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

Richard Pieris Exports Limited,
No.310, High Level Road,
Nawinna,
Maharagama.
Petitioner

CASE NO: CA/WRIT/119/2012

Vs.

1. Hon. Gamini Lokuge,
   Minister of Labour and Labour Relations,
   Ministry of Labour and Labour Relations,
   Labour Secretariat,
   Colombo 05.

1A. Hon. Wijedasa Rajapaksha,
   Minister of Justice and Labour Relations,
   Labour Secretariat,
   Colombo 05.

1B. Hon. John Seneviratne,
Minister of Labour and Trade
Union Relations,
Labour Secretariat,
Colombo 05.

1C. Hon. Ravindra Samaraweera,
Minister of Labour and Trade
Union Relations,
Labour Secretariat,
Colombo 05.

1D. Hon. Dinesh Gunawardena,
Minister of Skills Development,
Employment & Labour Relations,
Ministry of Skills Development,
Employment & Labour Relations,
6th Floor, "Mehewara Piyesa",
Narahenpita,
Colombo 05.

2. P. Weerasinghe,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat,
Colombo 05.

2A. Herath Yapa,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat,
Colombo 05.

2B. M.D.C. Amarathunga,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat,
Colombo 05.

2C. R.P.A. Wimalaweera,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat,
Colombo 05.

3. T. Piyasoma, [Arbitrator]
No.77, Pannipitiya Road,
Battaramulla.

4. The Ceylon Mercantile Industrial
& General Workers' Union (CMU),
[on behalf of N.A.K. Chandana]
No.03, 22nd Lane,
Colombo 03.

Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Romesh de Silva, P.C., with V. Niles for the Petitioner.
Suranga Wimalasena, S.S.C., for the 1st and 2nd Respondents.
Saliya Edirisinghe for the 4th Respondent.

Argued on: 11.03.2020

Decided on: 23.06.2020

Mahinda Samayawardhena, J.

At the time material to this application, the Petitioner Company had been exporting jar-sealing rubber rings. In one consignment, black marks were found on the product to be exported. It was evidently an act of foul play, as incisions by a needle were found in packed boxes containing the product. Following the said discovery, the lockers of the employees were searched, and a syringe without a needle was found in the lower shelf of the locker used by the workman represented by the 4th Respondent Union in these proceedings. The workman's services were suspended on 29.10.2007 and a domestic inquiry was held upon a charge sheet contained in a Show Cause letter dated 11.12.2007.[1] The workman's position was he was unaware of the said syringe in the lower shelf of his locker, which had been previously used by another employee about three years ago. This explanation was not accepted at the domestic inquiry. The workman was found guilty of all the charges against him and his services were terminated effective from the date of suspension.[2]

On the recommendation of the Commissioner General of Labour, the Minister of Labour acting in terms of section 4(1) of the Industrial Disputes Act, No. 43 of 1950, as amended, referred the dispute to the 3rd Respondent Arbitrator for arbitration.

The learned Arbitrator, having held an inquiry into the matter where both parties were fully heard, made the Award dated 09.12.2011, whereby reinstatement of the workman with back

[1] Page 16 of the brief.
[2] Page 483 of the brief.

wages was ordered upon the finding that the termination of services of the workman was unjustifiable.[3] The Petitioner employer filed this application before this Court seeking to set aside the said Award by way of a writ of Certiorari.

At the argument before this Court, learned President's Counsel for the Petitioner took up four positions to challenge the Arbitral Award.

The first relates to the onus of proof placed by the Arbitrator in paragraph 7 of the Award. This part reads as follows:

> *The burden is on the Respondent employer to prove the following facts by leading evidence.*
>
> *(i) That the workman brought without authority an empty syringe and kept it in the locker exclusively used by him.*
>
> *(ii) That the workman brought a black coloured liquid and with the assistance of the syringe injected the said colour liquid into the polythene bags containing rings.*

It is the contention of learned President's Counsel for the Petitioner that placing the burden of proving these two matters on the Petitioner is unwarranted, and once the Petitioner proves the syringe was found in the locker exclusively used by the workman, the burden shifts to the workman to establish he is not responsible for the sabotage.

---

[3] *Vide* page 474 *et seq* of the brief and the Gazetted Award marked P2.

This argument does not commend itself to me. As correctly pointed out by learned Counsel for the workman, the Arbitrator identified the above two matters to be proved by the Petitioner because those are the main charges on which the workman was found guilty at the domestic inquiry which led to his dismissal from service.

The first three charges contained in the Show Cause letter issued by the Company to the workman read as follows:[4]

1. *Bringing into the Company premises without authority an empty syringe which item is not required for the Management's productivity process.*

2. *Having brought in an empty syringe without authority keeping such item in your personal locker where only an Employee's personal clothing and personal items are permitted to be kept of which the keys are in your sole custody and possession.*

3. *That you have attempted to use this syringe brought in without authority for the purpose of undermining the productivity purpose of the Company by injecting liquid with carbon into Jar Sealing in polythene bags which are in the cardboard boxes.*

The above have been identified as proven "charges" in the letter of Termination of Employment sent to the workman by the

[4] *Vide* page 16 of the brief.

Company.[5] It is on this basis the workman's services were terminated.

Hence there is no illegality or impropriety on the part of the Arbitrator to expect the Petitioner to prove the aforesaid identified issues to the satisfaction of the Arbitrator.

The second point raised by learned President's Counsel for the Petitioner is linked to paragraph 16 of the Award, which runs as follows:

> *H.A.K. Chandana the workman was a very active Secretary in the Branch Union of the Richard Peiris Limited. A reasonable person in the relevant context would think that the Respondent employer has enough calculated reasons to get rid of H.A.K. Chandana, who was the Secretary of the Branch Union.*

Learned President's Counsel vigorously submits this position was not taken up by the workman and further states it goes to prove the mindset of the Arbitrator in deciding this matter.

I am unable to agree. Learned Counsel for the workman drew the attention of the Court to the written submissions filed by the Petitioner at the end of the inquiry before the Arbitrator.[6] In the said written submissions, the Petitioner identified four issues to be decided by the Arbitrator. The issues (translated into English) are as follows:

---

[5] *Vide* page 483 of the brief.
[6] *Vide* page 456 of the brief.

1. *Was the accused acting in the role of Branch Secretary of the Trade Union at the time material to the incident?*

2. *Was the Trade Union resentful of the Company's refusal to enter into a mutual agreement?*

3. *Were there tensions/misunderstandings between the Management of the Company and members of the Trade Union around the time material to the incident?*

4. *Was the syringe used to inject black liquid into the box containing rubber rings with the motive of terminating the employment of the accused, who was acting as the Branch Secretary of the Trade Union?*

It is in this context the Arbitrator made the said observations in the Award.

The third ground of learned President's Counsel is predicated on the second part of paragraph 18 of the Award. This paragraph reads:

> *I reject the suggestion that the workman injected a black coloured liquid to the packets containing the rubber rings. Merely because an empty syringe, without needle had been found in a worker's locker, it is not reasonable to conclude that a black coloured liquid had been introduced into ring packets kept in another section (ring section) using that syringe especially in view of the fact that none of those who checked the locker found black liquid on the syringe at the time of checking.*

> *Taking everything into consideration I am of the view that the syringe and the needle had been introduced into the locker by a friendly hand of the company. I reject the suggestion that the workman injected a black liquid to the packets containing the rubber rings.*

Learned President's Counsel strenuously contends it was never the position of the workman that the syringe was introduced by the Petitioner with the intention of getting rid of him from the establishment, but the Arbitrator has taken up such a position in the Award.

Learned Counsel for the workman accepts the workman did not take up such a position at the domestic inquiry or before the Arbitrator. However, Counsel's position is the Arbitrator's finding that the syringe was introduced into the locker "by a friendly hand of the company" cannot be given the meaning attributed to it by learned President's Counsel for the Petitioner.

It is not exactly clear what the Arbitrator meant by the said phrase. However, I do not think we need to cudgel our brains to interpret it, as that sentence is not decisive. The decisive sentence is the one which follows it, i.e. "*I reject the suggestion that the workman injected black coloured liquid to the packets containing the rubber rings*."

The final point raised by learned President's Counsel relates to the Test Report called for by the Petitioner from the Industrial Technology Institute regarding the contents of the syringe.[7] It is the submission of learned Counsel for the workman that the

[7] *Vide* page 316 of the brief.

said Report cannot be relied upon, as the syringe was tampered with in the process. Learned President's Counsel states he does not rely on the Report but refers to it to say the Arbitrator failed to address his mind to the said Report. If the Petitioner does not rely on the Report, failure on the part of the Arbitrator to refer to it in the Award cannot make any difference. There is no necessity to further dwell on this point.

In the result, the Petitioner fails in the main argument.

However, the matter does not end there. During the course of the argument, learned President's Counsel for the Petitioner took up two new positions:

(a) Even if this Court determines the Arbitrator was correct in deciding the termination of employment of the workman is unjustifiable, the order for reinstatement of the workman shall still be quashed.

(b) Once the Award is repudiated in terms of section 20 of the Industrial Disputes Act, which has been done in this case, the Award becomes null and void and of no legal effect whatsoever.

First I will consider the question of reinstatement. On what basis does learned President's Counsel for the Petitioner submit that reinstatement should not have been ordered? It is on the sole basis no reasons were given by the Arbitrator for making the order of reinstatement. This argument is unacceptable in the unique facts of this case.

In the written complaint/application before the Arbitrator, the workman sought reinstatement with back wages as the only relief for his services being unjustifiably terminated by the Petitioner.[8] In the answer/reply, the Petitioner sought only the dismissal of the workman's application on the basis the termination was justifiable.[9]

It was never the position of the Petitioner before the Arbitrator at any stage of the proceedings that, in the event the Arbitrator decided the termination to be unjustifiable, given the unique facts and circumstances of this case, payment of compensation should be ordered as an alternative to reinstatement. Simply stated, in the event the termination was found to be unjustifiable, the relief to be granted was uncontested and uncontroverted. It is for the first time at the argument stage in this Court the Petitioner states compensation should have been ordered instead of reinstatement. Let me remind, the Petitioner does so on the basis no separate reasons have been given by the Arbitrator in granting the said relief. I am not inclined to agree.

Whether or not compensation as an alternative to reinstatement should be awarded, and if so, how much should be so awarded, are not pure questions of law which can be raised for the first time before a writ Court. These are disputed questions of fact and law, the findings of which necessarily involve close analysis of the evidence led at the Arbitration proceedings. This is not the task of the writ Court. In the facts and circumstances of this case, the Arbitrator cannot be found fault with for granting

---

[8] *Vide* page 8 of the brief.
[9] *Vide* page 10 of the brief.

the said relief upon arriving at the firm finding the termination of services was unjustifiable.

This leads me to consider the last point raised on behalf of the Petitioner, which relates to the repudiation of the Arbitral Award. The Award was made on 09.12.2011 and Gazetted on 24.02.2012. The Petitioner repudiated the Award in terms of section 20 of the Industrial Disputes Act. This repudiation was Gazetted on 01.06.2012 to take effect on and after 24.02.2013, i.e. upon expiration of one year from the effective date of the Award (24.02.2012). The Petitioner admits the Commissioner General of Labour took steps to enforce the Award by instituting proceedings in the Magistrate's Court prior to 24.02.2013.[10]

Learned President's Counsel for the Petitioner contends once the Award is repudiated, it is null and void (*ab initio*), and "*the case law as at present (i.e. the repudiation is prospective) has not properly interpreted the section.*" He further submits "*the purpose of enacting the section is not relevant*", and "*any other interpretation would mean that someone could enforce an Award before repudiation.*" I regret my inability to agree.

If I may start from the latter part of the submission "*any other interpretation would mean that someone could enforce an Award before repudiation*", what about the flip side of the question? That is, if repudiation simply makes the Award a nullity, *ab initio*, what is the purpose of referring a matter for industrial Arbitration under section 4 of the Industrial Disputes Act? The whole process can be invalidated by the party against whom the

[10] *Vide* the affidavit dated 28.10.2013 of the Manager, Industrial Relations of the Petitioner Company filed in seeking an interim order.

Award is made simply by a notice of repudiation. I have no scintilla of doubt the legislature would never have intended such mischief. I must also add that although it is submitted "*the purpose of enacting the section is not relevant*", the purpose of the section is relevant in order to give purposive interpretation to it.

I need not go so far. Even a literal interpretation of the said section does not support the Petitioner's view. Let me explain.

Section 20 of the Act, insofar as is relevant to the present purposes, reads as follows:

> *20(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:*
>
> *(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):*

According to section 20(2), giving notice of repudiation of an Award does not make the Award null and void *ab initio*. It ceases to be operative "*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*", "*whichever is later*". Section 20(2)(b) particularly enacts the Commissioner shall declare in the Gazette "*the time at which the award shall cease to have effect*".

This means, the Award is valid from the date on which it comes into force, until it ceases to have effect on repudiation. After the Award ceases to have effect as a result of repudiation, the new terms and conditions between the employer and employee shall be founded upon *inter alia* the terms and conditions of the Award. This is the interpretation given to the section by the Supreme Court in *Thirunavakarasu v. Siriwardena [1981] 1 Sri LR 185*.

The submission made on behalf of the Petitioner "*the case law as at present is that the repudiation is prospective; that is the award ceases to be operative upon the expiration of twelve months from the date on which the award came into force, or three months immediately succeeding the month in which the notice is so received by the Commissioner whichever is the later*"

"*has not properly interpreted the section*" and "*it is not relevant whether it is prospective or retrospective, the award ceases to have effect when it is repudiated*" cannot be accepted.

The interpretation given to section 20(2) by case law is, in my view, in keeping with the spirit and purpose of the Act.

In *Thirunavakarasu v. Siriwardena* (*supra*), the question posed before the Supreme Court was "*whether or not an award once it is repudiated, has the effect, as it were, of wiping the slate clean so that the award and its effects will disappear altogether as if they had never existed from the inception.*" The Supreme Court, "*both on principle and practice*", rejected the argument that repudiation wipes out the Award *in toto*. Wanasundera J., with the agreement of Samarawickrema J. and Ismail J., stated at 193-194:

> *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.

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 a 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.*

This dictum was followed in later cases as representing the correct position of the law in relation to repudiation of Arbitral Awards. (*Vide Kulatunga v. Labour Officer, Colombo South [1987] 1 Sri LR 1, Fernando v. United Workers Union [1989] 2 Sri LR 199, Ceylon Electricity Board v. Alavi Moulana [2006] 3 Sri LR 1*) This Court is bound by the said decision.

In the Supreme Court case of *Fernando v. United Workers Union* (*supra*) G.P.S. de Silva J. (later C.J.), with the concurrence of Ranasinghe C.J. and Jameel J., stated at 204 "*the view that the award is operative for a minimum period of 12 months is supported on a plain reading of the section.*"

The application of the Petitioner is dismissed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal