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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution

Assistant Commissioner of Labour
District Labour Office
Colombo North

Complainant

Vs.

Court of Appeal
No: **CA/ PHC/121/17**

High Court of
Case No: HCRA/46/2016

Magistrate's Court
Case No: 55549/05

On behalf of
Ceylon Oxygen Limited
P. O. Box 322, Colombo
(No. 50 Pangnananda Mawatha, Colombo 15)

1. The Director
   Kattar Aloysius
   2, 6th Lane
   Colombo 3

2. The Director
   Jayasooriya Mahathalage Lalith
   Mahimus Peiris
   22, Maha Hunupitiya
   Negombo

3. The Director
   Kanagaratnam Nirmalan
   8/1 Rosmead Place
   Colombo 07

4. The Director
   Per Kanaram
   No. 50 Pangnananda Mawatha,
   Colombo 15

5. The Director
   Lo Kim Heti

6. The Director
   Avanthsa Venkatteri Lakshmi
   Narasinghe Rao
   No. 24B, Bullers Lane
   Colombo 07

7. Assistant Commissioner of Labour
   District Labour Office Colombo North
   Labour Secretariate
   Narahenpita
   Colombo 5

Respondents

And now between

The Ceylon Mercantile, Industrial and General Workers' Union
No. 03, 22nd Lane
Colombo 3

Petitioner – Appellant

Vs.

1. Ceylon Oxygen Limited
   P.O. Box 22, Colombo
   More correctly
   Ceylon Oxygen Limited
   P.O. Box 22, Colombo
   No. 50 Pangnananda Mawatha,
   Colombo 15

2. The Director
Kattar Aloysius
2, 6th Lane
Colombo 3

3. The Director
Jayasooriya Mahathalage Lalith
Mahimus Peiris
22, Maha Hunupitiya
Negombo

4. The Director
Kanagaratnam Nirmalan
8/1 Rosmead Place
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No. 50 Pangnananda Mawatha,
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No. 24B, Bullers Lane
Colombo 07

8. Assistant Commissioner of Labour
District Labour Office Colombo North
Labour Secretariate
Narahenpita
Colombo 5

Respondent – Respondents

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Saliya Edirisinghe for the Petitioner-Appellant. Kamran Aziz with Ershan Anaratnam for the 1st Respondent Chandana Sri Nissanka for the 3rd and 4th Respondents Hashini Opatha SC for the 8th Respondent
Argued on	:	02.12.2021
Decided on	:	18.01.2022

Iddawala – J

This appeal has been filed by The Ceylon Mercantile, Industrial and General Workers' Union, appellant-petitioner (hereinafter referred to as the petitioner) against the order dated 20.07.2017 delivered by the Learned Provincial High Court Judge of Colombo which dismissed the application of the petitioner, re-affirming the order of the Learned Additional Magistrate of Colombo dated 10.07.2014 which held in favour of the accused Ceylon Oxygen Limited (hereinafter referred to as the respondent) in MC Case No. 55549/05.

MC Case No. 55549/05 was filed by the Assistant Commissioner of Labour (hereinafter referred to as the complainant), charging the respondent for committing an offence under the provisions of section 40(1)(a), of the Industrial Disputes Act ((hereinafter referred to as the Act or IDA) for non-compliance with the arbitral award dated 29.03.2005 made under the provisions of the Act. Dissatisfied with the final determination dated 10.07.2014 by the Magistrate Court, the petitioner had filed a

revisionary application in the Provincial High Court on 17.03.2016 to revise and set aside the said order of the Magistrate Court.

On 20.07.2017, the Provincial High Court delivered its order, dismissing the revision application. Aggrieved by such dismissal, the petitioner has preferred the present application to this Court, praying for, *inter alia*, the following:

1. Set aside the judgment of the learned Provincial High Court Judge dated 20.07.2017

2. Set aside the order of the Additional Magistrate in MC Case No. 55549/5 dated 10.07.2014

3. Order/direct the learned Additional Magistrate to take up for trial the Complaint and the Charge Sheet in Case No. 55549/5

The law relating to industrial disputes is primarily governed by the IDA, as amended and has witnessed a steady growth *vis-à-vis* judicial interpretation and legislative interventions. As enunciated by His Lordship Justice Amerasinghe, in Elmo Rex Lord and Another, Partners, Mercantile Printers and Stationers v Eksath Kamkaru Samithiya 2001 1 SLR 161, *"The law relating to employment is not a one-way street. Justice, fairness and equity must be meted out even-handedly to employees and employers alike."* At its crux, the law recognizes the 'unequal playing field' created between the employer organization and its workmen thereby vesting both parties with rights, entitlements and avenues of redress through mechanisms of dispute settlement. Among such dispute resolution methods, arbitration can be seen as one of the main stream dispute settlement mechanisms adopted by many, where the IDA further provides for both voluntary as well as for compulsory arbitration. The Commissioner of Labour plays an integral role in the scheme of industrial disputes, and as such, his powers are set out in section 3 of the Act.

Section 3(1)(d) of the Act reads as follows:

> *"If the parties to the industrial dispute or their representatives consent, refer that dispute, by an order in writing, for settlement by arbitration to an arbitrator nominated jointly by such parties or representatives, or in the absence of such nomination, to an arbitrator or body of arbitrators appointed by the Commissioner or to a labour tribunal."*

As such, the legal framework set out by the Act provides for compulsory arbitration and voluntary arbitration. Voluntary arbitration takes place where the parties to an industrial dispute consent to the reference of such dispute by the Commissioner of Labour to an arbitrator chosen by the parties or chosen by the Commissioner of Labour, if the parties cannot agree on the nomination of an arbitrator (section 3(1)(d)). Compulsory arbitration can only arise on a reference made to the Minister of Labour who may, if he is of the opinion that an industrial dispute is a minor dispute, refer it by an order in writing for settlement by arbitration to an arbitrator appointed by him or to a labour tribunal even though the parties to such dispute or their representatives do not consent to such reference (Section 4(1)) – The Legal Framework of Industrial Relations in Ceylon S. R. De Silva (1973) H. W. Cave & Company

The reference to arbitration concerned in the present application was done under section 4(1) of the Act.

The arbitration proceedings commenced in February 2005 and the arbitral award was granted on 29.03.2005 in favour of the petitioner. Thus, as per section 18(2)/18(3)/18(4) of the Act (publication of award, date on which it comes into force and its duration), the award of the arbitrator came in to force on 29.03.2005 and the same was published in the Gazette as per section 18(1) of the Act. It is pertinent at this juncture to refer to section 19 of the Act which states the following:

> *"Every award of an arbitrator made in an industrial dispute and 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 the award in accordance with the provisions of section 17 (2); and the terms of the award shall be implied terms in the contract of employment between the employers and workmen bound by the award."*

Close to two months had passed since the award of the arbitrator came into force without any compliance on the part of the respondent. Subsequently, on 10.06.2005, the respondent filed a writ application before the Court of Appeal. While the writ matter was pending before the court, the respondents took measures to repudiate the award of the arbitrator, and as such, the Notice of Repudiation was published in the Gazette on 04.08.2005 in compliance with section 20 of the Act. Thereafter, the award of the arbitrator ceased to have any effect as of 20.05.2006. Subsequently, the respondent withdrew the writ application Writ 366/2008 on 29.09.2008.

It was submitted on behalf of the petitioner that filing of a writ application necessarily prevented the complainant from initiating criminal proceedings against the respondent for default in compliance with the award, an observation echoed by the Magistrate Court at a later stage when it referred to the termination of the writ application (29.09.2008) as the first instance at which the complainant could have instituted action against the respondent.

It was only on 21.05.2010 that the Commissioner of Labour instituted criminal prosecutions before the Magistrate Court against the respondent under section 40(1)(a) of the Act for committing the offence of failure to comply with the award of the arbitrator. A preliminary objection was taken up against such institution of proceedings where the respondent argued that the Magistrate Court lacked jurisdiction to hear the matter in light of the repudiation of the award of the arbitrator made effective on 20.05.2006.

The order of the Magistrate Court was delivered on 10.07.2014 which held in favour of the respondents and observed that the delay between the termination of the writ application Writ 366/2008 on 29.09.2008 and the initiation of criminal prosecution on 21.05.2010 acted against the complainant. Preliminary objection against sustaining the prosecution was upheld, and the court held that it lacked jurisdiction to hear the matter as the award of the arbitrator had already been rendered ineffective pursuant to subsequent repudiation.

Against such order, the petitioner filed a revision application before the High Court on 17.03.2016. The High Court delivered its judgement on 20.07.2017 and re-affirmed the order of the Magistrate Court. The High Court Judge made a pronouncement on the

delay on the part of the petitioner in filing the revision application and rejected the explanations given by the petitioner thereunder. Against such order, the present application has been preferred.

As such, the primary contention to be determined by this Court concerns the maintainability of the criminal prosecutions under the provisions of the Act, initiated by the Assistant Commissioner of Labour on 21.05.2010 when analyzed in the context where the repudiation of such arbitral award was made effective on 20.05.2006.

At this juncture, it is pertinent to refer to the relevant legal provisions of IDA and decided case laws on the subject matter of repudiation.

Accordingly, section 20 of the IDA notes that;

> *(1) Any party, trade union, employer or workman, bound by an award made by an arbitrator under this Act, may repudiate the award by a written notice in the prescribed form sent to the Commissioner and to every other party, trade union, employer and workman bound by the award:*
>
> *Provided that-*
>
> > *(a) it shall not be necessary for any employer or any workman who is a member of a trade union which is, or is included in, a party bound by the award to be notified independently of such trade union; and*
> >
> > *(b) any employer or workman who is a member of a trade union which is, or is included in, a party bound by the award, shall not be entitled to repudiate the award independently of such trade union, and any notice of repudiation given independently by any such employer or*

workman shall not be a valid notice for the purposes of this Act.

(2) Where a valid notice of repudiation of an award is received by the Commissioner, then, subject as hereinafter provided-

(a) the award to which such notice relates shall cease to have effect upon the expiration of three months immediately succeeding the month in which the notice is so received by the Commissioner or upon the expiration of twelve months from the date on which the award came into force as provided in section 18 (2), whichever is the later; and

(b) the Commissioner shall cause such notice to be published in the Gazette, together with a declaration as to the time at which the award shall cease to have effect as provided in paragraph (a):

Provided, however, that where valid notice of repudiation of any award is given by one or some only, but not all, of the trade unions, employers or workmen, included in a party bound by the award, such award shall cease to have effect only in relation to each trade union, employer or workman giving such notice and to the members of any such union, but shall otherwise continue in force and have effect accordingly.

In the case of K. Ram Banda v, The River Valleys Development Board 71 NLR 25 (1968) Weeramantry J referred to the history of the Industrial Disputes Act, No. 43 of 1950 and had noted that,

"The forerunner of the present legislation relating to the conciliation between employer and employee was the Industrial Disputes Ordinance, No. 3 of 1931, an Ordinance providing for the investigation and settlement of industrial disputes. This Ordinance provided for the appointment by the Governor of commissions to inquire into matters relating to industry which might be referred to it by the Governor. The Controller of Labour could also take certain steps towards effecting a settlement and it was the duty of Conciliation Boards to bring about a settlement of disputes referred to them. Where settlements were so arrived at, the settlements were binding, but if not arrived at, the proposals for settlement recommended by the Board were published in the Gazette and any party failing to make a statement rejecting the settlement was deemed to have accepted such settlement. ***However, a right of repudiation was expressly conferred, and there was thus no imposition of such terms upon an unwilling*** **party**." (Emphasis added)

In Walker Sons & Co., Ltd v F. C. W. Fry 68 NLR 73 which constituted a full bench of the Supreme Court including His Lordship Sansoni CJ at page 85 referred to section 20 of the Act as follows:

"Under section 20 of the Act, any party, trade union, employer or workman bound by an arbitrator's award may repudiate it by notice given to the Commissioner and the other parties. Upon the expiration of 3 months succeeding the month on which the notice is so given, or upon the expiration of 12 months from the date on which the award came into force, whichever is later, the award ceases to have effect.

The principle underlying this provision is that an arbitrator's award is a mere temporary settlement of an industrial dispute, which does not have the effect of preventing new disputes arising or new conditions of work, wages, etc., being laid down in the future*."* (Emphasis added)

Somasunderam Vanniasingham v Forbes and Another 1993 2 SLR 369 at page 369 held that,

> *"The instant case poses the question as to whether the right to repudiate an unacceptable award under Section 20 (1) of the Industrial Disputes Act is in the nature of a sufficient administrative remedy. There has been no due repudiation of the award within time so that the award remains binding on the scheme.* ***Repudiation results in the award ceasing to bind the parties. Once repudiated, the award no longer regulates or determines the rights or duties of the parties in respect of the dispute. But though rendered ineffective it remains part of the record. The dissatisfied party complains he has had no relief in relation to the dispute. There is no other relief he can have access to under the statute. In no sense therefore could it be said that repudiation of the award could have afforded him an equally appropriate and effective remedy as the discretionary remedy of certiorari which could strike down the award if illegality is present.*** *The appellant complains of errors on the face of the award. The appellant seeks review of the award to correct those errors. There are no words in the statute suggesting exclusion of ordinary remedies either expressly or by implication. In any case, review is a remedy within his rights to seek. He challenges illegalities in the award. This he can do in the circumstances. The Court of Appeal should have enquired into his application and in the exercise of its discretion made an order on the merits. This the Court failed to do.* (Emphasis added)

Thirunawakarasu v Siriwardena and others 1981 1 SLR 185 was heavily relied on both by the petitioner and the respondents. The nature, effect and operation of an award of arbitration was explained in the judgement as follows at page 193:

> *"The award in the case of an arbitration therefore is not intended to be a respite -and to provide a temporary breathing space leaving the parties free thereafter to reopen the disputes. No; the award is intended to be a true*

settlement of the existing dispute and that settlement is made binding on the parties with the sanction-of the award behind it., What the award seeks to do is to resolve the dispute by formulating a new set of terms and conditions, which are fair and reasonable to both parties, and imposing such terms on the parties so that these terms and conditions will supersede the original position of the parties and provide a new relationship that would henceforth guide the conduct of the parties. These terms and conditions are statutorily made implied terms in the contract of employment. In addition to that, ***the award will be binding on the parties and is made operative in its character of an award for a minimum period of twelve months. This means that there are some special sanctions, including criminal sanctions to back the award in its character as an award. During that period and in respect of that period. when the award will subsist, all rights and liabilities pertaining to the award in its character as an award can be enforced as an award****."* (Emphasis added)

The most potent portion of the judgment in relation to the present application is found at page 194 as follows:

"The law no doubt allows a repudiation of the award at any time after the required minimum period. What then is the effect of such a repudiation? In my view such a repudiation can have only prospective application and cannot affect any rights and obligations that have already accrued to the parties and have become terms and conditions of service. From and after the date of repudiation the parties are freed from the constraints and fetters of the award in its nature as an award. Henceforth the parties would be at liberty to order their affairs like any other employer or employee but- and this is important-any change that is sought can only be effected from the prevailing position; by this. I mean that the terms and conditions then subsisting (which will include those that came in by way of the award) must necessarily form the starting point. A repudiation of an award in my view can never result in going back to the contentious position of the parties which

had originally prevailed at the time of the dispute. To do so would be to devalue the concept of arbitration altogether and to make arbitral proceedings an almost useless exercise."

The impugned order of the High Court observed the following with regard to the effect of repudiation at page 16,

1. *"Upon the repudiation by notice and publication, the employer if he fails to abide by the terms of the award, he does not incur the penalties and criminal sanction as provided for by the Industrial Disputes Act, nor can the award be enforced in the manner as prescribed by section 40(1) 43(4) and 43(2) of Industrial Disputes Act. The effect of repudiation of the award is that it prevents the enforcement of the obligations under the award by imposing criminal sanction or penalties in the manner provided for in the IDA.*

2. *The accrued rights and obligation which flow from the award are not wiped out and cannot affect any rights and obligations that have already accrued to the parties and have become terms and conditions of service. Such accrued rights upon repudiation may be enforced by resorting to relevant forum."*

This Court is in agreement with the view of the Learned High Court Judge. The judgment of Kulatunga, Labour Officer, Colombo South v Dodangoda and Others 1987 (1) SLR 1 further buttress this view. It concerned an award of an arbitrator dated 29.10.1981, which was to the effect that the employers who are the accused-respondents in the case should reinstate the workers concerned and should also deposit a sum of Rs.23,381.92, with the Assistant Commissioner of Labour, Colombo-South to be distributed among the workers concerned. However, the accused-respondents had failed to comply with this award and had repudiated it on 12.02.1982. A plaint was filed in the Magistrate Court on 19.05.1982 against the accused respondents for committing an offence under section 40(1)(a) of the IDA for non-compliance with an arbitral award. A preliminary objection raised by the accused-respondent was upheld, and the court pronounced that the award has lapsed with repudiation, and as such, the Magistrate Court lacked jurisdiction to order the accused-respondent to comply with the award, thereby acquitting the accused. Aggrieved by the said decision, an appeal was preferred to the

Court of Appeal. The Court of Appeal held that in terms of sec. 20(2)(a), notwithstanding notice of repudiation, an award made by an arbitrator is binding on the parties to the award for a minimum period of 12 months. During the period specified in section 20(2)(a), any person who acts in violation of such an award would be contravening the provisions of section 40(1)(a) of the Industrial Disputes Act and would thus be guilty of an offence punishable under sec 43 (1) read with section 43 (4) of the Act. In coming to such a conclusion, the determining factor was that when the plaint was filed, the arbitrator's award bound the accused-respondents as it was yet to cease effect. The judgment observed the following

> *"State Counsel also urged that even where an award is repudiated if a party acts in violation of the award during the period specified in section 20(2)(x) of the Act, such party commits an offence under section 40 (1) (a) of the Industrial Disputes Act.... I am in agreement with the submissions made by State Counsel on this question, and I hold that during the period specified in section 20(2)(a) of the Industrial Disputes Act, any person who acts in violation of such an award would be contravening the provisions of section 40(1)(a) of the Industrial Disputes Act, and would thus be guilty of an offence under this Act, which would be punishable under section 43 (1) read with section 43 (4) of the said Act.*
>
> *I am of the view therefore, that the learned Magistrate was in error when he held that with the repudiation of the award such award ceased to have effect, and that the court had no jurisdiction to order the accused-respondents to comply with such award. We therefore set aside the order of the learned Magistrate and allow the appeal and remit this case back to the Magistrate's Court. The Magistrate is directed to proceed with the trial in this case and make an order in accordance with the law."*

Upon an extrapolation of the above judicial pronouncements and in line with the precedent set by Kulathunga (supra), it is evident that the event chronology of the present case is the basis in determining the issue whether the criminal prosecution against the respondent could be maintained in light of the repudiation of the arbitral award.

At this juncture it is suitable to refer to Maxwell on Interpretation of Statutes, (2006) 12th Edition Lexis Nexis Butterworths at Page 309.

> *"Where a statutory period runs "from" a named date "to" another, or the statute prescribes some period of days or weeks or months or years within which some act has to be done, although the computation of the period must in every case depend on the intention of Parliament as gathered from the statute, generally the first day of the period will be excluded from the reckoning, and consequently the last day will be included"*

As such, this Court will now examine the actions taken by the petitioner and the complainant within the context of the chronology of events that took place thus far.

The arbitral award came into effect on 29.03.2005. Within the 12 months subsequent to such date, no conceivable action has been taken on behalf of the petitioner either by the Commissioner of Labour or by their own volition. The only action is the writ application filed by the respondent praying for a writ of certiorari quashing the said arbitral award. Even if one were to argue that due to the pendency of the writ application, the complainant was prevented from initiating prosecution in the Magistrate Court, the writ application was terminated on 29.09.2008. It took more than a year (10.05.2010) for the complainant to institute criminal proceedings against the respondent.

In the meantime, the respondent has exercised a statutorily conferred right showcasing his unwillingness to be bound by the arbitral award repudiation. Had proceedings been instituted prior to such repudiation (following the precedent set by Kulathunga (Supra)), the Magistrate Court would be with jurisdiction to prosecute the respondent.

Hence it is observable with abundant clarity that the complainant instituted criminal prosecutions after the arbitral award was legally repudiated. Had the complainant initiated such proceedings any time prior to 20.05.2006, the outcome would be the opposite.

It must be noted that the framers of the Act did not envision a right of appeal to a party who refuses to be bound by an arbitral award. The only option for such a party, other

than resorting to a writ jurisdiction, is to repudiate the arbitral award, which has been done in the present instance.

During the argument stage, the counsel for the petitioner submitted that in delivering the judgment of Thirunawakarasu (supra), the court did not have the benefit of hearing submissions on the fact of criminal prosecution; rather, they were assisted by counsel only on the point of whether a subsequent quantification of compensation under an arbitral award could be allowed in light of repudiation of the same. The counsel attempted to distinguish the relief prayed in the Thirunawakarasu case, stating that unlike in the present application, the Thirunawakarasu case did not pray for a re-prosecution of a criminal trial by the Magistrate Court. Counsel for the petitioner relied on the Thirunawakarasu case only to the extent of delineating the effect of repudiation as 'prospective' thereby contending that the subsequent repudiation by the respondent did not obviate him from criminal liability the respondent incurred when the respondent failed to comply with the award of the arbitrator. To further buttress the argument, the counsel relied on section 456 of the Code of Criminal Procedure, which set out the period of prescription for crimes or offences and held that criminal proceedings could be maintained against the respondent despite repudiation. The said section states as follows:

> *"The right of prosecution for murder or treason shall not be barred by any length of time, but the right of prosecution for any other crime or offence (save except those as to which special provision is or shall be made by law) shall be barred by the lapse of twenty years from the time when the crime or offence shall have been committed."*

In light of the above discussion on the effect of a repudiation of an arbitral award and following the precedent set by Kulatunga, Labour Officer, Colombo South v Dodangoda and Others (supra) it is the considered view of the Court that a need to examine an 'offence' or application of section 456 of the Code of Criminal Procedure does not arise in the given case as a legally binding and valid award of the arbitrator did not subsist at the time a charge sheet was preferred against the respondent.

A violation of an award of the arbitrator amounting to an offence under section 40(1) of the Act does not arise when such award is no longer in operation. The effect of the exercise of the statutorily conferred right on a party refusing to be bound by an arbitral award thus amounting to repudiation would be made redundant if criminal prosecutions could be instituted even after such award cease to have an effect. As such, no charge sheet could be served upon valid repudiation of an award of arbitration.

Alternatively, during the argument stage, the petitioner referred to the time consumed for gathering sanction from the complainant as a reason for the delay in filing the present application. It is the view of this Court that the application to the High Court being in the nature of a revision, sanction as per section 44 of the Act is not a requirement. Section 44 says *"No prosecution for an offence under this Act shall be instituted except by or with the written sanction of the Commissioner".* The said requirement is only necessary for instituting criminal prosecution in the court of first instance. Provisions in connection with representation and appearance on behalf of any party are set out under section 46 of the IDA.

Appeal dismissed without cost.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL