmen bound by the agreement.*

(2) *Where there are any workmen in any industry who are bound by a collective agreement, the employer in that industry shall,* ***unless there is a***

> ***provision to the contrary in that agreement**, observe in respect of all other workmen in that industry terms and conditions of employment which are not less favourable than the terms and conditions set out in that agreement."*

I shall now consider the reasoning of the Arbitrator that prompted him to grant relief notwithstanding the above clauses.

The first ground relied upon by the Arbitrator is the following definition of *workman* in the Act:

> *" 'workman' means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and* ***includes any person whose services have been terminated**."*

It is not only correct but also logical that the definition of a workman extends to a *person whose services have been terminated*. If not, an employee whose services have been terminated cannot invoke any of the provisions of the Act to seek relief for unlawful termination. The definition must however be applied to a particular context. In this application, the context is, who are the workmen to whom the Collective Agreement would apply. To answer this question, one needs to examine the provisions of the Agreement. Once that is done, it would become clear that the Agreement does not apply to those who were not in employment on the date the Collective Agreement was executed. In such circumstances, I am of the view that the fact that the definition of a workman extends to a *person whose services have been terminated* does not assist the 1st – 4th Respondents. The Arbitrator has therefore clearly erred when he extended the applicability of the Collective Agreement to the 1st – 4th Respondents.

The next ground relied upon by the Arbitrator to hold that the Collective Agreement applied to the 1st – 4th Respondent is his finding that the Petitioner deliberately

delayed the execution of the said Collective Agreement in order to victimise the 1st – 4th Respondents who belonged to a union affiliated to a rival political party. This finding is erroneous for the following three reasons:

a) The 2nd Respondent has admitted in cross examination that the delay was due to the inefficiency of the Unions;[4]

b) The Petitioner has presented evidence that a total of ten employees had retired during the period commencing 1st April 2013 and ending on 28th November 2014, as well as that 104 employees had ceased employment during that period due to a variety of reasons;[5]

c) The Petitioner had permitted members of the Trade Union to which the 1st – 4th Respondents belonged, to agree to the terms and conditions of the said Collective Agreement.[6]

It is therefore clear that the justification that the Arbitrator has sought to give to his conclusions is not supported by the evidence that was before him.

Whether a Court can intervene when there is 'no evidence' to support the finding of the administrative body has been discussed in **Administrative Law** by Wade and Forsyth[7] in the following manner:

> "*No evidence" does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires. It also has some affinity with the substantial evidence rule of American law, which requires that findings be supported by substantial evidence on the record as a whole*."

---

[4] Vide page 5 of the proceedings of 23rd February 2017. (**එවකට වෘත්තිය සමිතියේ සිටිය දුර්වලතා සහ අකාර්යක්ෂමතාවයන් නිසා ගිවිසුම් ගත වීමට ප්‍රමාද වුනා ආයතනයත් සමග**)
[5] Documents marked 'X7-R12' and 'X7-R13'.
[6] Documents marked 'X7-R6a' and 'X7-R6b'.
[7] 11th Edition; page 227.

In **Heath and Company (Ceylon) Limited vs Kariyawasam**,[8] the Supreme Court 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, such a finding can only be described as being perverse and his award is liable to be quashed by way of Certiorari.

This position has been confirmed in several other decisions of this Court as well as the Supreme Court. In **All Ceylon Commercial and Industrial Workers Union vs Nestle Lanka Limited**[9] this Court held as follows:

> "*The arbitrator to whom a reference has been made in terms of section 4 (1) of the Industrial Disputes Act as amended is expected to act judicially. He is required in arriving at his determinations to decide legal questions affecting the rights of the subject and hence he is under a duty to act judicially. Although such arbitrator does not exercise judicial power in the strict sense, it is his duty to act judicially.*
>
> *It has been stressed that such an arbitrator's function is judicial in the sense that he has to hear parties, decide facts, apply rules with judicial impartiality and his decision is objective as that of any court of law, though ultimately he makes such award as may appear to him to be just and equitable. Vide the decision in Nadaraja Limited and 3 others. v. Krishnadasan and 3 others*[10]*.*
>
> *Thus, there is no evidence or material which has been adduced which could support the aforesaid inference and findings reached by the fourth respondent. Findings and decisions unsupported by evidence are capricious, unreasonable or arbitrary.*"

The Supreme Court, in **Singer Industries (Ceylon) Limited vs The Ceylon Mercantile Industrial and General Workers Union and others**[11] agreeing with the observations in Municipal Council Colombo vs Munasinghe[12] held as follows:

---

[8] 71 NLR 382
[9] (1999) 1 Sri LR 343 at page 348.
[10] 78 NLR 255.
[11] SC Appeal No. 78/08; SC Minutes of 7th October 2010.

"*It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives both of employer as well as the employee should be considered in a balanced manner and undoubtedly just and equity must apply to both these parties*."

The Arbitrator has lost sight of the provisions of the Collective Agreement which demonstrates a clear intention on the part of the parties to the Collective Agreement to apply the said Agreement only to those in active service on the date that the Agreement was executed. While the 1st – 4th Respondents as well as one hundred other employees of the Petitioner have lost monetarily as a result of the delay in concluding the Collective Agreement, the Arbitrator must not allow that to colour the judicial and objective approach that he is required to adopt. The Arbitrator appears to have forgotten that he must consider the matter from the perspective of the employer as well as the employee in a balanced manner and that just and equity must apply to both these parties.

Taking into consideration all of the above circumstances, I am of the view that the Arbitrator has exceeded his mandate and arrived at a finding which cannot be supported by the evidence placed before him. I therefore issue a Writ of Certiorari quashing the Award marked '**X10**' and the publication of the Award marked '**X10**'. I make no order with regard to costs.

President of the Court of Appeal

[12] Supra.