FREWIN & COMPANY LTD.,
v.
DR. RANJITH ATAPATTU AND OTHERS

COURT OF APPEAL.
S. N. SILVA, J.
C.A. APPLICATION NO. 293/89
DECEMBER 5 AND 12 1991, JANUARY 24 AND 28 AND FEBRUARY 05 1992.

Certiorari – Industrial Dispute – Reference to arbitration under section 4 (1) of the Industrial Disputes Act – Payment of Non-recurring cost of living gratuity (NRCLG) – Collective Agreement – Partial extension under s. 10 (2) of Industrial Disputes Act – Implied term of contract – Ultra vires.

A non-recurring cost of living gratuity (NRCLG) was paid by the petitioner (employer) to the workmen employed in its establishment on the assumption that there was a legal liability to pay under a partial extension of a Collective Agreement of 1971 to every employer in the printing industry by an order of the Minister under section 10 (2) of the Industrial Disputes Act. The payment of a NRCLG was the subject of clause 17 of the said Collective Agreement which was purported to be extended to the petitioner's industry. The extension of the Collective Agreement done by the Minister was subsequently held to be invalid. The petitioner was later advised that there was no liability to pay a NRCLG and the petitioner decided to pay a reduced amount. The contention for the employees (Eksath Kamkaru Samithiya 3rd respondent) was that after the extension was

declared invalid by the Supreme Court in 1982, the petitioner continued to pay a NRCLG up to 1988 and this payment constituted an implied term of the contract of employment. The Minister of Labour by order under section 4 (1) of the Industrial Disputes Act referred to arbitration the industrial dispute in respect of the matter specified in the statement of the Commissioner of Labour. According to the statement, the matter in dispute is whether the non-payment of the balance NRCLG for the period 01.09.1987 to 31.07.1988 to the named employees, being members of the 3rd Respondent union, is justified and the relief each of them is entitled to.

It was common ground that the payment of a NTCLG by the Petitioner commenced upon the purported extension of clause 17 of the Collective Agreement by the order of the Minister. The concept of an NRCLG, the qualifing period of its payment and the formula of its computation are referable to clause 17 according to the petitioner. It was contended that a NRCLG was paid due to a mistake of law but the reference to arbitration proceeds on the assumption was valid on the basis that the payment of a NRCLG had become an implied term of the contract. It was contended on behalf of the Minister that the order of reference to arbitration is severable from the statement of the matter in dispute.

Held :

1. An implied term may be derived in one of three ways : custom, statute law or inferences drawn by judges to reinforce the words of the contract in order to realise the mainfest intention of the parties.

A term of contract cannot be implied on a mere assertion of one of the parties to the contract or on the conduct of the other. In the absence of custom or statute an implied term cannot be added merely on the ground of reasonableness but its existence must be a necessary implication from the circumstances of the case and the language of the contract.

The Minister is not clothed with any judicial power to enable him to assume that a term of contract is implied.

2. The claim for payment of the NRCLG is referable not to an implied term but to clause 17 of the Collective Agreement.

3. The Company (petitioner) had paid the NRCLG by a mistake of law that clause 17 was binding on it by viture of the purported extension of that clause to the Industry of the petitioner by the order of the Minister.

4. By the reference the Minister is seeking to do indirectly what he cannot do directly in extending Clause 17 to the Industry of petitioner.

The petitioner is seriously affected by the reference to arbitration because it precludes him from urging before the arbitrator that quite apart from the balance NRCLG, no amount whatever is due as NRCLG since the extension of clause 17 to the industry of the petitioner as purported to be done by the order of the Minister is invalid and that payments were made on a mistake of law.

Therefore the reference to arbitration is bad and ultra vires.

5. The order of the Minister is not severable from the statement of the matter in dispute and is subject to judicial review on the ground that it is Ultra vires.

Cases referred to :

1. *A. F. Jones (Exporters) Ceylon Ltd. v. Balasubramaniam* (1982) 2 Sri LR 293.
2. *Ceylon Mercantile Union v. Aitken Spence Co. Ltd.* C.A. 140/83 Minutes of 5.9.1989.
3. *Ceylon Printers Ltd. v. Eksath Kamkaru Samithiya* S.C. 34 of 1988 Minutes of 11.11.1988.
4. *Kodakan Pillai v. Mudanayake* 54 NLR 433.
5. *Bandaranaike v. Weeraratne and others* (1981) 1 Sri LR 10, 16.
6. *Aislaby Estates Ltd. v. Weerasekera* 77 NLR 241.
7. Nadaraja Ltd. v. Krishnadasan 78 NLR 255.

APPLICATION for writ of certiorari.

L. Kadiragamer P.C. with *A. Thillakawardena and Maitri Guneratne* for the petitioner.

K. Sripavan, S.S.C. for 1st and 2nd respondents.

L. V. P. Wettasinghe for 3rd respondent.

Cur. adv. vult.

February 21, 1992

S. N. Silva, J.

The petitioner has filed this application for writs of Certiorari to quash the order dated 23-3-1989 (*A*) made by the 1st respondent and the statement of the matter in dispute dated 10-3-1989 (*B*) prepared by the 2nd Respondent. By the said order the 1st Respondent being the Minister of Labour has referred to arbitration an industrial dispute between the petitioner and the 3rd Respondent union, under section 4 (1) of the Industrial Disputes Act. Document (*b*) is the statement

of the matter in dispute, between the parties, prepared by the 2nd Respondent, the Commissioner of Labour under section 16 of the Act.

Learned President's Counsel for the petitioner challenged the validity of the reference and the statement on two grounds. Firstly, that the Non-recurring Cost of Living Gratuity (N.R.C.L.G.) referred to in the statement of the matter in dispute, was paid by the petitioner to the workmen employed in its establishment, on the assumption that there was a legal liability to pay, under a partial extension of the Collective Agreement 31 of 1971 (*e*) to every employer in the printing industry, by an order (*d*) of the Minister under section 10 (2) of the Act. The payment of a N.R.C.L.G. is the subject of clause 17 of the said Collective Agreement (*e*) which was purported to be extended to the petitioner's industry. The extension of the Collective Agreement done by the Minister by order (*d*) was subsequently held to be invalid by the Supreme Court in the case of *A. F. Jones (Exporters) Ceylon Ltd. vs. Balasubramaniam* [1]. The petitioner was later advised that there was no liability to pay a N.R.C.L.G and the petitioner decided to pay a reduced amount from 1988. It was submitted on the foregoing that by the reference to arbitration the Respondent was seeking to do indirectly what he could not do directly, by extending the provisions of clause 17 of the Collective Agreement (*d*) to the industry of the petitioner. The second ground urged by learned President's Counsel is that 17 of the workmen whose names appear in the statement of the matter in dispute (*b*) have ceased to be employees under the petitioner on their vacating post and that the termination of their employment is the subject matter of an inquiry before the 2nd Respondent under the Termination of Employment (Special Provisions) Act No. 45 of 1971 upon a complaint of the workmen. It was submitted that since there is no contract of employment subsisting between the petitioner and these workmen, an award of the arbitrator, even if it is made in favour of these workmen, cannot be implied as terms of the contract of employment, as provided for in section 19 of the Industrial Disputes Act.

Learned Counsel for the 3rd Respondent conceded that the extension of certain clauses of the collective Agreement (including clause 17) by the order (*d*) is invalid. However, learned Counsel submitted that after the extension was declared invalid by the Supreme