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

CASE NO: CA/WRIT/134/2018

1. Ceylon Grain Elevators PLC,
   No.15, Rock House Lane,
   Colombo 15.
2. Millennium Multibreeder Farms (Pvt) Ltd.
   No.15, Rock House Lane,
   Colombo 15.
3. Ceylon Warehouse Complex (Pvt) Ltd.,
   No.15, Rock House Lane,
   Colombo 15.
4. Ceylon Aquatech (Pvt) Ltd.,
   No.15, Rock House Lane,
   Colombo 15.
5. Ceylon Pioneer Poultry Breeders (Pvt) Ltd.,
   No.15, Rock House Lane,
   Colombo 15.
6. Three Acre Farms Ltd.,
   No.15, Rock House Lane,
   Colombo 15.

   Petitioners

Vs.

1. W. J. D. Seneviratne,
   Minister of Labour,
   Labour Secretariat,
   Colombo 05.
2. R. P. A. Wimalaweera,
   Commissioner General of
   Labour,
   Labour Secretariat,
   Colombo 05.
3. Inter Company Employees
   Union,
   No.259/9, Sethsiri Mawatha,
   Koswatta,
   Thalangama.
4. T. Piyasoma,
   No.77, Pannipitiya Road,
   Battaramulla.
5. P. Navaratne,
   No.570/B/1, Ekamuthu
   Mawatha,
   off Nugegoda Road,
   Talawathugoda.
6. S. Kariyawasam,
   No.28, Abeyrathna Mawatha,
   Boralasgamuwa.

Respondents

Before:	Mahinda Samayawardhena, J. Arjuna Obeyesekere, J.
Counsel:	Uditha Egalahewa, P.C., with Amaranath Fernando for the Petitioner. Shantha Jayawardena with Hirannya Damunupola for the 3rd Respondent.
Argued on:	22.06.2020
Decided on:	02.09.2020

Mahinda Samayawardhena, J.

The 3rd Respondent is a registered Trade Union. It engaged in several rounds of discussion with the Petitioner employers on behalf of the Petitioners' employees, who are members of the said Trade Union, to achieve the work-related demands of the employees, including salary increase – *vide*, *inter alia*, A2 to A5. Having failed in these discussions, the 3rd Respondent by the letter X3 informed the Petitioners on Friday, March 17, 2006, that its members would commence a strike action on Monday, March 20. The Petitioners, on the same day, informed the 3rd Respondent by X4 that the decision on the demands of the employees would be communicated on Monday, March 20. Despite this response, the strike commenced, as scheduled, on Monday, March 20. However, the strike lasted only a few hours due to the Petitioners having obtained an enjoining Order from the District Court preventing the 3rd Respondent from engaging in the strike action. Soon after serving the enjoining Order on the 3rd Respondent, the Petitioners on the same day (March 20)

proceeded to immediately serve letters of termination on the employees who engaged in the strike action (amounting to 275 employees in total, according to the 3rd Respondent). One such letter of termination dated March 20, 2006 is marked A7.

The Minister referred the dispute – i.e. whether the said terminations of employment were justified, and, if not, what reliefs should be granted to the employees – to the Industrial Court, under section 4(2) of the Industrial Disputes Act, No.43 of 1950, as amended.

After an exhaustive inquiry, at which both parties were fully represented by senior lawyers, the Industrial Court by the Order marked P2 directed the Petitioner employers to reinstate the said employees with back wages.

It is against this Order the Petitioners have filed this application seeking to quash it by certiorari.

The Petitioners challenge P2 on several grounds. Let me now consider them one by one.

The first ground is the reference of the Minister is bad in law, in that, the names listed in the Gazette marked X8 as the employees whose services were terminated are not accurate. The Petitioners say some employees entered into settlements, some are unidentifiable, and some do not have any dispute with the Petitioners.

In fact, this matter was raised before the Industrial Court[1] together with another objection (i.e. that a composite reference to the Industrial Court against six companies is illegal) and the Industrial Court by the Order marked X14 overruled both objections.[2] The Petitioners came before this Court against X14 and this Court by Judgment dated May 18, 2010 affirmed the said Order of the Industrial Court. Hence the Petitioners are debarred from reagitating the same matter again.

Be that as it may, the Petitioners should know which employees' services were terminated as a result of the Trade Union action, which employees entered into settlements, and which employees cannot be identified, and separate those employees from others whose grievances have not yet been addressed. As learned Counsel for the 3rd Respondent says in his written submission, "*if there are such names those names can be separated and removed. It does not render the Award illegal.*"

I reject the first ground.

The second ground is the alleged failure on the part of the Industrial Court to consider the evidence placed before it.

The Petitioners say the Industrial Court analysed the evidence put forward by the 3rd Respondent in detail but did not do so in respect of the evidence of the Petitioners. This is not a reasonable accusation.

---

[1] *Vide*, *inter alia*, pages 315, 399, 401 of the Brief.
[2] *Vide* page 403 of the Brief.

The Petitioners say no employee whose services were terminated as a result of the strike action gave evidence before the Industrial Court. However, the Secretary of the 3rd Respondent Trade Union gave evidence on behalf of the said employees. It is this Secretary who negotiated and communicated on behalf of the employees with the Petitioner employers and therefore was in a better position to give evidence on the legitimacy of the Trade Union action. It must be borne in mind that the termination of services of the employees was due to them engaging in the strike action and not any other disciplinary ground, and therefore calling each and every individual employee to give evidence was not necessary.

The Petitioners say the Industrial Court failed to give due weight to the document marked X5, which is in favour of the Petitioners. But X5 has been denied or not accepted as a genuine document by the 3rd Respondent at the inquiry.[3]

The Petitioners further say although the Industrial Court comments in P2 that the documents marked X16-X23 have not been tendered with the written submissions, the said documents are available in the Brief. On this basis, the Petitioners say the Industrial Court did not consider all the evidence when coming to the impugned decision. Voluminous documentary evidence was tendered at the inquiry. However, the Petitioners do not say how or why consideration of the documents marked X16-X23 would have changed the decision of the Industrial Court. Unless the same is shown to the satisfaction of this Court, this Court

[3] *Vide* pages 1461, 1465, 1467, 1537 of the Brief.

cannot set aside the Order of the Industrial Court on this ground.

I reject the second ground.

The third ground is the Industrial Court failed to consider the illegality of the strike.

According to section 2 of the Trade Unions Ordinance, No.14 of 1935, as amended, a Trade Union can have as one of its objects "*the promotion or organisation of financing of strikes or lock-outs in any trade or industry or the provision of pay or other benefits for its members during a strike or lock-out*".

The freedom to form and join a Trade Union is a fundamental right guaranteed by Article 14 of the Constitution.

A workman has the right to engage in a legitimate strike as a means towards fulfilling legitimate demands. Strike action is a powerful weapon in the armoury of the workman, making the reconciliation process between parties easier and quicker. It has the miraculous power to correct the unequal and incomparable bargaining position of the employer and employee. Yet, I must hasten to add, it shall be adopted not as the first resort but perhaps as the last resort. This does not mean however that unless all other avenues are exhausted, engaging in a strike is illegal and therefore termination of service on that ground is justifiable. Whether or not a strike action is justifiable depends on the facts and circumstances of each individual case. It is presumed a workman who engages in a strike has no intention of terminating his employment. Rather, in doing so, he asserts

his commitment to the employer but on terms more favourable to him. A strike *per se* is not an illegal act. (*Rubberite Company Ltd. v. Labour Officer, Negombo [1990] 2 Sri LR 42*, *Best Footwear (Pvt) Ltd. v. Aboosaly, Former Minister of Labour and Vocational Training [1997] 2 Sri LR 137.*)

The Industrial Court was not of the opinion the strike action taken by the 3rd Respondent was illegal. I have no reason to disagree.

The last ground urged by the Petitioners is the proceedings before the Industrial Court is *ultra vires*, as there was no proper quorum of the Court.

The Minister referred the dispute to the Industrial Court to be heard by three members. The Petitioners say approximately 31 days of the proceedings were conducted in the presence of only two members and, therefore, the entire proceedings including the Order shall be quashed.

As I stated earlier, at the inquiry before the Industrial Court, the Petitioners were represented by eminent lawyers.

This is not a new objection taken up for the first time in this Court. This matter was raised before the Industrial Court by learned President's Counsel for the Petitioners eight years after the commencement of the proceedings in the Industrial Court.[4] On that occasion, learned President's Counsel candidly accepted that the proceedings had been duly conducted before two

[4] *Vide* page 1235 of the Brief.

members with the consent of both parties.[5] As I understand, learned President's Counsel made an application to the Industrial Court to adjourn the inquiry on that day and proceed with the further inquiry in the presence of all three members from that point onwards.[6] This application was allowed by the Industrial Court.[7] Thereafter, Petitioners' Counsel moved to file affidavit evidence in lieu of oral evidence, which was also allowed.[8] All three members of the Industrial Court were present thereafter without any absence. This means the lapse, if any, in respect of the quorum of the Industrial Court was perpetuated and thereafter rectified with the consent of the Petitioner employers. Having so acted, the Petitioners cannot now move this Court to quash the entire proceedings *ab initio* on the ground there was a lack of quorum in the early proceedings of the Industrial Court.

Unlike other legislative enactments, the Industrial Disputes Act, No.43 of 1950, as amended, is silent on the quorum of the Industrial Court. For instance, section 3(4) read with item 8(2) of the Schedule to the Consumer Affairs Act, No.9 of 2003, enacts "*The quorum for any meeting of the Authority shall be four members.*" Section 2 of the High Court of the Provinces (Special Provisions) (Amendment) Act, No.54 of 2006, which introduced *inter alia* section 5B to the principal Act, enacts "*The jurisdiction of a High Court of a Province referred to in section 5A, shall be ordinarily exercised at all times by not less than two judges of that Court, sitting together as such High Court.*" Section 26(1) of

---

[5] *Vide* page 1231 of the Brief.
[6] *Ibid.*
[7] *Vide* page 1235.
[8] *Vide* page 1245.

the Urban Councils Ordinance and section 26 of the Village Communities Ordinance similarly stipulate the quorum for meetings shall be one-third of the members in office on that day. There is no comparable provision in the Industrial Disputes Act in relation to the quorum of the Industrial Court.

Instead, section 31(1) of the Industrial Disputes Act states "*Whenever an industrial court consists of more than one person and there is a vacancy in such court, the court may act notwithstanding such vacancy*."

Section 31(5) states "*No act, proceeding or determination of an industrial court shall be called in question or invalidated by reason of any vacancy in the court.*"

The proceedings and the procedure before Labour Tribunals, Industrial Courts and Arbitrators shall not be viewed with rigidity but with flexibility, allowing the said bodies to make just and equitable Orders that are not unnecessarily constrained by the strict letter of the law. This shall not be misconstrued to mean such bodies can make illegal orders. Section 24(1) of the Industrial Disputes Act says:

> *It shall be the duty of an industrial court to which any dispute, application or question or other matter is referred or made under this Act, as soon as may be, to make all such inquiries and hear all such evidence, as it may consider necessary, and thereafter to take such decision or make such award <u>as may appear to the court just and equitable</u>*. (emphasis added)

Sections 17(1) and 31C of the Industrial Disputes Act allow the Arbitrator and the Labour Tribunal, respectively, to make such Orders as may appear to the Arbitrator and Labour Tribunal to be just and equitable.

In *United Engineering Workers Union v. Devanayagam (1967) 69 NLR 289*, the Privy Council stated:

> *The powers and duties of an Arbitrator under the Industrial Disputes Act, of an Industrial Court and of a Labour Tribunal on a reference of an industrial dispute are the same. In relation to an arbitration, the Arbitrator must hear the evidence tendered by the parties. So must a Labour Tribunal on a reference. An Industrial Court has to hear such evidence as it considers necessary. In each case the award has to be one which appears to the Arbitrator, the Labour Tribunal or the Industrial Court just and equitable. No other criterion is laid down. They are given an unfettered discretion to do what they think is right and fair.*

This view has been expressed in numerous Judgments handed down by our superior Courts, including *Thirunavakarasu v. Siriwardena [1981] 1 Sri LR 185, Kalamazoo Industries Ltd v. Minister of Labour and Vocational Training [1998] 1 Sri LR 235* at 249, *Brown & Company PLC v. Minister of Labour [2011] 1 Sri LR 305* at 316-317, *Asian Hotels and Properties PLC v. Benjamin [2013] 1 Sri LR 407* at 419.

Nevertheless, the discretionary power of these bodies is not unfettered. Such discretion shall be exercised not arbitrarily but reasonably. Whether or not it is correctly exercised can be tested through judicial review.

I take the view the temporary absence of a member of the Industrial Court on some days of the proceedings does not *ipso facto* invalidate the entire proceedings, unless this Court can be convinced with cogent reasons that a party to the proceedings was prejudicially affected by such a lapse. I must also add that whilst actively taking part at the inquiry before the Industrial Court despite the lack of quorum and thereby acquiescing to it, a party cannot later complain of the same when he realises the final Order is against him.

Learned President's Counsel for the Petitioners has not cited any authorities whereby a decision of the Industrial Court has been set aside on lack of quorum. The cases cited relate to different inquiries. The Industrial Disputes Act serves a distinct purpose.

In the facts and circumstances of this case, I have no hesitation in concluding that the Petitioners shall fail on this last ground as well.

The impugned decision of the Industrial Court in the instant case is neither irrational nor perverse.

I dismiss the application of the Petitioners with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal