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

In the matter of an Application in terms of Article 140 of the Constitution for mandates in the nature of Writs of Certiorari and Mandamus.

C.A. (Writ) Application No. 139/2012

Arbitration Case No. A/2832

N.L.D. Ariyaratne,

No. 21/3, 2nd Lane,

Galpotte Road,

Nawala.

Petitioner

-Vs-

1. P.B.P.K. Weerasinghe,

   The Commissioner of Labour,

   Labour Secretariat,

   P.O. Box 575,

   Kirula Road, Narahenpita,

   Colombo 05.

2. D.A. Wijewardena,

   Arbitrator,

   Labour Secretariat,

   P.O. Box 575,

   Kirula Road, Narahenpita,

   Colombo 5.

3. Kahawatte Plantations Ltd.,

   No. 52,

   Maligawatte Road,

   Colombo 10.

   Respondents

BEFORE : **Vijith K. Malalgoda P.C. (P/CJ)**

A.H.M.D. Nawaz, J.

COUNSEL : V.K. Choksy for the Petitioner

Chaya Sri Nammuni, S.C. for the 1st Respondent

Dhanushka Dissanayake for the 3rd Respondent

Written Submissions	:	By the Petitioner on 21.08.2014 By the 3rd Respondent on 17.10.2014 and on 14.07.2014 By the AG on behalf of the 1st Respondent on 4.11.2014
Decided on	:	10.09.2015

A.H.M.D. NAWAZ, J.

ORDER ON THE PRELIMINARY OBJECTIONS ON THE MAINTAINABILITY OF JUDICIAL REVIEW

The petitioner in this case has invoked the supervisory jurisdiction of this Court under Article 140 of the Constitution seeking the discretionary remedies of writs of certiorari and mandamus in the following manner.

a) a writ of certiorari to quash the decision and/or reward of the 2nd respondent arbitrator dated 19.07.2011 contained in the document marked 'P5'.

b) a writ of mandamus to direct the 1st Respondent (the Commissioner of Labour)' to recommence the arbitration proceedings *de novo* with a new Arbitrator.

After several applications for objections and counter objections were permitted by this court on several dates, the 1st and 3rd Respondents have moved that this court should in the first instance decide on the preliminary objections as to the

maintainability of this application for judicial review and written submissions have been tendered expatiating on the preliminary objections

For purposes of fully comprehending the scope of the preliminary objections raised on behalf of the 3rd Respondent and 1st Respondent, the factual matrix surrounding the basis of this application for judicial review in terms of Article 140 of the Constitution repays attention.

Factual Matrix

On a reference made by the then Minister of Labour under Section 4 (1) of the Industrial Disputes Act as amended, the industrial dispute between the Ceylon Planter's Society who represented the Petitioner and Kahawattha Plantations Ltd – the 3rd Respondent was referred to the 2nd Respondent Arbitrator for settlement by arbitration. The learned State Counsel who appears for the 1st Respondent has made available to this Court copies of Gazette notifications bearing number 1165/28 dated 05/01/2001 and No. 1730/16 dated 03/11/2011. Whilst the Gazette notification bearing No. 1165/28 dated 05/01/2001 contains a copy of the original reference by the Minister to the 2nr Respondent arbitrator along with the Statement of Matters in Dispute, the other Gazette notification bearing No. 1730/16 dated 03/11/2011 carries the publication of an award dated 22.09.2011. In fact this publication of the award of the arbitrator dated 22.09.2011 has been made by the then Commissioner of Labour in compliance with the provisions of Section 18 (1) of the Industrial Disputes Act as amended. Since none of the parties to the industrial dispute had appended to their pleadings copies of both the reference and the publication of the award, this court, *ex abuntanticautela,* directed the State

Counsel to make these two documents available to this court so that we could have the benefit of perusing them in the course of our deliberations on the preliminary objections.

It has to be observed *though* that the petitioner has appended to his petition the all important document "P5"-a copy of the proceedings dated 19.07.2011 which contains the decision of the 2nd Respondent Arbitrator terminating further proceedings of the arbitration under reference on account of the absence of the petitioner on that particular day. It is this decision dated 19.07.2011 that is being sought to be quashed by way of a writ of certiorari. This decision is the precursor to what the Commissioner of Labour published in the end as an award in Gazette Notification bearing No 1730/16 dated 03/11/2011.

In fact the prayer of the Petitioner at (a) seeks a mandate in the nature of a Writ of Certiorari to quash the decision and / or **Award** of the 2nd Respondent Arbitrator dated 19.7.2011 contained in P15 *(sic)*. As I have observed, the award which is limited to an order of dismissal of the petitioner's application before the arbitrator does not embody a decision on the industrial dispute that was referred to him.

The last two paragraphs of "P5" make it crystal clear that the second respondent arbitrator was terminating further proceedings under reference for lack of due diligence on the part of the petitioner to prosecute the application and that he was making a decision ***not to make an award under the circumstances (sic).***

The 2nd Respondent arbitrator had also directed the Registrar of the office of the Arbitrator to transmit a copy of his order to the petitioner which has found its way into these proceedings as P5.

However I observe that what was finally published in the Gazette bearing No 1730/16 dated 03/11/2011 **as an award** contains an expanded version of P5 dated 19.07.2011. In fact the decision P5 which was delivered by the arbitrator on 19.07.2011, when it was published as an award on 03.11.2011, contains further observations of the arbitrator.

Though the 2nd Respondent Arbitrator decided quite specifically on 19.07.2011 that he was not proceeding to make an award on the substantive dispute before him but was only terminating further proceedings of the arbitration under reference, which he attributed to want of due diligence on the part of the Petitioner, the fact remains that the improved version of P5 setting out his reasons as to why he was not proceeding to make an award but rather was terminating the reference did finally find its way as an award in the Gazette notification bearing No. 1730/16 dated 03/11/2011and certainly at this stage this Court would not go into the propriety of the Commissioner of Labour treating it as an award as he has to cause the publication of an award upon receipt in terms of section 18 of the Industrial Disputes Act. But as I have stated before, this award *(sic)* specifically declares itself to be a termination of further proceedings under reference but it doesn't amount to a decision on the evidence that has already been led before the arbitrator.

The decision to terminate the arbitration proceedings and not to proceed to make an award, which is being challenged before this Court as irrational and ultra vires has, according to the petitioner, resulted in misdirection of fact and law and the Petitioner also relies on grounds such as taking into account irrelevant considerations which, if established, would go to vitiate the decision made by the 2nd Respondent arbitrator on 19.07.2011.

Both the 3rd Respondent Kahawatte Plantations Ltd and the 1st Respondent Commissioner of Labour have filed their statement of objections resisting this application and pleading in bar of further proceedings before us certain preliminary objections which have been expanded upon in their respective written submissions.

Preliminary Objections

The State Counsel who appears for 1stRespondent Commissioner of Labour has concurred with the 3rd Respondent on the preliminary objections. Before I proceed to set down the decisions on the preliminary objections, let me crystallize them in a nutshell. The objections some of which are often described as discretionary bars are as follows:-

1) Suppression and misrepresentation of facts;

2) Non-suiting of the Minister of Labour is fatal to the application as he becomes a necessary party by virtue of the fact that it is the Minister who is vested with the statutory discretion to refer an industrial disputes for compulsory arbitration;

3) laches;

4) the remedy has not been sought by the proper party/non-observance of the Supreme Court rules;

Suppression of Material Facts or Absence of *Uberrimae fides*

It is useful at this stage to refer to the course of the proceedings before the arbitrator in order to understand this ground of bar that is being urged by the 3rd Respondent Employer. The averments pertaining to this ground as stated in the

statement of objection of the 3rd respondent employer is that the trade union which represented the petitioner and the petitioner had been warned on several occasions concerning their erratic attendance or participation in the proceedings before the arbitrator and the failure on the part of the petitioner to annex a copy of the case record of the proceedings that manifested want of due diligence is intentional and deliberate. The proceedings of 17.06.2009, 28.08.2009, 10.03.2010, 19.04.2010, 29.06.2010, 27.08.2010, 02. 11.2010, 06.01.2011 and 19.07.2011 are cited as instances when neither the trade union nor the petitioner had been ready to prosecute their case and the third respondent alleges that it was in those circumstances that the arbitrator came to make the order as he did on 19. 07. 2011 terminating further proceedings in the matter. This, according to the third respondent, would amount to suppression of material facts.

Further, paragraphs 44, 45 and 46 of the petition and their corresponding averments in the affidavit of the petitioner are sought to be contradicted by police statements made by both the petitioner and the registrar of the office of the arbitrator. The attempt on the part of the 3rd respondent is to show that the so-called contradiction manifests "unclean hands" which should automatically disentitle the petitioner to seek the main remedies-namely writs of certiorari and mandamus.

The crux of paragraphs 44, 45 and 46 of the petition along with their corresponding averments in the affidavit is that is that when the petitioner went for the arbitration on 04.07.2011, the registrar had informed him that as the 2nd Respondent arbitrator was having a personal difficulty the arbitration would be postponed and the parties would be notified of the next date after the arbitrator was consulted. According to the petitioner, no such notification of the next date

was communicated to him and as he went to check on the next date of hearing, he came to know that the arbitration had been taken up on that fateful day 19.07.2011 and terminated for his want of due diligence. The petitioner admits the receipt of the order of the arbitrator dated 19.07.2011 that has been produced as P5 referred to above.

The petitioner also alleges that there was no written notification of the next date which fact has been confirmed in writing by the post master relevant to his area and the notation of the postmaster of Rajagiriya to this effect has been briefed to this Court in a document marked P6.

The petitioner avers that he made a complaint to Rajagiriya Police who recorded in the course of their investigations a statement from the registrar of the arbitrator's office who confirmed that she had not sent a written communication of the next date namely 19.07.2011. The statements made to police of both the petitioner and the registrar of the office of the arbitrator have been appended to the petition as P7 and P7(a).

The explanation of the Petitioner for his failure to be present before the arbitrator on 19.07.2011 that his absence was due to non-communication of the date by the Registrar has been sought to be contradicted by his police statement and the statement made by the Registrar. It boils down to a case of evaluating the averments in the petition vis-à-vis the petitioner's police statement and the statement made by the registrar. The petition and affidavit aver that the petitioner could not attend the arbitration on 19.07.2011 because the date was not notified to him in writing. He has maintained this position in his police statement. The 3rd Respondent seeks to contradict him with a portion of his police statement (P7) which is as follows:-

"As the arbitrator was indisposed he would not be present on 4th July 2011. The Respondent had given 19th July 2011 as a convenient date for them."

I do not subscribe to the view that this police statement renders the petitioner unworthy of credit. This would only mean that the petitioner knew that 19 July 2011 was a convenient date for the respondent. Was it a convenient date for the arbitrator? In fact it is incumbent on the registrar to consult the arbitrator as to whether he would be available on 19th July 2015 and it was only thereafter that the registrar could fix this date as a date of inquiry and this date has to be communicated to both the petitioner and respondent. It is my respectful view that this portion of the police statement made by the petitioner does not advance the case of suppression of material facts urged by the third respondent within the parameters adverted to by the oft quoted dictum of Pathirana J in ***Alphonso Appuhamy v Hettiarachchi*** 77 NLR 131 at 135 which is worthy of recapitulation-

"The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the *King v. The General Commissioner* for the Purpose of the Income Tax Acts for the *District of Kensington-Ex-Parte Princess Edmorbd de Poigns.* Although this case deals with a writ of prohibiting the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her

affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination."

This principle has been followed consistently by our courts including in the cases of *Hulangamuwa v Siriwardena* [(1986) 1 SLR 275], *Collettes Ltd., v Commissioner of Labour* [(1989) 2 SLR 6], *Laub v Attorney General*[(1995) 2 SLR 88], *Blanca Diamonds (Pvt) Ltd., v Wilfred Van Els* [(1997) 1 SLR 360], *Jayasinghe v The National Institute of Fisheries* [(2002) 1 SLR 277] and *Lt. Commander Ruwan Pathirana v Commodore Dharmasiriwardene and Others* [(2007) 1 SLR 24].

Has the allegation that the petitioner knew of the next date namely 19.07.2011 been established before us? If so, does it fall within the criteria laid down by the long line of precedents cited above?

I have shown that the statement made to police by the petitioner to the effect-

> *"As the arbitrator was indisposed he would not be present on 4th July 2011. The Respondent had given 19th July 2011 as a convenient date for them."*

does not advance the case of falsity against the Petitioner. This only shows that the Petitioner was aware that the date 19th July 2011 was a convenient date for the Respondent. Was this date fixed finally as the next date for further proceedings after consultation with the arbitrator? Was this date notified to the petitioner? The pleadings and the written submissions leave room for doubt on these issues.

The 3rd Respondent also adverts to a portion of the statement made by the registrar of the arbitrator's office to the effect-

> *"the previous date was 4.07.2011. On that day the applicant* ***N.L.D. Ariyaratne submitted a motion*** *and I informed him of the next date."*

This assertion is somewhat repeated by the Registrar before the Arbitrator on that fateful day-19.07.2011 when the arbitrator terminated proceedings. According to P5, the Arbitrator records that the Registrar went on record stating that the petitioner informed her that the date 19.07.2011 was convenient to him and the inference sought to be made out there from is that the petitioner knew of the next date-please vide proceedings dated 19.07.2011 reflected in P5.

In my view this fact does not advance the allegation of suppression of material facts or lack of *uberrimae fides* against the petitioner. If the petitioner, as the Registrar states, submitted a motion moving for a date and she informed him of the next date, the question arises where that motion is. Certainly it must be in the case record or proceedings and this Court does not have the benefit of having seen the motion as it has not been briefed to us.

In our view the hearsay police statement of the Registrar remains unsubstantiated before us and for this reason I take the view that the allegation of lack of *uberrimae fides* has not been established before us.

Moreover the registrar does not state that she consulted the arbitrator on 04.07.2011 or thereafter and it was the arbitrator who fixed the next date. The version of the petitioner that the registrar told him that the date 19.07.2011 was only convenient to the respondents has not been contradicted by the registrar in

her police statement either. On this score there is no sufficient material to taint the Petitioner with falsity.

The other allegation that the Petitioner never brought to the notice of this Court that he had been *"playing truant"* on several dates of the arbitration does not become probative of establishing "unclean hands" as P5 which has been appended to the petition displays the erratic absence of the petitioner on several dates of inquiry and this Court is possessed of that fact.

In the circumstances I see no merit in the contention of the 3rd Respondent that the Petitioner lacks *uberrimae fides* and thus this court overrules the preliminary objection raised on this discretionary bar.

Non-suiting of the Minister

It is beyond doubt that it was the Minister who referred the matter to the 2nd Respondent arbitrator-please vide the Gazette notification bearing No. 1165/28 dated 05.01.2001 which contains a copy of the original reference by the Minister to the 2nr Respondent arbitrator along with the Statement of Matters in Dispute. It is based on this reference that the arbitrator received the mandate to begin the arbitration.

In the written submissions filed on behalf of the 1st and 3rd Respondents, it has been contended that that the failure to name the Minister of Labour as a necessary party is a fatal regularity that would render this application liable to be dismissed *in limine*.

There is a long line of precedents that it is open to a party to show that what was referred was not an industrial dispute within the meaning of the Act and challenge the jurisdiction of the tribunal on the basis that there was no industrial dispute or

what was referred is not an industrial dispute-vide ***ANZ Grindlay's Bank v Ministry of Labour*** (1995) 2 Sri.LR 53. In this case certiorari was issued to quash the reference under section 4 (1) of the Industrial Disputes Act as amended as well as the award of the arbitrator. If the reference was bad, definitely the award would get tainted. That seems to be the rationale of the decision.

If the Minister's order of reference is invalid in law, the order of reference "amounted to doing indirectly what the Minister could not do directly."-***Eksath Kamkaru Samithiya v Ceylon Printers Ltd*** (1996) 2 Sri.LR 317. In such a situation it becomes incumbent upon the Petitioner to implead the Minister as the award is traceable to an invalid reference which operates as a poison pill on the award.

In the instant case we are not confronted with such a situation. No reference to an invalid reference has been averred before us. Neither is any relief asked of the Minister's exercise of power, past or future. The question arises whether in such a situation the Minister is a necessary party. It has to be borne in mind that an application for judicial review succeeds or falls asunder on the sufficiency or otherwise of pleadings. If pleadings do not call in question the vires of the Minister's discretion nor do they require him to act in the future in a particular way as enjoined by law, does he become a party to the case? I am not persuaded that on the pleadings presented before us and the prayer contained therein the Minister has become a necessary party. In any event there are other factors allied to what have said before that would militate against the contention that the Minister is a necessary party in the case.

The proposition that the Minister divests himself of any jurisdiction over his reference once he has referred an industrial dispute for arbitration is brought out in the leading case of ***Nadaraja Ltd v Krishnadasan*** (1975) 78 NLR 255 at 258, where

the Supreme Court held after a comprehensive analysis of the scheme of the Industrial Disputes Act,

> *"the order of reference is an administrative act of the Minister who has to form an opinion as to the factual existence or apprehension of an industrial dispute."*

Sharvananda J, (as he then was) stated,

> *"Thus according to the scheme of the Act, the Minister does not come into the picture once he has made a reference under Section 4 (1), and he cannot frustrate such reference on second thoughts. That arbitrator proceeds with the reference without interference and directions from the Minister. Once he has acquired jurisdiction over the dispute between the parties, the Minister cannot divest him of that jurisdiction. Situations may however, arise necessitating a second reference if the Arbitrator declines, resigns, dies or becomes incapable of performing his functions, or leaves Sri Lanka under circumstances showing that he will probably not return at an early date. Strictly speaking, in such an event there is no occasion to withdraw or supersede any reference from the first arbitrator; the first arbitrator has ceased to function and there is a frustration of the reference, and so there is in existence no Arbitrator who could act on such reference."* (at p 259).

I would opine that this judgment of the Supreme Court is today the *locus classicus* for the twin propositions that once the Minister makes a reference under Section 4 (1) of the Industrial Disputes Act, he is *functus* and is devoid of power to frustrate

the reference by divesting the Arbitrator of his authority *except for certain specified reasons*.

I have to observe that the decision in Nadaraja's case was subsequently cited with approval and followed by the Court of Appeal in ***Piyadasa v Bata Shoe Co Ltd*** (1982) 1 Sri.LR 91.

Nadaraja's case also survived a constitutional challenge in ***Walker Sons & Co (UK) Ltd v Gunatilleke*** (1985) 1 BLR 208, where a Divisional Bench of the Supreme Court held that it remained good law notwithstanding that it was decided by the Supreme Court established under the 1st Republican Constitution of 1972, and that it was binding on all subordinate Courts including the Court of Appeal under the 1978 Constitution.

I have to observe that though the Minister has no power to revoke the reference, exceptional situations may arise and consequently irrevocability of the reference is subject to exceptions as recognized by Sharvananda J (as he then was) in ***Nadaraja Ltd., v Krishnadasan*** (supra) at p 259.

> "If the first arbitrator declines resigns, dies or becomes incapable of performing his functions, or leaves Sri Lanka under circumstances showing that he will probably not return at an early date. Strictly speaking in such an event there is no occasion to withdraw or supersede any reference from the first arbitrator; the first Arbitrator has ceased to function and there is a frustration of reference, and so there is in existence no Arbitrator who could act in such reference".

These exceptional situations were cited with approval by Wanasundera J in ***Equipment and Construction Co. Ltd., v Ranasinghe*** (1985) 1 Sr. LR 82, 85. There is

nothing in the petition alleging these exceptional situations. Even if these situations exist, what is sought to be quashed before us is the order P5 made by the arbitrator. No relief is sought against the Minister to make a reference a second time and exceptional situations alluded to by Sharvananda J (as he then was) have not been averred assuming that they exist. In the absence of express assertions in the petition that bring out the existence of exceptional situations and having regard to the fact that no mandamus is sought against the Minister to make a second reference because his first reference has become frustrated, I hold that the Minister is not a necessary party in those circumstances and the preliminary objection premised on non-suiting of the Minister in the petition must necessarily fail

What is now left of the preliminary objections pertains to laches, non-observance of Supreme Court rules and the status of the petitioner to apply for judicial review.

Laches

The impugned order (P5) has been made on 19.07.2011. The application for judicial review has been filed on 21st May 2012. As has been pointed out by the 3rd Respondent, the delay has been explained only in the written submissions of the Petitioner-namely the delay has been occasioned by the time spent on obtaining necessary documentation from the labour department. The long delay, albeit indicative of lack of due diligence, has not been per se a ground for rejection of applications for judicial review.

There are dicta to the effect that where the Court has examined the record and is satisfied that the Order complained of is manifestly erroneous or without jurisdiction the Court should be loathe to allow the mischief of the Order to

continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction-vide the judgment of Sharvananda J as he then was in ***Biso Menika v Cyril De Alwis*** (1982) 1 Sri.LR 368, 379. It has to be remembered that the petition is chockfull of averments alleging errors of jurisdiction. Unless this Court goes into these grounds of challenge where in a case of compulsory arbitration the arbitrator has terminated proceedings despite having taken evidence previously, it will work injustice to a Petitioner if this Court rejects the petition on the ground of inordinate delay. As the Supreme Court observed in ***V.Ramasamy v Ceylon Mortgage Bank*** (1976) 78 NLR 510, the validity of a plea of delay must be tried on principles which are substantially of an equitable nature, and the principles of laches must be tried "carefully and discriminatingly, and not automatically and as a mere mechanical device (*per* Wanasundera, J at p517). Equity must temper the plea of laches and there is no doubt that in all the circumstances of this case, equitable considerations do favor the petitioner. In the premise we are disinclined to reject the petition at this stage on the ground of laches.

Proper Petitioner is not before Court/infringement of SC rules

The fact that only the petitioner has come before this Court without joining the Trade Union which represented him at the arbitration, cannot be held against the Petitioner. Section 47 of the Industrial Disputes Act as amended provides that the word "workman" includes a trade union consisting of workmen. This is quite indicative of the fact that a workman enjoys *locus standi* to vindicate his rights not

only under the Industrial Disputes Act but also in proceedings under Article 140 of the constitution. A trade union need not be an indispensable adjunct at all times. The petitioner who is aggrieved by the order P5 can have and maintain this application without being hamstrung by any issues of *locus standi.*

The objections premised on non-observance of Supreme Court rules pertain to the absence of the reference and certified copies that should have been appended to the petition. I have already pinpointed that the reference is not impugned in these proceedings. In the circumstances we need not call in question the absence of the reference at this stage and reject the application for judicial review.

I hold that the above is dispositive of the preliminary objections raised in these proceedings and we are of the view that the substantive merits of this application for judicial review must be gone into at a hearing and we would accordingly proceed to fix this matter for argument.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda P.C. (PCJ)

I agree

JUDGE OF THE COURT OF APPEAL