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 under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 268/2018

The Sri Lanka Transport Board,
200, Kirula Road,
Narahenpita, Colombo 5.

PETITIONER

Vs.

1. S. Kariyawasam,
   The Arbitrator,
   No. 28, Abeyratne Mawatha,
   Boralesgamuwa.

2. M.P.G. Jayalath,
   Galpaya, Kendagolla,
   Kurunduwatta Kadaveediya,
   Gampola.

3. R.P.A. Wimalaweera,
   Commissioner General of Labour,
   Department of Labour.

4. Hon. W.D.J. Seneviratne,
   Minister of Labour, Trade Union Relations
   & Sabaragamuwa Development,
   Labour Secretariat, Colombo 5.

5. The Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

Before:	**Arjuna Obeyesekere, J**
Counsel:	Ranjith Ranawaka with Ravinath Ranawaka for the Petitioner
	Duminde De Alwis for the 2nd Respondent
	Rajin Gooneratne, State Counsel for the 3rd – 5th Respondents
Argued on:	3rd September 2019
Written Submissions:	Tendered on behalf of the Petitioner on 14th February 2020
	Tendered on behalf of the 2nd Respondent on 26th June 2020
Decided on:	4th September 2020

Arjuna Obeyesekere, J

The Petitioner has filed this application, seeking *inter alia* a Writ of Certiorari to quash the arbitral award made by the 1st Respondent in terms of the Industrial Disputes Act.

The facts of this matter very briefly are as follows.

The 2nd Respondent was an employee of the Petitioner, the Sri Lanka Transport Board, and was attached to the Gampola Depot of the Petitioner in the capacity of a driver. On 27th July 2008, the 2nd Respondent had been involved in a fatal road accident, for which proceedings had been instituted against the 2nd Respondent in the Magistrate's Court. The Petitioner had issued the 2nd Respondent a charge sheet in respect of the said accident and having conducted a disciplinary inquiry, terminated the services of the 2nd Respondent with effect from 21st November 2008. The appeal filed by the 2nd Respondent had been rejected by the Appeal Board of the Petitioner.

Pursuant to a complaint made by the 2nd Respondent to the Department of Labour, the Minister of Labour, acting in terms of Section 4(1) of the Industrial Disputes Act, had referred the following dispute for resolution by arbitration:

> "*Whether the penalties imposed on Mr. M.G.P.Jayalath in terms of the Disciplinary Order dated 21st November 2008 issued by the Senior Disciplinary Officer and the Appeal Order dated 21st October 2009 issued by the Appeal Board Chairman of the Nuwara Eliya Regional Office of the Sri Lanka Transport Board regarding a road accident that had taken place while he was in service as a driver in the Gampola Depot of the said Board are justified and, if not justified to what relief he is entitled.*"

It appears that the only *penalty* imposed on the 2nd Respondent had been his dismissal from service. Even though the above reference required the 1st Respondent Arbitrator to examine whether the termination of services of the 2nd Respondent was justified, it is clear from the proceedings held before the 1st Respondent on 2nd August 2013 that the 2nd Respondent was content if the Petitioner was agreeable to pay the statutory payments due to the 2nd Respondent, together with suitable compensation.

By his award dated 5th June 2017, marked '**P3**', the 1st Respondent had held as follows:

> "2014.03.31 දින බේරුම්කරණ ක්‍රියාවලිය ආරම්භ කළ අවස්ථාවේදි ඉල්ලුම්කරු තමාට ලැබිය යුතු වන්දියක් හෝ කරුණා සහගත දිමනාවක් හෝ සමග අනෙකුත් සියළු ව්‍යවස්ථාපිත දිමනා ලබාගැනිමටත්, යටොක්ත සියළුම දිමනා ඉල්ලුම්කරු වෙත ලබාදිමටත් ශ්‍රී ලංකා ගමනාගමන මණ්ඩලයේ නිතිඥවරු එකගතාවය පළ කිරීමෙන් අනතුරුව මෙම බේරුම්කරණයේ කටයුතු නිමාවට පත් කිරීම සඳහා දෙපාර්ශවයේ එකගතාවය මත තීරණය කළෙමි."

Dissatisfied by the said award relating to the payment of compensation, the Petitioner filed this application, seeking a Writ of Certiorari to quash the award '**P3**'.

The learned Counsel for the Petitioner presented three arguments.

The first argument was that the reference to arbitration is bad in law in view of the provisions of Sections 44B(1)(c) and 44B(2) of the Industrial Disputes Act, which reads as follows:

Section 44B(1)(c)

> "*Notwithstanding anything to the contrary in any other written law, a suit for the recovery of any sum due under this Act from any employer to any workman shall be maintainable if it is instituted within two years after that sum has become due*."

Section 44B(2)

> "*For the purposes of this section, "sum of money" includes, where any benefit is due under this Act from an employer and where such benefit is capable of being computed in terms of money, such amount as may be determined by the court in which the action for the recovery of the value of such benefit is brought*."

The argument of the learned Counsel for the Petitioner was that the arbitration proceedings had been initiated for the recovery of money, and that as the reference to arbitration had been made after a lapse of two years from the date of the Appeal Board decision, the reference to arbitration is not in compliance with the provisions of Sections 44B(1)(c) and 44B(2). Quite apart from the initiation of arbitration proceedings not being a suit, as contemplated by the provisions of the Industrial Disputes Act, the dispute that was referred for arbitration did not relate to the recovery of money, but to the question of whether the termination of the services of the 2nd Respondent was justified. Hence, this Court does not see any merit in the first argument advanced on behalf of the Petitioner.

The second argument of the learned Counsel for the Petitioner was that the Legal Officer of the Petitioner had not agreed to the payment of compensation, as recorded by the 1st Respondent, and that the findings of the 1st Respondent to that effect is erroneous.

According to the proceedings of 31st March 2014, marked '**P2c**', the 2nd Respondent had indicated that he is not in a position to proceed with the arbitration due to his personal difficulties, and agreed to the following:

> "එය විසඳනු වෙනුවට ඔහුට ලැබිය යුතු ව්‍යවස්ථාපිත දීමනා ඉක්මනින් ලබා ගැනීමට එකඟත්වය පළ කර සිටි. එම දීමනා ලබා ගැනීමට අවශ්‍ය පියවරන් සඳහා වගඋත්තරකාර පාර්ශවය වෙනුවෙන් පෙනී සිටින නීතිඥ, මහත්මිය විසින් නිත්‍යානුකූල කටයුතු කිරීමට එකඟත්වය පළ කර සිටි. ඒ අනුව ගොනුවේ ක්‍රියාකාරිත්වය නතර කර සිටි."

The agreement of the Legal Officer was therefore to expedite the payment of all statutory payments, and not to the payment of compensation.

Arbitration proceedings had not been held thereafter for almost three years. The inquiry had recommenced on 15th February 2017 -vide '**P2e**' – where the following had been recorded:

> "මේ අවස්ථාවේදී වගඋත්තරකාර පාර්ශවය වෙනුවෙන් පැමිණ සිටින නීති නිලධාරී මහත්මිය මෙසේ කියා සිටි.
>
> මෙම නඩුව අවසන් වරට කැඳවූ 2014.03.31 වන දින ඉල්ලුම්කරු පැමිණ සිටි අතර තවදුරටත් මෙම නඩුව පවත්වාගෙන යාමට තමාට හැකියාවක් නොමැති බවද, එසේම නියෝජිතයකු මගින් හෝ පවත්වාගෙන යාමට තමාට හැකියාවක් නොමැත් බවත්, ඒ අනුව තමාට හිමි ව්‍යවස්ථාපිත දීමනා ලබා ගැනීමට එකඟත්ව පළ කරන ලදී, එකී ව්‍යවස්ථාපිත දීමනා නිත්‍යානුකූලව ලෙස ලබා දීමට කටයුතු කරන බව වඋත්තරකාර පාර්ශවය වෙනුවෙන් පෙනී සිටින ලද නීති නිලධාරිනිය ප්‍රකාශ කර ඇත, ඒ අනුව මෙම නඩු ගොනුවේ ක්‍රියාතාරිත්වය අවසන් කර ඇත.
>
> අධිකරණය
>
> ඉල්ලුම්කරුගේ ඉල්ලීමට හා වගඋත්තරකාර පාර්ශවයේ නීති නිලධාරී මහත්මියගේ ප්‍රකාශ පරීදි මෙම නීති කෘත්‍ය මෙතනින් අවසන් කිරීමට තීරණය කරමි. ඒ සඳහා දෙපාර්ශවයට ඉඩ දෙමි. ඒ අනුව ප්‍රදානය කිරීමට නියමිතය."

Thus, it is clear that the Petitioner had not agreed to the payment of any compensation to the 2nd Respondent.

In the written submissions filed on behalf of the 2nd Respondent, it has been stated that on 31st March 2014 as well as on 15th February 2017, the Petitioner agreed to pay all statutory payments due to the 2nd Respondent,

and that the 1st Respondent agreed to make the award on that basis. The 2nd Respondent has not taken up the position that the Petitioner, through its Legal Officer agreed to pay compensation, in addition to the statutory payments due to the 2nd Respondent. In these circumstances, there is no doubt that the Petitioner has not agreed to pay any compensation to the 2nd Respondent, and that the award of the arbitrator is factually incorrect.

This Court is mindful that in this application, it is exercising its writ jurisdiction as opposed to its appellate jurisdiction, and to the fact that this Court is not concerned with *the rights and wrongs* of the decision, but only whether such decision is legal or not. However, it is an accepted fact that a Court can intervene when there is '*no evidence*' to support the finding of the administrative body. This issue has been discussed in **Administrative Law** by Wade and Forsyth[1] 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*."

In **Samarakoon Jayasundera Mudiyanselage Kiri Banda vs. A.H. Irangani Samaraweera and Others**[2], this Court held as follows:

> "*Generally, courts exercising judicial review do not review errors of fact made by administrative bodies/officials, unless those errors of fact are linked to the assumption of the administrative body's jurisdiction i.e. jurisdictional errors of facts.*[3] *[R v. Fulham, Hammersmith and Kensington*

[1] 11th Edition; page 227.
[2] CA (PHC) 98/2007; CA Minutes of 19th October 2018.
[3] See Barnett H, Constitutional and Administrative Law, 3rd Edition, Routelege 2014 at page 763 where it is stated that a court will be reluctant to review a non-jurisdictional error of fact because it is

Rent Tribunal (1951) 2 K. B. 1 at 6; Walter Leo v Land Commissioner 57 NLR 178]. One exception to this general principle is the 'no evidence rule'."

Having referred to the above passage from **Administrative Law** by Wade and Forsyth, this Court went on to state as follows:

"*The observations made by the text writers about this ground of judicial review have been adopted and endorsed by the Supreme Court in Kiriwanthe v Navaratne [(1990) 2 Sri LR 393 at 409] and in Nalini Ellegala v Poddalagoda [(1999) 1 Sri LR 46 at 52].*

In Hasseen v Gunasekara and others [CA Application No. 128/86 C.A.M. 02.10.1995] this court considered an order of the Rent Board of Review, affirming an order of the Rent Board which had been "arrived at without an adequate evaluation of the evidence and by failing to take into consideration relevant items of evidence which could have influenced the finding" and held the Rent Board as well as the Board of Review had "erred in law by failing to take into account relevant items of evidence in arriving at the finding" and therefore quashed the orders of the Rent Board as well as of the Board of Review.

Therefore, when a factual finding by an administrative body is not supported by the evidence on record, or has been made ignoring relevant and established evidence on record, the court has the ability to exercise judicial review."

Having carefully considered the proceedings before the 1st Respondent, this Court is of the view that the 1st Respondent has clearly erred when he arrived at the finding that the Petitioner had agreed to the payment of compensation to the 2nd Respondent. In the said circumstances, this Court is in agreement with the second argument of the learned Counsel for the Petitioner, and is of the view that, that part of the award '**P3**' dealing with the payment of compensation, is liable to be quashed by a Writ of Certiorari.

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presumed that administrative decision makers have all the factual information on hand and are best equipped to make factual determinations.

The final argument of the learned Counsel for the Petitioner was that in any event, the award is uncertain, in that the amount of compensation has not been specified and therefore, the award is not capable of being given effect to, or enforced. This Court is of the view that an award must be specific and must be capable of being given effect to, which unfortunately is not the case in this application.

The learned Counsel for the 2nd Respondent has accepted this position and submitted that whether compensation should be paid, and if so, the quantum of such compensation has been left to the discretion of the Petitioner. This Court is of the view that an Arbitrator cannot leave the payment of compensation at the discretion of the employer. Where an arbitrator is of the view that compensation must be paid, quite apart from supporting such a conclusion with the evidence led before him, the Arbitrator must state the quantum of such compensation, and the basis for the calculation of such compensation. The 1st Respondent has done neither.

In **Municipal Council Colombo vs Munasinghe**[4] 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 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,*

[4] 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].

for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin."

The Supreme Court, in **Singer Industries (Ceylon) Limited vs The Ceylon Mercantile Industrial and General Workers Union and Others**[5] agreeing with the above observations in Municipal Council Colombo vs Munasinghe[6] held as follows:

"*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*."

In **Heath and Company (Ceylon) Limited vs Kariyawasam**,[7] 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 the evidence led before him, such a finding can only be described as being perverse and his award is liable to be quashed by way of Certiorari.

In **All Ceylon Commercial and Industrial Workers Union vs Nestle Lanka Limited**,[8] 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

[5] [2010] 1 Sri LR 66.
[6] Supra.
[7] 71 NLR 382
[8] [1999] 1 Sri LR 343 at page 348.

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[9]*.*

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."

Regretfully, the 1st Respondent has lost sight of his role as an Arbitrator, and made an award which is vague, uncertain, and is not enforceable. In these circumstances, this Court is in agreement with the learned Counsel for the Petitioner that the award is liable to be quashed for not being certain.

Before concluding, this Court must note that there has been an inordinate delay on the part of the Petitioner in the payment of gratuity to the 2nd Respondent, which probably resulted in the reference to arbitration, and this application. Although the services of the 2nd Respondent had been terminated on 21st November 2008, and the Petitioner had undertaken before the 1st Respondent to pay the gratuity that was due to the 2nd Respondent as far back as 2014, the payment had been made only on 19th December 2018.[10] Given the dire circumstances faced by persons such as the 2nd Respondent who lose their employment, this Court is of the view that the Petitioner must act responsibly and comply at all times with the provisions of the Payment of Gratuity Act No. 12 of 1983.

In the above circumstances, this Court issues a Writ of Certiorari quashing that part of the award '**P3**' that deals with the payment of compensation and ex-gratia payment to the 2nd Respondent. This Court makes no order with regard to costs.

Judge of the Court of Appeal

[9] 78 NLR 255.
[10] Vide motion dated 7th October 2018 filed on behalf of the Petitioner.