CEYLON ELECTRICITY BOARD
VS.
ALAVI MOULANA AND OTHERS

COURT OF APPEAL.
SRISKANDARAJAH, J.
CA 523/2003.
JUNE 28, 2004.
MAY 9, 22, 24, 2006.

Writ of Certiorari-Industrial Disputes Act-Section 4 (1), Section 20, Section 34(1) - Arbitration- Labour Tribunal order set aside by High Court-Employee reinstated-No back wages paid during period of interdiction-Dispute referred for arbitration-Repudiation of award-Minor industrial dispute-Repudiation an effective alternative remedy to the remedy by way of a Writ of Certiorari?

The 4th respondent, an employee of the petitioner was interdicted from service on 6.1.1988 and his services were terminated on 2.10.1989. The application filed in the Labour Tribunal by the 4th respondent employee was dismissed. The High Court allowed the appeal of the respondent and made order that the employee would be entitled to arrears of salary and other benefits due to him under the law. In view of the judgment the 4th respondent was reinstated with back wages from 2.10.1989. (date of termination) up to date of reinstatement. The 4th respondent contended that, as he was exonerated from all charges he should have been paid his salary from 6.1.1988. (date of interdiction) to 2.10.1989 (date of reinstatement).

The 4th respondent complained to the Commissioner of Labour and the matter was referred under section 4(1) by the Minister for arbitration.

The petitioner before the Arbitrator, stated that, as the said dispute has already been determined by an order of the High Court the arbitrator had no jurisdiction to hear the matter, this objection was overruled and after inquiry, the arbitrator held in favour of the 4th respondent.

The 4th respondent contended that, the petitioner had an alternative remedy-repudiation of the award - and therefore no Writ of Certiorari lies.

HELD:

(1) Repudiation of an arbitration award cannot be considered as an effectual alternative remedy to the remedy by way of a Writ of Certiorari.

Held further :

(2) The judgment totally exonerates the 4th respondent, this judgment was delivered on an appeal from the order of the Labour Tribunal dismissing the application of the 4th respondent. The High Court is only empowered to decide the appeal. The High Court cannot give an equitable order.

(3) The High Court order was restricted to reinstatement with back wages and other benefits from the date of termination to the date of reinstatement. The High Court cannot consider any other dispute other than termination, therefore the High Court has correctly decided not to deal with the period of interdiction as the period of termination does not cover period of interdiction.

(4) As the petitioner has not paid for the period of interdiction even though the 4th respondent has requested for the payment and as it was not paid this dispute could be regarded as a minor industrial dispute - reference under section 4(1) is therefore valid.

Per Sriskandaraja. J:

"If the petitioner had any question in relation to the interpretation of the award it could have referred such question to the arbitrator in terms of section 34(1). Without invoking the statutory provisions to get clarification the petitioner cannot complain that the award is illegal, meaningless or non specific".

APPLICATION for a Writ of Certiorari/Prohibition.

Cases referred to :

(1) *E. S. Fernando vs. United Workers Union and Others* - 1989 2 Sri LR 119 at 204 (SC)
(2) *Obeysekera vs. Albert and Others* 1978-79 2 Sri LR 220.
(3) *Thirunavakarasu vs. Siriwardene and Others* - 1981 - 1 Sri LR 185 (SC)

Dulinda Weerasuriya with Amila Vithana and Vajira Ranasinghe for petitioner.

R. P. Wimalasena for 2nd and 5th respondents.

S. T. Gunawardene for 4th respondent.

Cur. adv. vult,

June 12th, 2006.

SRISKANDARAJAH, J.

The Petitioner in this application has sought to quash the appointment of the 3rd Respondent as the Arbitrator, made under section 4 (1) of the Industrial Disputes Act by the 1st Respondent by his letter dated 16.08.2001 (P1) and also to quash the award of the 3rd Respondent made on 20.01.2003 marked P12.

The Petitioner submitted that the 4th respondent is an employee of the Petitioner. He joined the Petitioner Board as an apprentice in August 1968 and thereafter being confirmed as an employee served in various posts and places. While he was serving as an Electrical Superintendent in the Board, he travelled in a vehicle of the Board on 12.01.1987 which met with an accident in the Police area of Marawila. He was interdicted on 6.1.1988 on the allegation that he had not taken proper steps in regard to the said accident and a charge sheet was served on him on 17.03.1988. After an inquiry the Petitioner's services were terminated on 02.10.1989. The 4th respondent filed an application in the Labour Tribunal on 30.03.1990 challenging the termination. This application was dismissed after inquiry by the order of the Labour Tribunal dated 10.06.1993 (P3). The 4th Respondent appealed against this order in the High Court of Colombo. The said appeal bearing No. HC/LTA773/93 was heard and the judgment was delivered by the learned High Court Judge on 19.10.1995 allowing the said appeal and holding that the appellant will be entitled to arrears of salaries and other benefits due to him under the law as from 02.10.1989 (P5). In view of this judgment the 4th Respondent was reinstated by letter dated 31.1.1996 with immediate effect and back wages was paid from 02.10.1989 up to the date of reinstatement.

The 4th Respondent contended that as he had been completely exonerated from blame over the incident of 12th January 1987 and as he had been reinstated in service with all attendand benefits, he should have been paid his salary from 6.1.1988 to 2.10.1989 during his period of interdiction in relation to the above incident. The learned High Court Judge's Order was to reinstate him with full entitlement to all salaries and other benefits due to him under the law as from 2.10.1989. This date is the date on which his service was terminated. The Petitioner in this case terminated his service after an internal inquiry not from the date of interdiction but

from a subsequent date *i. e* from 2.10.1989 departing from the normal practice. The Learned High Court Judge in his Order reinstated the 4th Respondent with immediate effect with wages from the date of termination to the date of reinstatement. The 4th Respondent contended that as the salary payable by the Petitioner during the period of interdiction was not considered by the learned High Court Judge and as he was exonerated from all the charges and reinstated with all benefits he is entitled to the salary for the period in which he was under interdiction. As the Petitioner failed and neglected to pay the said salary, this matter was reported to the Commissioner of Labour and this dispute was referred for arbitration by the Honourable Minister, under section 4 of the Industrial Dispute Act on the 14th of August 2001. This decision was communicated to the Petitioner by letter dated 16th of August 2001 (P8). The said reference of the Minister was "whether the non-payment of arrears of salary for the period of interdiction from 1.6.1988 to 2.10.1989 of Mr. S. H. Hemapala who is employed at the Ceylon Electricity Board is justified and to what relief he is entitled" (P8a). The Arbitrator's award on the said reference was made on 20.1.2003.

The Petitioner has not challenged the reference of the dispute for arbitration. The Petitioner's position is that the said dispute has already been determined by the Order of the High Court and therefore the Petitioner objected to the hearing of the dispute before the arbitrator. The arbitrator overruled the objection and proceeded to hear the dispute, the Petitioner without challenging the decision overruling the objection and to hear the dispute participated in the proceedings and waited for a final decision.

When the final decision was not in favour of the Petitioner the Petitioner filed this application seeking for the following relief ; (a) appointment of the 3rd Respondent as an arbitrator under Section 4(1) of the Industrial Disputes Act by the 1st Respondent by his letter dated 16.8.2001 (P1) is illegal, unlawful and therefore null and void. (b). Quash the award of the 3rd Respondent dated 20.1.2003.

As far as the first relief is concerned the said appointment was made on 16.8.2001 by the 1st Respondent but the Petitioner is challenging the said appointment in this application only on 27th of March 2003 after a lapse of 19 months. The explanation given by the Petitioner in it's written submission is that the question of appointment of the arbitrator is a

jurisdictional issue and it is an objection mixed with facts and law, meaning that the objection is based on certain facts namely, that there was an industrial dispute that was gone in to by the Labour Tribunal and the High Court, that the High Court made a particular order granting relief to the 4th Respondent. Therefore the Petitioner waited till the outcome of the award to challenge the jurisdiction.

The Respondents contend that if the Petitioner is of the view that the arbitrator has made an error in facts in arriving at the jurisdictional question and/or made an error in arriving at a final decision those errors are embodied in the award of the arbitrator and the Petitioner is entitled to repudiate the award of the arbitrator by a written notice in the prescibed form sent to the Commissioner in terms of section 20(1) of the Industrial Disputes Act. But the Petitioner has failed to seek an alternative remedy provided by law to have the orders complained of invalidated. Therefore the Petitioner cannot seek a writ of certiorari to quash the said orders.

In *E. S. Fernando vs. United Workers Union and Others* [1] *at 204 G. P. S. De. Silva J with Ranasinghe C. J* (as he then was) and Jameel J agreeing held :

"Apart from the absence of an error of law on the face of the award, the availability of an alternative remedy by way of "repudiation" of the award in terms of section 20 of the Industrial Disputes Act, was the other matter which the Court of Appeal took into consideration in dismissing the application for the writ of certiorari. The Court of Appeal relied on the decision in *Obeysekera vs. Albert and Others.* [2]

That was a case where the Court of Appeal held that section 20(1) of the Industrial Disputes Act conferred the right on an aggrieved party to repudiate the award, and that, certiorari being a discretionary remedy, the petitioner was not entitled to relief. In fairness to the Court of Appeal, it is proper to state that *Obeysekera* vs. *Albert* (*supra*) was directly in point on the question of the availability of an alternative remedy in the present case.

Mr. H. L. de Silva, however, submitted that *Obeysekera vs. Albert* (*supra*) was wrongly decided inasmuch as the Court of Appeal took the view that section 20(1) of the Industrial Disputes Act was an "alternative remedy" in

relation to proceedings for a writ of certiorari to quash an award made by an arbitrator. Section 20, in so far as is material for present purposes, reads thus :

Sub-section (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 ....."

Sub-section (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 3 months immediately succeeding the month in which the notice is so received by the Commissioner or upon the expiration of 12 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)".

In support of his submission that the repudiation of an award in terms of section 20 of the Industrial Disputes Act is not an "alternative remedy", Mr. H. L. de Silva relied strongly on the judgment of Wanasundera J. in *Thirunavukarasu vs. Siriwardena and others*,[3]. In that case Wanasundera J. considered the effect of the repudiation of an award in terms of section 20 of the Industrial Disputes Act. Said the learned Judge : "The question that has been posed is 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. I must confess that I find it difficult to accept this argument both on principle and practice the award will be binding on the parties and is made operative in its character of an award for a minimum period of 12 months. 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....".

It seems to me that the view that the award is operative for a minimum period of 12 months is supported on a plain reading of the section. On the other hand, if the petitioner succeeds in his application for a writ of certiorari, the award is rendered null and void *ab initio*. It would therefore appear that, assuming that the repudiation of an award in terms of section 20 is a "remedy", yet it is not an adequate and an effectual remedy. To disentitle the petitioner appellant to the remedy by way of certiorari, the "alternative remedy" must be an adequate and an effectual remedy. In *Obeysekera vs. Albert and Others (supra)* the Court of Appeal does not seem to have sufficiently addressed its mind to the question of the adequacy and efficacy of the "remedy" provided in section 20 of the Industrial Disputes Act. In this view of the matter, as at present advised, I am of the view that the case of *Obeysekera vs. Albert and others (supra)* has been wrongly decided."

In view of the principles enumerated in the above judgment the repudiation of an arbitration award cannot be considered as an effective alternative remedy to the remedy by way of a writ of certiorari.

I will now consider the merits of this application. The Petitioner challenged the reference to arbitration and the appointment of the arbitrator on the basis that the reference of the dispute amounts to re-canvassing or re-adjudication of the matters already decided by the High Court Judge and therefore the reference is illegal and hence the appointment of the arbitrator in unlawful.

The matter referred to arbitration by the 1st Respondent to the 3rd Respondent is "whether the non payment of arrears of salary for the period of interdiction from 06.01.1988 to 02.10.1989 of Mr. S. H. Hemapala who is employed at the Ceylon Electricity Board is justified and to what relief he is entitled".

An examination of the judgment of the learned High Court Judge reveals that he has set aside the L. T. order on the ground that there was

misdirection in the assessment of facts which amounts to an error of law. The learned Judge having examined the charges has decided that all the charges before the Labour Tribunal have not been proved. Based on this finding the learned Judge set aside the order of the President of the Labour Tribunal and ordered reinstatement of the appellant (4th Respondent) with immediate effect deciding that the termination of the employment of the appellant (4th Respondent) is not justified. He further ordered that the 4th Respondent will be entitled to arrears of salary and other benefits due to him under the law as from 02.10.1989 and awarded costs fixed at Rs. 1,050/-. The Judgment of the learned High Court Judge totally exonerates the 4th Respondent from any allegation and the order for reinstatement with immediate effect with all benefits shows that the judge decided to give all benefits to the 4th Respondent without any reservation. But the judgment has referred to 02.10.1989 as the date from which he is entitled for the arrears of salary and other benefits. This Judgment was delivered on an appeal from the order of the Labour Tribunal dismissing the application of the 4th Respondent. Therefore the High Court is only empowered to decide the appeal. Like a Labour Tribunal the High Court Judge cannot give a just an equitable order. The High Court order was restricted to reinstatement with back wages and other benefits from the date of termination to the date of reinstatement. The High Court cannot consider any other dispute other than the termination. Therefore the learned High Court Judge has correctly decided not to deal with the period of interdiction as the period of termination does not cover the period of interdiction.

As the High Court judge has exonerated the 4th Respondent from all charges and has granted all benefits the 4th respondent is entitled to claim his wages for the period of interdiction from the Petitioner as the period of interdiction was not considered by the High Court Judge. As the Petitioner has not paid his wages for the period of interdiction even though the 4th Respondent has requested for the payment and as it was not paid this dispute could be considered as a minor industrial dispute. Therefore the reference of this dispute by the Minister of Labour under section 4 (1) of the Industrial Disputes Act to the 3rd Respondent arbitrator appointed by him by his order dated 16.8.2001 is legal and hence the 3rd Respondent has jurisdiction to hear this dispute.

The Petitioner in this application has also sought to set aside the award of the arbitrator dated 20.1.2003 on the basis that the award is unintelligible,

meaningless, non specific and therefore unenforceable and therefore it is an illegal order.

The dispute referred for arbitration is specific *i. e* the payment of arrears of salary for the period of interdiction from 6.1.1998 to 2.10.1989. Therefore there cannot be any ambiguity arising from the award. But on the other hand if the Petitioner had any question in relation to the interpretation of the award it could have referred such question to the arbitrator in terms of Section 34(1) of the Industrial Dispute Act but the Petitioner without invoking the statutory provisions to get clarifications cannot complain that the award is unintelligible, meaningless or non specific.

For the aforesaid reasons this court dismisses this application without costs.

Application dismissed.