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 Writ of *Certiorari* under article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Korana Mudiyanselage Gama Walawwe Abeysinghe Bandara,
No. 183/3,
Kurunegala Road,
Katugastota.

PETITIONER

CA/WRIT/ 29/2013

Vs,

1. Minister of Labour Relations and Manpower,
   Labour Secretariat,
   Narahenpita.

2. Commissioner of Labour,
   Department o Labour,
   Labour Secretariat,
   Narahenpita.

3. M. Ariff,
   No. 47/1, Hospital Road,
   Dehiwala.

4. Ceylon Electricity Board,
   No.50,
   Sri Chittampalam A. Gardiner Mw,
   Colombo 02.

RESPONDENTS

Before : **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel : Lal Wjenayake with Lasantha Amarasinghe for the Petitioner
Vikun de Abrow DSG for the 1st and 2nd Respondents
Sanjaya Kannangara for the 4th Respondent

Argued on: **17.07.2015**

Written Submission on: **15.09.2015**

Order on: **30.10.2015**

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioner to this application Konara Mudiyanselage Gama Walawwe Abeysinghe Bandara has come before this court seeking inter alia.

b). issue a Writ of Certiorari to quashing the award of the 3rd Respondent dated 14.11.2012 marked X-9.

Petitioner was employed under the 4th respondent board and while serving as the Regional Supplies Assistant his services were terminated by letter dated 26. 05.2003, on being found guilty of charges set out in the charge sheet dated 24.05.2002, after a domestic inquiry.

The Petitioner alleged that there were several domestic inquiries regarding the same incident in respect of the loss of a bank guarantee, held against Deputy General Manager, the two Provincial Chief Engineers, a chief clerk and a minor employee separately by the same inquiry officer who conducted the inquiry against the Petitioner. Petitioner further submitted that the said inquiry officer had found guilty the Petitioner as well as the Deputy General Manager and the Chief Provincial Engineer, of the charges against them, but the board rejected the findings into the charges against the Deputy General Manager and Chief Engineer and exonerated them. However the board acting on the finding of the same inquiry officer terminated the services of the Petitioner and other two minor employees.

It was revealed during the argument stage that, the Petitioner being aggrieved by the said termination filed several applications in different forums prior to filling the present application in the Court of Appeal.

a) Petitioner made an application to the Labour Tribunal of Kandy
b) Pending the said application filed a Fundamental Right application in the Supreme Court
c) Application was also made to the Human Rights Commission.
d) Submitted an appeal to a Political Victimization Committee (PVC) a committee appointed to consider appeals made by the employees of the Ministry of Power and Energy

The said Political Victimization Committee submitted its recommendation (4 R 1) and accordingly, as regards the Petitioner the said Political Victimization Committee recommended that " the Petitioner be re-instated and that at the time of retirement his period of service to be considered as a continuous period of service and for the pension to be calculated accordingly." The said Political Victimization Committee recommendations were submitted for the approval of the Cabinet by the Minister of Power and Energy by cabinet paper dated 13. 07. 2013 and the said cabinet paper was approved by the Cabinet of Minister "without any financial implications" in other words without back wages.

When the said recommendations were approved and communicated to the Petitioner, the Petitioner accepted the said decision and reported to work reserving his right to agitate his claim for back wages.

Thereafter the Petitioner withdrew his Fundamental Right application in the Supreme Court reserving his right to canvass the question of back wages in an appropriate forum.

Petitioner agitated the nonpayment of his back wages for the period 26.05.2003 to 14.09.2006 with the 2nd Respondent, and on his recommendation to the 1st Respondent, the Minister of Labour referred the dispute to the 3rd Respondent for Arbitration under section 4(1) of the Industrial Disputes Act.

The said arbitrator in his award dated 14.11.2012 refused to grant any relief to the Petitioner. Being aggrieved by the said decision of the Arbitrator, the Petitioner has filed the present application seeking this court to issue a Writ of *Certiorari* to quash the said award by the 3rd Respondent.

Before considering the legality of the said award, this court decided to consider the circumstances under which the Petitioner was re-instated by the 4th Respondent.

As discussed by me earlier, the Petitioner being aggrieved by the dismissal, went before the Labour Tribunal Kandy challenging the said decision to terminate his services, by the 4th Respondent. Whilst the said application was pending before the Labour Tribunal, the Petitioner has gone before the Political Victimization Committee seeking redress for his grievance.

When the said Political Victimization Committee submitted its recommendation to the Honorable Minister of Power and Energy, the said Minister had submitted a Cabinet Memorandum dated 13.07.2005.

Fourth paragraph of the said Memorandum gives the summary of Recommendation as follows;

Annex No.	Recommendation	No of employees granted Relief
01	Re-instatement (without arrears of salary- - or increments)	33
02	Promotions (without arrears of salary- - or increments)	83
03	Miscellaneous (without arrears of salary- - or increments)	28

When the said Cabinet Memorandum was submitted before the Cabinet of Ministers on 28.07.2005 the proposals which did not have any financial commitment was approved by the said cabinet and was conveyed to the relevant authorities for necessary action.

The decision of the Political Victimization Committee which was later approved by the Cabinet of Ministers was to re-instate the Petitioner without back wages and the most important aspect of the said decision was the none financial commitment nature of the said decision. The second part of the same cabinet decision requested the Finance Minister to submit his recommendation to the cabinet on recommendation that has financial commitment.

Therefore it is clear that the reinstatement the Petitioner canvassed before us has come to him with a strong condition which was approved by the Cabinet of Ministers that he will only be re-instated but will not be paid his back wages or increments. If the Petitioner has accepted the re-instatement does he impliedly accepted the whole proposal or can he rejected a part of the proposal is also a matter to be considered by us.

In the case of **Ceylon Playwood Corporation V. Samastha Lanka G.N.S.M & Rajya Sanstha Sevaka Sangamaya 1992 (1) Sri L.R 157 S.N. Silva J** (as he was then) whilst observing the issue to be decided in the said case as " whether the work men who elected to retire according to the scheme set out in the circular R3 and received the payments in terms of it, were entitled to seek further benefits by marking an application to the Labour Tribunal" and held that " the workmen by making their applications to the Labour Tribunal were attempting to circumvent the terms and conditions of the

circular after having received the benefits due upon it. A legal procedure in the nature of an application to the Labour Tribunal in terms of section 31 B (1) cannot be resorted to for such a purpose. The doctrine of approbate and reprobate (*quod approbo non reprobo*) is based on the principle that no person can accept and reject the same instrument.

On the other hand we observe that the application before the Labour Tribunal where the Petitioner agitated dismissal was dropped by him the moment he was re-instated on the recommendation by Political Victimization Committee. This fact was commented by the President of the Labour Tribunal in his order dated 02.12.2008 when he dismissal the said application. As pointed out in the said decision the proper forum to consider the dismissed of the Petitioner under the provisions of the Industrial Disputes Act was the Labour Tribunal. The Petitioner, who could not wait till the outcome of the Labour Tribunal decision, tried a short cut and decided to go before the Political Victimization Committee which did not go into the merits of the charges against him but made its recommendation for re-instatement without financial commitment to the employer.

We further observe that the 1st Respondent Minister was mindful of the said position when he referred the matter for Arbitration under section 4 (1) of the Industrial Disputes Act. In the statement of Dispute the dispute is referred to as follows,

> "Whether any injustice was caused to Mr. K.M.G. Abeysinghe Bandara who is presently employed in the Ceylon Electracity Board as a supplies assistant owing to holding a disciplinary inquiry against him and dismissed of him in service for the period from 26.05.2003 to 14.09.2006 by the said Board and if any injustice was caused to what relief Mr. K.M.G. Abeysinghe Bandara is entitled." (X-1)

When go through the above reference by the 1st Respondent, this court observes that, the grievance the Petitioner has complained of, i.e. the fact that he was re-employed by the Ceylon Electracity Board without back wages was not before the arbitrator.

The position taken up by the Petitioner before this court was that, the arbitrator's (3rd Respondent) findings and recommendation are contrary to the evidence led at the inquiry and is based on irrelevant matters. Such as observations made by the Labour Tribunal President in Labour Tribunal order. The Petitioner has further alleged that the 3rd Respondents failed to address the matters referred for arbitration.

As Wade identified the need to give reasons as,

> "There is a strong case to made for the giving of reasons as an essential elements of administrative justice. The need for it has been sharply exposed by the expanding law of the judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of the law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others."
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> *(H.W.R. WADE and C.F. FORSYTH Administrative Law 10th Edition, page 436)*

With regard to the Adequacy of the reason Wade has further submitted,

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principle important controversial issues,' disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision- maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant ground. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration...."
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> (*H.W.R.WADE* and *C.F. FORSYTH* Administrative Law 10th Edition page 438)

As pointed out by me earlier, the Arbitrator was restricted by the statement of Dispute to find whether there was any injustice caused to the Petitioner by holding the disciplinary inquiry against him and dismissed of him from the service and what relief he is entitled to.

The Petitioner has submitted before this court the finding of the Arbitrator produced marked X-9. Court observes that the Arbitrator has permitted the employee as well as the employer to lead evidence before him and thereafter considered the disciplinary inquiry proceedings submitted before him. As pointed out by me earlier, the statement of dispute has not permitted the arbitrator to hold a fresh disciplinary

inquiry against the Petitioner but his role was to see any injustice has caused to the Petitioner by holding the said inquiry.

The arbitrator has carefully analyzed the disciplinary proceedings submitted before him and observed that the inquiry officer was mindful of certain obstacles he faced during the inquiry but recorded that he has taken all necessary steps to protect the rights of the employee. It was further observed that the employee was satisfied with the conduct of the said inquiry and recorded that fact in the inquiry proceedings and based on the above observation concluded that no injustice has caused to the Petitioner by conducting the said disciplinary inquiry.

I observe that the Arbitrator was mindful of the statement of Dispute and its limitations when considering the matter referred to him by the 1st Respondent and adequate reasoning was given within the limitation of the said reference.

It is further observed by this court that the Petitioner is not entitled to approbate and reprobate in the circumstances of this case.

For the reasons adduced above, this court is not inclined to grant relief as prayed by the Petitioner.

Therefore the court decided to dismiss this application with cost fixed at Rs. 5000/-

Application dismissed with cost.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE COURT OF APPEAL