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

In the matter of an application for a mandate in the nature of a Writ of Certiorari in terms of Article 140 of the Constitution.

C.A. Writ Case No.92/2013

Industrial Court of Colombo
Arbitration Case No. A 3291

Kaduwela M.C. 50419

Ceylon Steel Corporation Limited,

Kaduwela Road, Oruwela,

Athurugiriya.

PETITIONER

-Vs-

T. Piyasoma,

The Arbitrator, Industrial Courts,

Department of Labour,

Narahenpita.

And 45 Others

RESPONDENTS

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

COUNSEL : Kamal Dissanayake with Sureni Amarathunga, Atheek Inan and Sunil Witharanage for Petitioner.

Manohara Jayasinghe, S.C for the 2nd, 3rd and 46th Respondents.

Uditha Egalahewa, P.C with Ranga Dayananda and Anuradhi Wickremasinghe for the 4th to 7th, 10th to 14th, 16th, 18th, 20th, 22nd, 24th, 26th, 31st, to 42nd, 44th and 45th Respondents.

Decided on : 03.09.2018

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

The learned President's Counsel for the Respondents raised a preliminary objection as to the maintainability of this application for a writ of certiorari. This application has been made to have an arbitral award made by the 3rd Respondent quashed. The arbitral award which is appended to the petition as **P20** bears the date of 07.11.2012 and has been impugned in the petition on a number of grounds some of which are specified in paragraphs 24, 25, 26 and 27 of the petition. The learned President's Counsel has contended that though the award was published in *Gazette* bearing No.1789/12 on 17.12.2012, the petition does not seek a quashing of this publication of the award in the *Gazette*. Rather it only seeks a nullification of the award dated 07.11.2012. The learned President's Counsel has relied on Section 18 of the Industrial Disputes Act to drive home his argument that it is the publication in the *Gazette* that gives effect to the arbitral award. The learned State Counsel has associated himself with the preliminary objections raised on behalf of the Respondents. A glance at the relevant provisions of the Industrial Disputes Act No.43 of 1950 as amended becomes apposite.

Section 18(1)

The award of an arbitrator shall be transmitted to the Commissioner who shall forthwith cause the award to be published in the *Gazette*.

Section 18(2)

Every award of an arbitrator shall come into force on the date of the award or on such date, if any, as may be specified therein, not being earlier than the date on which the industrial dispute to which the award relates first arose.

Section 18(3)

Where any award of an arbitrator provides that the award shall have effect for any period or until any date specified therein, such award shell continue in force with effect from the date on which it comes into force as provided in subsection (2) until the end of the period or until the date so specified, unless it ceases earlier to have effect as provided in section 20.

Section 18(4)

Where no period or date is specified in any award as the period during which or date until which the award shall have effect, the award shall continue in force with effect from the date on which it comes into force as provided in subsection (2) unless it ceases to have effect as provided in Section 20.

Thus Section 18(2) of the Industrial Disputes Act gives two effective dates for an arbitral award to come into force. It can become operative on the date of the award. Or it may become operative upon its publication in the *Gazette*. Whichever date is operative, it is axiomatic that what is impugned in judicial review is not the merit of the award but the process through which it came into being. Even though the norm in Section 18(2) of the Industrial Disputes Act refers to "coming into force" of an award, the award itself could be set at naught by assailing the process that brought it into existence. What is assayed and appraised in judicial review is the antecedent process of decision-making of the arbitrator and not its final trappings in the garb of a published award. Even if it is published, it cannot come into force if a flawed decision-making has given rise to an invalid award. One need not overemphasize the mantra which is repeated oftentimes to highlight the distinction between appeal and judicial review. A general appeal, bestowed by statute typically carries with it a remedial power to substitute a new decision, whilst judicial review looks to the legality (validity) and not the correctness, of decisions-see how Lord Brightman described judicial review in ***Chief Constable of the North Wales Police v. Evans*** (1982) 3 All ER 141 at 154

(House of Lords). The very clear way that Lord Brightman put the position in 1982 is still supposedly the law today with its own nuances and flourishes.

> *"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the Court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."*

Hilaire Barnett, in her *Constitutional and Administrative Law* (10th edn 2013) at pp 594-5 articulated thus:-

> *"While judges continue to use the term ultra vires it is nowadays too limited a term to encompass the whole ambit of judicial review. It may be preferable, therefore, to regard judicial review as the control of discretion and the regulation of the decision-making process by the courts."*

Therefore one need not go into the question and indeed it is irrelevant to pose the question- whether the *Gazette* gives enforceability or not. Does the process of decision-making give validity to the award? It is this question that is uppermost in proceedings under Article 140 of the Constitution. The traditional judicial review remedies (the prerogative writs or orders in the nature of writs as they are called under Article 140 of the Constitution) allow courts to quash decisions illegally or unlawfully made (certiorari), prohibit the commencement or continuation of illegal action (prohibition), or compel the performance of certain legal duties (mandamus).

Certiorari as has been prayed for in the petition before this Court seeks an annulment of the arbitral award and once the grounds on which certiorari would traditionally issue are established, the award would be amenable to a quashing order without more, provided no other discretionary bars to the issuance of the remedy exist. If the award *per se* is found to be vitiated by illegality, irrationality and procedural impropriety not to mention proportionality, the award would be quashed whichever form it has finally taken. If the award is struck down and set at naught, there is no award to be published in the *Gazette* and even if it has been published, the publication exists in *vacuo* with no

trappings of a valid award. In the circumstances the Petitioner need not separately pray for a quashing of the *Gazette* and in effect it is otiose to have such a prayer.

In fact Lord Denning in the Privy Council in ***McFoy v. United Africa Company*** (1961) 3 AER 1169 stated at p.1172:-

> *"If an act in law is void, then it is in law a nullity.....There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad.* ***You cannot put something on nothing*** *and expect it to stay there. It will collapse."*

If the gravamen of the complaint is that the decision (the award) is null and void, it cannot come into force merely because it is published. Once the award *per se* is quashed or annulled, it goes without saying that the nullity of the publication of the award is *ipso facto* implied and it would be superfluous to insist on a prayer to have the publication of the award in the *Gazette* quashed.

Thus the petition as constituted does not suffer from any fundamental vice of invalidity which strikes at its core and I am of the view that the merit of the application must be investigated. So I would overrule the preliminary objection.

JUDGE OF THE COURT OF APPEAL