BEST FOOTWEAR (PVT) LTD., AND TWO OTHERS
v.
ABOOSALLY, FORMER MINISTER OF LABOUR & VOCATIONAL TRAINING AND OTHERS

COURT OF APPEAL.
F. N. D. JAYASURIYA, J.
C.A. NO. 577/95.
ARBITRATION CASE NOS. A2376 TO A2378.
NOVEMBER 06, 1996 AND JANUARY 22, 1997.
FEBRUARY 06 AND MARCH 07, 1997.

Industrial Dispute – Certiorari – Reference to arbitration under section 4(1) of the Industrial Disputes Act on issue of non-offer to a part of the workforce when entire workforce went on strike – Award – Relevance of issue of justification of the strike to the terms of reference – Vacation of post – Back wages – Considerations relevant to issue of back wages – Emergency Regulations Nos. 563/16 and 786/7 of 25.9.93 – Certiorari distinguished from appeals.

Where out of a total of 169 workers that went on strike, there was a non-offer of work to 54 workmen and the rest were permitted to resume work the issue of justification of the strike is not relevant to the question of non-offer referred to arbitration under section 4(1) of the Industrial Disputes Act. An employer company is not entitled to blow hot and cold, approbate the strike with regard to some of the strikers and to reprobate the strike with regard to the 54 workmen whose claims form the subject of the arbitration proceedings. The action and conduct of the management by offering work to a part of the striking workers is open to be attacked as being tainted with the vice of discrimination, victimisation and therefore constituting an unfair labour practice.

The contention that the strike was illegal and unlawful as the workmen in question were engaged in manufacture of export commodities is not supportable as no cogent evidence was adduced on the point.

The contention that the trade union had not given 14 days notice of the strike to the Commissioner of Labour as required by Regulation 2B framed under section 5 of the Public Security Ordinance and therefore the strike was illegal and unlawful would be unsustainable and untenable on account of the operation of the retroactive provisions of Emergency Regulation No. 786/7 of 25.9.93. The Emergency Regulation No. 1 of 1993 published in the Gazette Extraordinary No. 771/16 of June, 1993 was amended by Emergency Regulation published in Gazette Extraordinary No. 786/7 of 25.9.93 and as a result, even if 14 days notice of a strike has not been given to the Commissioner of Labour and to the employer of the workmen, such omission is not deemed to be a contravention of the aforesaid regulation.

Relief by way of certiorari in relation to an award made by an arbitrator will be available only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently unreasonable or irrational or is guilty of a substantial error of law. The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically different from appeals. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In judicial review the court is concerned with its legality. On appeal the question is right or wrong. On review, the question is lawful or unlawful. Instead of substituting its own decision for that of some other body as happens when an appeal is allowed, a court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not.

***Per* Jayasuriya, J:** "In evaluating the evidence of a witness a court or tribunal is not entitled to reject testimony and arrive at an adverse finding in regard to testimonial trustworthiness and credibility on the mere proof of contradiction or the existence of a discrepancy. The deciding authority must weigh and evaluate the discrepancy and ascertain whether the discrepancy does go to the root of the matter and shake the basic version of the witness. If it does not, such discrepancies cannot be given too much importance ... Before arriving at an adverse finding in regard to testimonial trustworthiness the Judge must carefully give his mind to the contradictions marked and consider whether they are material or not and the witness should be given an opportunity of explaining those contradictions that matter ... Witnesses should not be disbelieved on account of trivial discrepancies and omissions and the Court should look at the entirety and totality of the material placed before it in ascertaining whether the contradiction is weighty or is trivial".

> "The workers had a right conferred on them to launch a legitimate strike. The right to strike has been recognized by necessary implication in the industrial legislation in Sri Lanka and there are numerous express statutory provisions providing for the regulation of strikes. It is, thus a recognised weapon of the workmen to be resorted to by them for asserting their bargaining power and for promoting their collective demands upon an unwilling employee".

The strike weapon is to be used as a last resort.

Though the workmen physically kept away from work during the period after cessation of the strike, it is the background and the circumstances that induced them to keep away from the work place. There was no mental element to desert their employment imputable to the workmen in the proved circumstances of the case.The plea of vacation of post is wholly untenable and unsustainable in law.

Generally an order for reinstatement carries with it an order for back wages from the date claimed by the successful applicant. However both the arbitrator and the

Court of Appeal have a discretion in the award of back wages and the deciding authority would scrupulously look at the conduct of the trade union and its members who are the workers in exercising its discretion. In awarding back wages the deciding authority, in regard to the quantum of back wages, is required to make a just and equitable order which would have necessarily to reckon with the impact of such an order on the financial stability and continued viability of the employer company. If the cessation of work with its consequent loss in production and financial detriment is due to the hasty, rash and precipitate action of the trade union, its officials and its membership, this is a matter to be taken into account. The conduct of the employer and misuse of the strike weapon are also relevant.

Cases referred to:

1. *Barwada Boginbhai Hirjibhai v. State of Gujerat* AIR 1983, 753, 755.
2. *Attorney-General v. Visuvalingam* 47 N.L.R. 286.
3. *Uttar Pradesh v. Anthony* AIR 1985, S.C. 48.
4. *Stanley Perera v. Yoosoof-Sah* 65 N.L.R. 193, 194.
5. *M. M. K. Samson v. Provincial Transport Board, Kandy* C.A. No. 28/87.
6. *W. Nelson G. de Silva v. Sri Lanka State Engineering Corporation* C.A. No. 21/89, C.A. Minutes of 26.6.96.
7. *Somaratne v. Pullamaden Chetty & Sons Ltd.*, S.C. Appeal No. 160/7 – S.C. Minutes of 7.6.72.

APPEAL from award of arbitrator appointed under section 4(1) of the Industrial Disputes Act.

V. C. Motilal Nehru, P.C. with *Mrs. N. P. Joseph* for petitioner.

Gomin Dayasiri with *Manouri Jinadasa* for 4th respondent.

No appearance for 1A, 1B, 2A, 2B and 3rd respondents.

Cur. adv. vult.

April 04, 1995.

F. N. D. JAYASURIYA, J.

The third respondent has pronounced his awards in the arbitration Case Nos. A2376, A2377 and A2378 on the 5th of December, 1994 and on the 9th of January 1995 and copies of these awards have been annexed to the petition marked A. B and C.

The Minister of Labour and Vocational Training, by virtue of the powers vested in him in terms of section 4(1) of the Industrial Disputes Act (as amended) had appointed the third respondent as arbitrator by the Minister's order dated 10.1.94 and had referred the disputes to be mentioned below to the third respondent for settlement by arbitration. The second respondent, who is the Commissioner of Labour, has drawn up the Terms of Reference (T7/41/92(1)) and forwarded such reference to the third respondent setting out the matters in dispute between the parties as follows: "Whether the non-offer of work to 54 workers with effect from the 2nd of March, 1992 by the Management of Best Footwear (Private) Limited and allied Companies **after calling off the strike** at its factory at Elaka, Ja-ela is justified and, if not, to what relief each of them is entitled." The terms of reference expressly named the aforesaid 21, (award A2376), 15, (award A2377) and 18, (award A2378) workers, respectively aggregating to a total number of 54 workers who were the subject-matter of this arbitration inquiry. The inquiry commenced before the arbitrator on the 17th of February, 1994 and was concluded on the 21st of October, 1994 and his award was pronounced on the 5th of December, 1994 and on the 9th of January 1995.

Learned President's Counsel appearing for the petitioner impugned the said award on two principal grounds. It was contended initially that the award was illegal, in that the learned Arbitrator had misdirected himself when he came to the conclusion that although much evidence was tendered before him at the arbitration inquiry to the effect that the strike launched by the workers was unjustified, yet the unjustifiability of the strike was not germane to the matter in dispute, which essentially concerned the issue whether the non-offer of work to those workmen, after they had called off the strike, was justified. It was strenuously argued on behalf of the petitioner that the crucial position taken up by the employer company at the arbitration inquiry was that the strike in question was unjustified and that the Arbitrator committed a grave error in law and grievously misdirected himself in holding that the unjustifiability of the strike was not germane to the matter in dispute in the arbitration proceedings.

Out of the workforce employed at the employer company's workplace, 169 workmen in the three distinct companies went on strike. Out of the workmen who took part in the aforesaid strike, 101 workmen were initially permitted to resume work and were offered continued work by the employer after the cessation of the strike. The evidence discloses that 54 workmen were refused work and their claims formed the subject-matter of the arbitration proceedings. Out of these 54 workers, 10 workers were alleged to have been refused work because they failed to comply with the two conditions precedent imposed by the employer. The arbitration inquiry, thus, related to the alleged non-offer of work to 54 workmen, of whom, it is alleged 44 workmen were not permitted to resume work at all, whereas 10 other workmen were required to signify an assent to certain conditions and when they refused to comply with the conditions, they were also refused work. Thus, it is an admitted fact that out of the total of 169 workers who went on strike, there was an alleged non-offer of work to 54 workmen **but the rest of the workmen who went on strike were permitted to resume work after the strike.** This factual background is a crucially important feature in the attendant circumstances of this application. It is in view of those curious attendant circumstances that the terms of reference were advisedly drawn up in the aforementioned manner. The issue before the Arbitrator was whether the non-offer of work to 54 specified workers with effect from the 2nd of March, 1992 by the management, after calling off the strike, is justified. Certain workers who took part in the strike have been permitted by the management to resume work. To that extent it was argued that there was condonation of the strike **by the employer company** – that the employer company is not entitled to blow hot and cold, approbate the strike with regard to some of the strikers and to reprobate the strike with regard to the fifty four workmen whose claims form the subject of the arbitration proceedings. The action and conduct of the management by offering work to a part of the striking workers, it is contended, is tainted with the vice of discrimination, victimisation and therefore constituted an unfair labour practice. That was a predominant issue that was raised as a matter in dispute between the parties and the said terms of reference were advisedly drawn up to raise the aforesaid issue clearly for adjudication by arbitration. In

view of the specific terms in which the reference was drafted, the question arises whether the learned counsel is justified in his aforesaid impugnment of the awards. The Arbitrator, having correctly conceived of the matter in dispute before him in this light held logically and analytically that the justifiability of the strike is not germane to the matter in dispute before him, which is specifically whether the non-offer of work to the aforesaid 54 workmen, after they had called off the strike was justified.

Learned President's Counsel appearing for the petitioner contended that the strike launched by the Ceylon Mercantile, Industrial and General Workers' Union (fourth respondent) on behalf of the workmen at the premises of Best Footwear (Pvt.) Ltd., Vinyl Products (Pvt.) Ltd. and Lanka Vinyl Ltd. was illegal and unlawful in view of the provisions of the subsidiary legislation which governs the particular issue as the workmen in question were engaged in the manufacture of export commodities. *Vide* the contents of the Gazette dated 24.6.1989 which was produced marked as X1. This identical issue relating to the illegality and the unlawfulness of a strike on identical media was raised before me in the case of Simca Garments Limited v. Ceylon Mercantile, Industrial and General Workers' Union, C.A. Application No. 735/96, Arbitration Case No. A 2404, C.A. minutes of 13.11.96. The illegality and unlawfulness of the strike both in the instant application and in the application which came before the Court of Appeal in the decision in Simca Garments Limited was based on the application of the Emergency Regulations bearing No. 563/16 (marked as X1) which have been promulgated in terms of the Emergency Regulations of 1989, as amended. This particular Emergency Regulation does not become operative to both the aforesaid applications in view of the enactment of the subsequent Emergency Regulation No. 786/7 dated 25.9.93. The effect of the subsequent Emergency Regulation is retroactive in character and it sets out that for all purposes the workmen are deemed not to have vacated their posts and their services are deemed not to have been terminated and their strike is not illegal by reason of anything set out in the earlier gazetted regulations. Equally, a strike which was launched without giving sufficient time as prescribed in the law is deemed by the operation of the retroactive provisions of the

Emergency Regulation No. 786/7 dated 25.9.93 to be, nevertheless, lawful and legal. The basis and foundation on which the contentions in regard to the unlawfulness and illegality of the strike which were advanced by learned President's Counsel has been effectively removed by an enactment of the subsequent Emergency Regulation No. 786/7 dated 25.9.93. When this point was brought to the notice of learned President's Counsel in the course of the argument and his attention specifically drawn to the decision in Simca Garments Limited application, he stated that in view of that judgment he is not pressing the point raised by him in regard to the illegality and unlawfulness of the aforesaid strike. Hence, the contention placed before this court that the trade union in question, that is the fourth respondent trade union, had not given 14 days' notice of the strike to the Commissioner of Labour as required by Regulation 2B framed under section 5 of the Public Security Ordinance and therefore the strike was illegal and unlawful, would be unsustainable and untenable on account of the operation of the retroactive provisions of Emergency Regulation No. 786/7 dated 25.9.93. The Emergency Regulation No. 1 of 1993 published in the Gazette Extraordinary No. 771/16 of 17th June, 1993 was amended by Emergency Regulation published in Gazette Extraordinary No. 786/7 of 25.9.93 and as a result, even if 14 days' notice of a strike to be commenced by a trade union has not been given to the Commissioner of Labour and to the employer of the workmen, such omission shall be deemed not to be a contravention of the provisions of the aforesaid regulation. The subsequent regulation bearing No. 786/7 dated 25.9.93 has retroactive and retrospective operation and, therefore, is the regulation which is applicable to the issue raised by the learned President's Counsel.

Further, in regard to the stand taken by the employer company that the strike was illegal, the employer company failed to place cogent material and evidence before the Arbitrator that any part of the manufactured products of the employer company was in fact exported. The employer called a witness by the name of Wilson Perera and his evidence was to the mere effect that part of the goods produced **was meant for local and foreign markets.** It was the bounden duty of the employer company to have produced evidence

before the Arbitrator that the products manufactured by the employer were in fact exported and this fact could have been established by the production of the registers maintained at the Customs Department and other official documents emanating from proper custody. This fact could have been easily established if that was the actual position. However, the employer company failed to discharge that onus. In the circumstances, the Arbitrator has very correctly held that no acceptable evidence has been tendered by the employer company that the workmen concerned were "engaged in services, work or labour of any description, necessary or required to be done in connection with the **export** of commodities, garments or other export products" as stipulated by the regulation relied upon by learned counsel for the employer company.

In considering and in evaluating the contentions and submissions advanced by learned President's Counsel before this Court, I must stress that this court must necessarily have in the forefront of its mind that it is exercising in this instance a very limited jurisdiction quite distinct from the exercise of appellate jurisdiction. Relief by way of certiorari in relation to an award made by an arbitrator will be available to quash such an award only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently unreasonable or irrational or is guilty of a substantial error of law. The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order and if the arbitrator's award was not set aside in whole or in part it had to be allowed to stand unreversed. I refer to a passage in the treatise on Administrative Law written by Prof. H. W. R. Wade (12th edition) at pages 34 and 35 which reads thus: "Judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of the decision under appeal ... but in judicial review the court is concerned with its legality. On appeal, the question is right or wrong? On review, the question is lawful or unlawful?... Judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, a court on review is concerned only with the question

whether the act or order under attack should be allowed to stand or not." Thus, the object of this Court upon judicial review in this application is to strictly consider whether the whole or part of the award of the Arbitrator is lawful or unlawful. This Court ought not to exercise its appellate powers and jurisdiction when engaged in the exercise of supervisory jurisdiction and judicial review over the award of the Arbitrator.

Having considered carefully the two principal grounds raised by learned President's Counsel in his impugnment of the Arbitrator's award, I hold, for the reasons enumerated by me, that there is no unlawfulness and/or illegality in the award in these respects and the award is lawful.

In regard to the issue of "non-offer of work" which is specifically raised in the terms of reference, when the workers concerned reported for duty on the 2nd of March, 1992 after calling off the strike, the position of the trade union and the workers is that when the workmen did report for work on the 2nd of March, 1992, the Management had made arrangements to offer work only to those workers who agreed to assent to two conditions. Firstly, that the workers should resign from the trade union; and, secondly, that they be taken in and given employment as new entrants. Workman M. Siripala has given evidence and stated in his oral evidence that they reported for work on the 2nd of March, 1992 and these two conditions were wrongfully imposed and Siripala and many other workmen refused to accede to these two conditions and then the Management refused to offer them work. Witness Siripala was subjected to cross-examination and in the course of the cross-examination he was confronted with the contents of documents A22. A22A and A22B. Particularly in document A22B, which has been signed by U. R. S. Manawasinghe and the witness M. Siripala, the signatories to this written communication state that after ending the strike on the 2nd of March, 1992, they had reported for work at 8 a.m. at the work place of the employer and on that occasion the officers on duty at the entry security point stationed at the work place, had informed the signatories that on the instructions of the Management that the signatories were required not to be permitted to enter the work place. Contents of these three documents and in particular

A22B have been made use of by learned counsel for the employer to assail the credibility of witness Siripala. The Arbitrator has considered this contradiction and discrepancy between the oral evidence of Siripala and the contents of document A22B and has arrived at the conclusion that this contradiction and discrepancy is not of such great import. On a consideration of the contents of documents A22, A22A and A22B, it is clear that these letters have been written as a protest by the **general body** to the Management. They are general letters written by the workers as a whole, whereas document A23, in contract, is a **specific** letter written by another workman named. L. A. Nimal Nandasena. In that letter there is a reference to the imposition of the condition that the worker is required to resign from the aforesaid trade union if he is to be offered employment. No such condition is set forth in documents A22, A22A and A22B. It is this consideration which has induced the Arbitrator to hold that the discrepancy and contradiction is not of such great import. In evaluating the evidence of a witness a court or a tribunal is not entitled to reject testimony and arrive at an adverse finding in regard to testimonial trustworthiness and credibility on the mere proof of contradiction or the existence of a discrepancy. The deciding authority must weigh and evaluate the discrepancy and ascertain whether the discrepancy does go to the root of the matter and shake the basic version of the witness. If it does not, such discrepancies cannot be given too much importance. *Vide* the decision in *Barwada Boginbhai Hirjibhai v. State of Gujerat*[1]. Justice Canon was at pains to point out that before arriving at an adverse finding in regard to testimonial trustworthiness the Judge must carefully give his mind to the contradictions marked and consider whether they are material or not and the witness should be given an opportunity of explaining those contradictions that matter – *Attorney-General v. Visuvalingam*[2]. The Indian Supreme Court emphasized the important consideration that witnesses should not be disbelieved on account of trivial discrepancies and omissions and the **Court should look at the entirety and totality of the material placed before it in ascertaining whether the contradiction is weighty or is trivial.** See the case of *State of Uttar Pradesh v. Anthony*[3]. The evaluation of evidence is a matter for the deciding authority who is sitting as a court of first instance. It is quite manifest that the Arbitrator has given

his mind to the contradiction and discrepancy highlighted by learned counsel who appeared for the employer and has arrived at the finding of fact having had the benefit of the demeanour and deportment of witness M. Siripala that the discrepancy and contradiction spotlighted is not of such great import. In the circumstances, he has arrived at the following finding and stated: "I accept the evidence of the above quoted documents that these workmen did report for work on the 2nd of March, 1992 and that they were not offered work as they were not agreeable to the conditions laid down". It was elicited in evidence that in the letter issued to worker A. Seetha Dulcie, which was produced marked A28, that she was offered re-employment as a new entrant. In the circumstances, having considered the totality of the evidence before him, the Arbitrator holds "with regard to the other condition, namely, that these workers should resign from the union, there is no reason for the Arbitrator to reject the evidence of the witnesses of the union that the workers were given the draft of a letter imposing two conditions which they were to sign and hand over to the Management before they were offered work and only those who had done so were re-employed. The laying down of these two pre-conditions for the offer of work can be considered to be tantamount to an unfair labour practice. The workers mentioned in the reference had refused to do so and had not been offered work. On a consideration of all the evidence tendered and the inquiries made by me, I have no hesitation in holding that the non-offer of work to the workmen named in the terms of reference was not justified." In regard to this finding, it is clear that there has been no misdirection in point of fact or law, there has been no failure to take into account the effect of the totality of the evidence placed before the Arbitrator and there is no improper evaluation of evidence. Hence, there is no error of law on the face of the record and certainly the findings are all lawful and legal.

The employer company, in its statement of its case filed on the 30th of January, 1994, has taken up the position that the workers, when they failed to report for work on the 10th of January, 1992 after receiving the letter issued by the employer company dated 4th January, 1992 had vacated their posts and employment and, by a communication dated 6th of February, 1992 the employer company

had informed the workers, that by failing to report for work as directed, they had vacated their employment. Document marked as R20 written by Lanka Vinyl Ltd. to the workers, communicates the determination of the employer that the workers had vacated their posts. There is no position set up in that letter that the strike is unlawful, Illegal, unjustified or unreasonable. The workers had a right conferred on them to launch **a legitimate** strike. The right to strike has been recognised by necessary implication in the industrial legislation in Sri Lanka and there are numerous express statutory provisions providing for the regulation of strikes. It is, thus, a recognised weapon of the workmen to be resorted to by them for asserting their bargaining power and for promoting their collective demands upon an unwilling employer. *Vide* the judgment of Chief Justice Basnayake in *Stanley Perera v. Yoosoof-Sah*[4] where the learned Judge reproduces a part of the award of P. O. Fernando Arbitrator and Judge in Industrial Dispute between United Engineering Workers' Union and Taos Limited.

It is in evidence that the strike commenced on the 28th of November, 1991 and after cessation of the strike that the workmen reported for work on the 2nd of March, 1992. Though the workmen physically kept away from work during this period, having regard to the background events and the circumstances which induced them to keep away from the work place, (*Vide* judgment in *Stanley Perera v. Yoosoof-Sah*[4] – per Industrial Court Judge P. O. Fernando) no mental element to desert their employment could be imputed to the workmen in the proved attendant circumstances of this case. I refer to the principles laid down in the decision in *M. M. K. Samson v. Provincial Transport Board, Kandy*[5] and the decision in *W. Nelson G. de Silva v. Sri Lanka State Engineering Corporation*[6] where all the significant decisions on the law relating to vacation of post have been collated and reviewed by the Court of Appeal. Thus, the plea of vacation of post set forth in the aforesaid statement of case and which was sought to be substantiated before this Court at the hearing of this application is wholly untenable and unsustainable in law.

The Arbitrator has finally arrived at the finding that he had no hesitation in holding that the non-offer of work to the workmen

mentioned in the three references was not justified. In regard to the relief to which the workmen are entitled, he has held as follows: "I would therefore consider it just and equitable that these workmen be re-employed with back wages less statutory deductions, if any, from January, 1994. The employer company is hereby directed to implement the terms of this award within one month of its publication in the Gazette." The award was made and pronounced on the 9th day of January, 1995. The trade union had claimed that the workmen be reinstated with back wages from the 2nd of March, 1992. However, the trade union was unable to explain the reasons for the inordinate delay in this dispute coming up for arbitration before the Arbitrator as late as January, 1994. The award of the Arbitrator has been published on the 1st of March, 1995. The employer company has been directed to implement the terms of the award within one month of the 1st of March, 1995, that is, on the 1st of April, 1995.

Generally, an order for reinstatement carries with it an order for back wages from the date claimed by a successful applicant. However, both the Arbitrator and this Court of Appeal have a discretion in the award of back wages and the deciding authority would scrupulously look at the conduct of the trade union in question and its members who are the workers, in exercising its discretion in regard to the award of back wages. *Vide* the unreported Supreme Court decision in *Somaratne v. Pullamadan Chetty and Sons Ltd.*[7] and the decision of the Court of Appeal in *M. M. K. Samson v. Provincial Transport Board, Kandy*[5] In *Samson's* Case, the Court of Appeal, in the exercise of its discretion, having particular regard to the conduct of the applicant, refrained from making an order for the payment of back wages to the applicant-appellant. On the question of back wages, the Court of Appeal is entitled to inquire whether the order of the Arbitrator and his award of back wages is irrational or unreasonable applying the rule in Wednesbury's case. In awarding back wages, the deciding authority, in regard to the quantum of back wages, is required to make a just and equitable order which would have necessarily to reckon with the impact of such an order on the financial stability and continued viability of the employer company. The trade union has claimed back wages for its members from the

2nd of March, 1992, which is the date on which, they alleged, that the workers had reported for work at the employer company's factory. I would, in this context, refer to the evidence elicited and the submissions advanced before this Court in regard to the reasonableness of the conduct of the employer company in eagerly entertaining representations made on behalf of the workmen by the trade and the attempts made by the employer companies to raise the wages of the workman within the limitations permitted by financial constraints that faced the employer companies. The contents of documents A12, A13, A14, A15, A16 and A19 evidence such willingness to conciliate, hear representations of workers and grant whatever reliefs that were claimed which were permissible in the circumstances on the part of the employer company. On the other hand, the cessation of work with its consequent loss in production and financial detriment and the strike was largely due to the hasty, rash and precipitate actions on the part of the trade union in question its officials and its membership. By document marked as R12, which is a letter written by the Ceylon Mercantile Industrial and General Workers Union (CMU) to Messrs. Lanka Vinyl Ltd. dated 13th November, 1991, the General Secretary of the CMU has informed the management that the Executive Committee of the trade union has decided to authorise the members of the branch union in the employer's establishment to strike, without further notice, in pursuance of certain issues mentioned, **if** they do not receive a satisfactory response from the management on or before the 22nd of November, 1991. This is a conditional notice of an intention to strike and it has its inherent deficiencies, in that it is a conditional notice. Thereafter, the General Secretary of the CMU, on the **27th of November, 1991** addressed a communication to the three management employer companies informing the addressees of the letter that the members of the CMU in the establishments of the management have been authorised by the General Council of the **trade union** to take strike action from the **28th of November, 1991** in pursuance of certain enumerated demands, vide R14. It is in evidence that this document R14 had been delivered to the employer companies only **at 2 p.m.** on 27.11.91. I hold that the notice to strike given by R14 is woefully inadequate and both the Commissioner of Labour and the Assistant Commissioner of Labour, Ja-ela and the

employer companies were deprived of an opportunity, by the hasty decision and hasty determination to strike, of interceding and mediating in this dispute to effect a settlement and to initiate conciliation procedures. In the circumstances, this decision to strike on 28.11.91 by a communication which was delivered at 2 p.m. on 27.11.91 is a hasty and a precipitate decision smacking of rashness and indecent hurry for which considerable blameworthiness must attach to the union, its officials and its members who are the workers who are involved in these arbitration proceedings. It is a trite proposition that since the commencement and the continuance of a strike has an adverse effect upon production and upon the industry and because it may ultimately lead to a closure of manufacturing establishments, this weapon of a strike ought to be used as a **last resort** when all other avenues for settlement of industrial disputes have proved to be futile and fruitless. In the circumstances, Courts of law by their orders ought to discourage the **misuse** of strikes and to control and minimise the deleterious and harmful consequences of its misuse in respect of industries as far as possible so that the economy of the country would not be adversely affected. I hold that the strike in this case has not been utilised as a **last resort** and this hasty and ill-considered decision to strike has caused cessation of production, considerable financial loss and detriment to the employer and an adverse effect on the economy of the country for which all blame must be imputed to the trade union in question, which is the C.M.U. The Arbitrator has referred to this aspect and he has stated that the company has complained of financial loss, detriment and financial constraints. He had emphasized that several workmen are involved and granting of back wages for so long a period would certainly **strain** the resources of the company and perhaps even **jeopardise its viability.** In these circumstances I hold that it is unreasonable and irrational, particularly having regard to the conduct of the trade union in question and its member workers and having particular regard to the conduct of the employer, which is reflected in documents A12, A13, A14, A15, A16 and A19 to award back wages from January, 1994. In the circumstances, I quash the order of the Arbitrator awarding the workmen back wages from January, 1994. I would set aside that order for back wages and instead direct and order that the workmen be reinstated and be re-employed in the posts that they

held before the strike,in the service of the employer companies with back wages less statutory deductions, if any, from the **1st of April, 1995** till they are actually reinstated in the aforesaid posts in the service of the employer companies. 1st of April, 1995 is the date specified by the Arbitrator for the implementation of the terms of the award, as the award has been published in the Government Gazette on the 1st of March, 1995. Subject to the aforesaid variation relating to the award of back wages, I proceed to dismiss the application of the petitioners with costs in a sum of Rs. 525 payable by the petitioners to the 4th respondent. Subject to the variation contained in the judgment, application is dismissed with costs.

Order varied and Appeal dismissed,
subject to the variation.