**VOLANKA LTD**

**v.**

**SENEVIRATNE**

**MINISTER OF LABOUR AND OTHERS**

COURT OF APPEAL.
DE SILVA, J.
CA 1196/98.
ARBITRATION A 2636.
4TH OCTOBER, 1999.
3RD NOVEMBER, 1999.

*Writ of Certiorari - Arbitration Award - Industrial Disputes Act, Ss.4(1), 16, 17, 18, 19, 20, 36(5) - Reference of dispute to compulsory arbitration - Collective Agreement in force - Is the reference lawful?*

The Petitioner has entered into successive Collective Agreements with C C I Workers Union from time to time and the Collective Agreement remained in force.

The 4th Respondent Union moved for a revision of the Collective Agreement and demanded a 50% wage increase. As this was not met the Members of the Union began picketing first, and thereafter struck work. When the strike was prolonging the Minister of Labour referred the dispute to compulsory arbitration.

It was contended that (1) the reference is bad in law as there was no repudiation of the Collective Agreement by either party (2) that the Arbitrator should have called upon the Petitioner to produce evidence in respect of its capacity to pay the demanded increase (3) that the statement of the matter in dispute referred amounted to a decision by 1st and 2nd Respondents (Commissioner of Labour) that some increase should be granted, and the function of the Arbitrator (3rd Respondent) was purely to determine the quantum of such increase.

**Held :**

(i) Although in the Statement of Objections the 4th Respondent Union had taken up the position that, the collective agreement expired in March 1995, evidence showed that it is still in force.

(ii) S.4 of the Industrial Disputes Act confers power on the Minister to refer by an order in writing an industrial dispute if he is of the opinion

that the Industrial dispute is a minor dispute for settlement by arbitration.

(iii) The order of reference is an administrative act of the Minister who has to form an opinion as to the factual existence or apprehension of an industrial dispute.

(iv) The power of the Minister to refer an industrial dispute to arbitration is limited only when it is pending before a judicial forum (Labour Tribunal).

(v) S.17 of the Industrial Disputes Act states that the "Arbitrator shall make all such inquiries . . . However, it is observed that the Petitioner knew the demand of the Respondent Union - 50% salary increase - in these circumstances it was the duty of the Petitioner to assist the arbitrator by placing relevant evidence to solve the dispute."

*Per* de Silva J.,

> "Since the arbitrator is empowered under S.36(1) to require any person to furnish particulars, produce documents and give evidence, it would have been a very desirable thing to call the Petitioner to give evidence . . ."

(vi) Under S.16 of the Industrial Disputes Act an order referring a dispute for settlement by arbitration shall be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute between the parties.

From the documents annexed to the Commissioners objections, it is clear that discussions before the Commissioner too proceeded on the basis that some increase in wages could be given to the workers subject to certain conditions. Therefore the question in dispute as formulated is in order.

**APPLICATION** for a Writ of Certiorari to quash the award and the reference to arbitration.

**Cases referred to :**

1. *Aislaby Estate Ltd., vs Weerasekera* 71 NLR 241
2. *Wimalasena vs Navaratne* [1978-79] 2 Sri.L.R. 10
3. *Nadarajah vs Krishnadasa* 78 NLR 25
4. *Upali Newspapers Ltd., vs Eksath Kamkaru Samithiya* [1999] 3 Sri.L.R. 205
5. *Walker Sons & Co. Ltd., vs F.C.W. Fry* 68 NLR 73

6. *Liyanage vs Queen* 68 NLR 265
7. *Brown & Co. Ltd., vs Ratnayake - Arbitrator and 3 others* (1986) BALJ Vol. I Part vi - 229
8. *Piyadasa vs Bata Shoe Company* [1982] 1 Sri.L.R. 91
9. *Frewin & Company Ltd. vs Dr. Ranjit Atapattu & others* [1993] 2 Sri.L.R. 53

*S.L. Gunasekera* with *Indra Laduwahetty* for the Petitioner.

*Adrian Perera* S.S.C. for 1st Respondent.

*Ms Chammantha Unamboowe* for 4th Respondent Union.

*Cur. adv. vult.*

January 28, 2000.

**DE SILVA, J.**

This is an application for a grant and issue of a mandate in the nature of a writ of certiorari to quash the award of the arbitrator (3rd Respondent) dated 15th September 1998 and also to quash the reference of the purported dispute by the Minister of Labour (1st Respondent) to arbitration.

Before I deal with the submissions of counsel regarding the points raised at the hearing, it will be useful to briefly recite the facts leading to the order of the Minister the 1st respondent, the legality of which has been challenged in these proceedings.

The petitioner has entered into successive collective agreements with Ceylon Commercial and Industrial Workers Union from time to time and the last agreement came into effect on 1st July 1992. This collective agreement provided that it shall remain in force unless determined by either party giving six months notice, subject to the provision that neither party could give notice of determination before 1st July 1995 and that such notice should not expire before 30th June 1995. It is observed that such notice has not been given by either party and the collective agreement remained in force.

The collective agreement of 1992 sets out scales of wages and provided for the payment of a non recurring cost of living

gratuity computed on the basis of the Colombo Consumers Price Index. There was also provision for the cost of living component to be consolidated into the salary annually in December.

By letter dated 11th July 1995 the 4th respondent Union moved for a revision of the collective agreement and demanded a 50% increase in the wages. The petitioner's position was that the demand of the Union for a wage increase is unreasonable and without any justification as the salaries and terms and conditions of Volanka Limited employees were higher than those employees in comparable employment.

About the end of March 1997 members of the Union began a "picketing" campaign between 11.30 and 12.00 noon everyday and there was general unrest during this period at the work place.

Negotiations on the question of increase in the wages continued for nearly two years and from the end of July 1997 to the beginning of October 1997 the members of the Union struck work.

The Union complained to her Excellency the President. As a result the Commissioner of Labour intervened but could not bring about a settlement. When the strike was prolonging, the Minister of Labour (1st Respondent) referred the dispute to compulsory arbitration.

Counsel for the petitioner urged three grounds in support of this application. *Firstly* that the reference to arbitration by the Minister was bad in law as there *was no* repudiation of the agreement by either party. *Secondly* that the arbitrator should have called upon the petitioner to produce evidence in respect of its capacity to pay the demanded increase in wages. *Thirdly* that the statement of the matter in dispute referred to arbitration amounted to a decision by the 1st and 2nd respondents that some increase in the wages should be

granted to the members of the 4th respondent Union and that the function of the arbitrator, namely the 3rd respondent was purely to determine the quantum of such wage increase.

On the first question counsel for the petitioner submitted that in the statement dated 11th November 1997 filed by the 4th respondent he has taken up the position that the collective agreement entered into between the parties in 1992 expired in March 1995. However the witness called by the 4th respondent viz. W.D.J. Anthony gave evidence to the contrary and admitted that the said collective agreement was still in force.

It was his submission that the Minister has no jurisdiction to refer expressly for determination by an arbitrator, a dispute with regard to the terms of a 'live' collective agreement as the collective agreement which was in force would be binding on the parties. He further stated that the reference by the Minister to arbitration of a dispute as to whether the wages prescribed by a 'live' collective agreement should be increased is in fact an indirect reference of a dispute whether a 'live' collective agreement should be amended, altered and/or revised.

Counsel for the 4th respondent submitted that no agreement between the employee and employer could take away from the Minister the powers vested in him by section 4(1) of the Industrial Disputes Act.

Section 4 of the Act confers powers on the Minister to refer by an order in writing an industrial dispute if he is of the opinion that the industrial dispute is a minor dispute for settlement by an arbitrator appointed by him. The order of reference is an administrative act of the Minister who has to form an opinion as to the factual existence or apprehension of an industrial dispute (*Aislaby Estate Ltd. Vs. Weerasekara*[1]). Justice Pathirana in the same case at page 253 stated that "I go still further and take the view that section 4(1) of the Act vests the Minister with an amplitude of power (subject only to

the fetter that he is referring an industrial dispute within the meaning of the Act) to order in writing once he is of the opinion that the industrial dispute is a minor dispute for settlement by arbitration to the Labour Tribunal . . . as the Minister is acting solely in an administrators capacity and not judicially or quasi-judicially. The concluding words in section 4(1) : "notwithstanding that the parties to such dispute or their representatives do not consent to such a reference", in fact highlight the amplitude of power vested by section 4 in the Minister".

The same question was again considered by the Supreme Court in *Wimalasena Vs. Navaratne and two others*[2] and it was held that the Minister had the power to refer a dispute for settlement by arbitration under section 4(1) of the Industrial Dispute Act even though an inquiry was pending in the labour tribunal regarding the same dispute. It was also held that the reference to arbitration is a lawful exercise of the powers vested in the Minister by statute and does not amount to an interference with the pending proceeding of a judicial nature. Justice Sharvananda as he was then too considered this question in *Nadarajah Vs. Krishnadasa*[3].

However in a case decided on the 3rd of March 1999 (*Upali Newspapers Ltd. Vs. Eksath Kamkaru Sammuthiya*[4]) the Court of Appeal considered the same question in the light of the decision given in *Walker Sons & Company Ltd. Vs. F.C.W. Fry*[5] where Chief Justice Sansoni, H.N.G. Fernando, S.P.J. and T.S. Fernando, J. (Thambiah, J. and Sri Skandarajah, J. dissenting) held that a labour tribunal exercises judicial powers.

The Court of Appeal also considered the decision in the case *Liyanage Vs. Queen*[6], Article 116 and Article 170 of the present Constitution where the term "Judicial Officer" is interpreted and came to the conclusion that the Minister has no power to refer a matter pending before a labour tribunal for arbitration as it would amount to interference with the pending proceedings of a judicial nature.

From the above it is clear that the power of the Minister to refer an industrial dispute to arbitration is limited only when it is pending before a judicial forum viz. labour tribunal.

According to the facts of the instant case there was a dispute which could not be resolved by the parties nor through conciliation with the intervention of the Commissioner of Labour. The Minister thereafter exercised his discretion in terms of section 4(1) and referred the dispute for settlement by arbitration. Therefore I hold that in the circumstances of this case the terms of the collective agreement which operated as implied terms of the contract of employment did not affect the Minister's power under section 4(1).

The second ground raised by the petitioner was that in view of section 17 of the Industrial Disputes Act which imposes a duty on the arbitrator to make all such inquiries into the dispute as he may consider necessary he should have called upon the petitioner to produce evidence in respect of his capacity to pay the demanded increased wages.

It is to be noted that once the Minister has made the order of reference in terms of section 4(1) the arbitrator appointed by him becomes seized of the dispute and is charged by section 17 "to make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute and thereafter make such award as may appear to him just and equitable". Section 16 authorizes him to admit, consider and decide any other matter which is shown to his satisfaction to have been a matter in dispute between the parties to the date of the order of reference, provided that such matter arises out of or is connected with the statement prepared by the Commissioner. Section 36(5) of the Act supplements this power. Sections 18, 19 and 20 deal with the award of the arbitrator and speak of incidents, attributes and tenure of the award made by the arbitrator.

Section 17(1) of the Industrial Disputes Act was interpreted in *Brown & Company Ltd. Vs. Ratnayake Arbitrator and Three Others*[7] by Rodrigo, J. as follows:

"It is important to note that the section enacts that arbitrator shall make all such inquiries. This section does not say that the arbitrator shall not hold an inquiry. In my view the word 'make' is a pointer to how the inquiry commences . . . the arbitrator can start the ball by calling upon any party in the first instance to place his case before him and thereafter hear the other party, if affected by the case placed before the arbitrator by the party who begins to give him an opportunity to place his case in answer."

It was the contention of the petitioner that the arbitrator did not call upon the petitioner to lead evidence on any specific matter as contemplated by section 17(1) read with section 36(1) of the Industrial Disputes Act. In the instant case there was a dispute as to who should begin the case. After hearing the submissions the arbitrator made order calling upon the petitioner to commence leading evidence. However at that stage the petitioner's position was that "there was no case to meet" but ready and willing to produce any document or evidence which the learned arbitrator calls upon the petitioner to produce. In these circumstances respondent union was called upon to lead evidence with regard to the dispute referred to arbitration. The union led the evidence of one Anthony who admitted the existence of the collective agreement and also told the arbitrator that the petitioner is in a financial position to meet the demand of the union.

Counsel for the 4th respondent submitted that arbitrator is not bound to call for evidence and cited the decision in *Piyadasa Vs. Bata Shoe Company*[8] where the Court of Appeal had stated that an arbitrator in a reference is only required to hear such evidence as may be tendered by the parties to the dispute (section 17) unlike the Industrial Court which has to hear such evidence as it may consider necessary (section 24).

It is observed that the petitioner knew the demand of the respondent union viz. 50% salary increase. His position was that they pay the highest wages in the coir industry but was prepared to consider a salary increase if linked to an increase in productivity either on the basis of higher production or lower manning levels in the factory. In these circumstances it was the duty of the petitioner to assist the arbitrator by placing relevant evidence to solve the "dispute".

The petitioner marked several documents in cross examination of the witness of the 4th respondent union. Having done that the petitioner now cannot complain that the arbitrator should have asked it to produce particular items of evidence.

However it seems to me that since the arbitrator is empowered by section 36(1) of the Act to require any person to furnish particulars, produce documents and give evidence it would have been a very desirable thing to call the petitioner to give evidence at the conclusion of the respondents evidence even though he declined to do so at the commencement on the basis that 'there was no case to meet'.

The third point raised by the petitioner was that the statement of the matter in dispute was bad in that it amounted to a decision by the 1st and 2nd respondents that some increase in wages must be given to the employees of the petitioner and a direction that the question for determination by the 3rd respondent was only what the quantum of such increase should be.

The statement of the matter in dispute referred to arbitration set out in P(1)(b) reads as follows "Whether the demand of the All Ceylon Commercial and Industrial Workers Union for an increase of 50% of Wages to its members, employed at M/S Volanka Limited is justified. If not so what relief could be granted to them".

It was contended that the order of the Minister making a reference to arbitration in terms of section 4(1) of the Industrial Disputes Act is inseparable from the statement of the matter in dispute referred to arbitration by such order formulated by the Commissioner of Labour under section 16 of the said Act and that such references are liable to be quashed by writ of certiorari where the circumstances merit issue of such writ. In support of this contention the petitioners relied on the decision of *Frewin & Company Ltd. Vs. Dr. Ranjith Attapattu & Others*[9].

It is observed that section 16 of the Industrial Dispute Act provides that an order referring a dispute for settlement by arbitration shall be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute between the parties.

It must be noted that the petitioner and the 4th respondent union held discussion on the question of increase in the wages for over two years commencing from the letter written by the 4th respondent union dated 11th July 1995 where the union moved for a revision of the collective agreement and demanded a 50% increase in the wages. The petitioner's position was that the demand of the union was unreasonable as salaries of its employees were higher than those employed in comparable employment. The same arguments were put forward before the Commissioner of Labour when he intervened.

From document 2R4 annexed to the Commissioner's objections it is clear that discussion before the Commissioner too proceeded on the basis that some increase in wages could be given to the workers subject to certain conditions.

Therefore I hold that in the circumstance of this case the question in dispute as formulated by the Commissioner is quite in order. I dismiss this application with costs.

*Application dismissed.*