MORAPANA COMMERCIAL CO. LTD. AND OTHERS
v.
MARIAMMA AND OTHERS

COURT OF APPEAL.
S. N. SILVA, J.
C.A. APPLICATION NO. 458/89
LT NO. 9/14334/87
APRIL 03 ,1992.

Certiorari – Substitution of worker's name in place of Trade Union – Sections 31B(1) and 31C(1) of Industrial Disputes Act.

Applications were filed by a trade union in the Labour Tribunal for relief or redress in respect of the termination of employment of six workmen by the Petitioners who sought to justify the termination. On the date of inquiry counsel representing the trade union submitted that the union did not wish to proceed with the applications and that he was not appearing in the matter. A motion filed by another person to represent the workmen was refused by the President of the Labour Tribunal and notice was issued on the union to explain its position. There was no response from the union to this notice. Workmen who were present filed a joint motion stating that the union "deserted them" and moved that their names be substituted as applicants. The Petitioners resisted the motion and moved that the applications be dismissed for non-prosecution by the union. The President allowed the motion of the workmen, substituted them as applicants and permitted them to proceed with the application.

In an application for writ of certiorari to quash the order of the President, counsel for the Petitioners conceded that the application is not liable to be dismissed in view of the failure of the trade union to prosecute it, but that in view of the duty of the Tribunal in terms of section 31(c)(1) it should go on with the inquiry with the union as the applicant, in its absence, without the workmen being substituted as applicants.

Held:

The duty cast on the Tribunal by section 31(C)(1) to make all inquiries and hear all evidence as may be considered necessary does not detract from the basic premise that there are two parties to the proceedings from the beginning to end.

The Legislature never intended inquiries by a Labour Tribunal to proceed with the employer fully represented and the workman saddled with an applicant union that is not looking after his interests. A trade union is empowered by Section 31B(1) to

make an application "on behalf of a workman" to a Labour Tribunal only on the premise that the union will effectively prosecute the cause of securing relief or redress to the workman in all stages of the proceedings. If at any stage, the applicant union fails or neglects to effectively prosecute this cause, it is in accord with the legislative purpose to permit the workman to substitute himself as the applicant and to proceed with the application.

The matters of substitution of a party and the amendment of the caption of the application for that purpose pertain to procedure. In the absence of any provision on the Act or the Regulations to deal with these matters, the Labour Tribunal may permit such substitution and amendment in keeping with the ultimate objective of making a just and equitable order as required by section 31C(1).

Cases referred to:

1. *The South Ceylon Democratic Workers Union v. Selvadurai* 71 NLR 244, 246.
2. *Ceylon Workers Congress v. Subramaniampillai* 77 NLR 335.
3. *Piyadasa v. Bata Shoe Co.* (1982) 1 Sri LR 91.
4. *Hewagam Korale East Multi Purpose Co-Operative Society Ltd. v. Hemawathie Perera* (1986) 1 Colombo Appellate Law Reports 535, 536 (1986) 2 Sri LR L173.
5. *All Ceylon Commercial and Industrial Workmen's Union v. Collettes Ltd.* (1987) 1 Sri LR 281.
6. *Sherman de Silva and Co. Ltd. v. United Tea, Rubber and Local Produce Workers Union* S.C. 42/65 – Minutes 24.7.1967; 19 Ceylon Labour Gazette 806.
7. *Peiris v. Laksalite Roche Co.* (1983) Sriskantha's Law Reports Vol. II p. 91.

Application for writ of certiorari to quash order or Labour Tribunal Nuwara Eliya.

L. C. Seneviratne P.C. with *R. L. Perera* for Petitioners.
A. Vinayagamoorthi for 1st respondent.

Cur adv vult.

June 19, 1992.

S. N. SILVA, J.

The Petitioners have filed this application for a Writ of Certiorari to quash the order dated 31.3.1989 made by the learned President of the Labour Tribunal, Nuwara Eliya. By that order learned President substituted the name of the 1st Respondent (workman) as the applicant in place of the applicant-union (Ceylon Workers Congress) and permitted the workman to prosecute the application. This order is

applicable to five other applications that had been consolidated for inquiry before learned President. At the commencement of the hearing of this application it was agreed by counsel that the decision in this case will be binding on applications CA 459/89 CA 463/89.

The Ceylon Workers Congress (Union) filed six applications in the Labour Tribunal, Nuwara Eliya on behalf of the workmen-respondents. The Petitioners are the Respondents to those applications. The Union was represented by Counsel at the inquiry. The Petitioners admitted termination of employment and adduced evidence to justify termination on several days. When the matter came up for inquiry on 2.3.1989, Counsel for the Union submitted that the Union did not wish to proceed with the application and that he was not appearing in the case. On the same day one R. A. Selliah tendered a motion to the Tribunal and sought permission to appear for the workmen. Learned President refused this motion on the ground that Selliah had no authority from the applicant union to appear in the case. Thereupon learned President issued a notice by registered post on the union to explain its position to the Tribunal with regard to the applications that were pending. There was no response to the notice and on 31.3.1989, when the matter came up for inquiry the union was absent and unrepresented. The workmen who were present on that day filed a joint motion praying that the name of the union be deleted as applicant and the names of the workmen be substituted in that place. The motion (X2) specifically states that the workmen authorized the union to file the applications in the Labour Tribunal on their behalf and that the union has without any reason "deserted them". Counsel for the Petitioners resisted this motion and submitted that the applications, should be dismissed since the union was no longer prosecuting them. Learned President by the impugned order allowed the motion of the workmen and made order deleting the name of the union as applicant and also permitting the workmen to proceed with the applications.

Learned President's Counsel for the Petitioners submitted that the applications were filed by the union as principal, in its own right, and not as agent of the workmen; that the workmen only received the benefit of the application and have no right to be substituted as applicants even if the union is wilfully neglecting to prosecute the

applications. Learned President's Counsel did not rely on the submission of counsel who appeared before the Tribunal, that the applications should be dismissed in view of the failure of the union to prosecute them. It was conceded, that even if the union fails to prosecute the applications, there is a duty of the tribunal to make all inquiries, hear all evidence as may be considered necessary and to make a just and equitable order, in terms of section 31 C(1) of the Industrial Disputes Act. Hence, the submission is that the inquiry should go on with the union as the applicant but in the absence of the union and without the workmen being substituted as applicants.

Learned Counsel for the workmen-respondents conceded that certain judgments of the Supreme Court and of this Court appear to be based on the premise that when a union takes up the cause of a workman it functions as principal and not as an agent of the workmen. However, he relied on other judgments where a different approach is adopted and, submitted that the union's status is one of agent and not principal. In any event it was submitted that the order of learned President is one that is just and equitable in the circumstances of this case and that there is no error of law that affects its validity. It was also submitted that it would be a travesty of justice to refuse a motion of a workman to prosecute an application made on his behalf where the applicant-union is failing to do so.

I will now examine the judgments relied upon by learned President's Counsel in support of the proposition that an application is made by a union as principal and not as agent of the workman.

In the case of *The South Ceylon Democratic Workers Union v. Selvadurai*,[1] the Supreme Court issued Writ of Certiorari quashing a decision of an arbitrator to whom an industrial dispute had been referred in terms of section 4(1) of the Industrial Disputes Act. The arbitration related to the termination of employment of an officer of a Co-operative Society who was represented by a trade union. An objection was raised by the Society to any relief being awarded on the basis that the dispute being one between the Society and its officer should be referred to arbitration in terms of section 53 of the Co-operative Societies Ordinance and that the Minister had no jurisdiction to make a reference in terms of section 4(1) of the

Industrials Disputes Act. In the course of his judgement (at page 246) T. S. Fernando, J. referred to the definition of the phrase "industrial dispute" appearing in section 48 of the Act and observed that "the Act appears to be framed with the deliberate purpose of providing for trade unions to take up as their own the cause of workmen belonging to their unions, and when a union has so taken up as its own, the cause of one of its workmen, the cause for all formal purposes of the Act must be regarded as that of the union and not that of the individual workman." Learned President's Counsel relied on this passage to support the proposition that a union functions as principal and not as agent of a workman. I have to note that the observation was made by T. S. Fernando, J. in the context of a submission that the Minister had no jurisdiction to make a reference in view of a specific provision in the Co-operative societies Ordinance. He relied upon the definition of the phrase "industrial dispute" as appearing in section 48 to hold that the parties to an industrial dispute are different from the parties to a dispute as referred in the Co-operative societies Ordinance. The phrase "industrial dispute" does not appear in section 31 B(1) of the Act in terms of which an application is made to a Labour Tribunal for relief in respect of a termination of services by an employer. As noted below the wording of this section is different. In such a situation, it would be misleading to define the provisions of section 31 B(1) in the light of the observations made by T. S. Fernando, J.

In the case of *Ceylon Workers Congress v Subramaniampillai,*[20] the Supreme Court dismissed an appeal from a Labour Tribunal. By the order from which the appeal was filed, President of the Labour Tribunal dismissed a second application made by a different union on the basis that a previous application made by another union in respect of the same workmen had been withdrawn. It is to be noted that the workmen did not dispute that they were members of the union that made the previous application at the time that application was dismissed upon the motion for withdrawal. The Supreme Court held that since there was no appeal from the first order of dismissal it should remain as the final order and that the second application could not have been made by another union. The judgment does not in any way deal with the question whether an applicant-union should be considered as the principal or, not.

In the case of *Piyadasa v. Bata Shoe Co.* [3] this Court considered the validity of an award made by an arbitrator in terms of a reference under section 4 (1) of the Industrial Disputes Act. In the course of the arbitration, the workmen involved in the dispute, requested the arbitrator to substitute them for the union, that was named as a party to the dispute, on the basis that the union had ceased to represent them. This request was refused by the arbitrator. Subsequently, the union and the employer asked the arbitrator for permission to withdraw from the proceedings and moved that the arbitrator return the papers to the Minister. This was also refused by the arbitrator who proceeded to make the award on the basis of the evidence that had been adduced before him. The application for a Writ of Certiorari was refused on the basis that there is no illegality in the award made by the arbitrator. In the course of the judgment Tambiah, J. cited the passage from the judgment of T. S. Fernando. J. referred above and, observed that there do not appear to be any provision for the substitution of a party where an industrial dispute is referred to an arbitrator under section 4 (1) of the Act. Therefore, for the same reason stated above I am of the view that this judgment does not support the proposition of learned President's Counsel.

In the case of *Hewagam Korale East Multi Purpose Co-operative Society Ltd. v. Hemawathie Perera*[4] this Court rejected a petition of appeal filed by an employer from the order of a Labour Tribunal on the basis that the proper party was not named as respondent in the petition. The application to the Labour Tribunal was filed on behalf of the workman by a trade union. In the petition of appeal the employer did not cite the union as the respondent but in its place gave the name of the workman. It was held that the petition of appeal is defective and the application to substitute the respondent was refused. Section 31 D (2) requires an employer appellant to mention the other party, that is the trade union or the workman who made the application to the Labour Tribunal as the respondent. The Court refused to accept the submission that the union represents a workman in making an application and that it is sufficient compliance with the requirements of section 31 D (2) if the workman, on whose

behalf the application was made is named as respondent. Bandaranayake, J. (at p. 536) observed as follows:

> "Here the statute contemplates a Trade Union representing a workman. What is the rationale for the creation of this statutory relationship? In the context of the need to balance the interests of the employee and the employer it appears that the statute recognises that the Union is usually better equipped to prosecute the claim of the workman. For example, the Union has varied experience in prosecuting labour disputes and the Union can meet the costs both before the Tribunal and in appeal. The policy of the law seems clear. The Union is a party to the proceedings representing the workman being so permitted by statute. Once so included as the applicant to the proceeding before the Tribunal the Trade Union assumes the status of the applicant party and must necessarily continue throughout all other phases of legal proceedings as a party to the same dispute, in view of the statutory provisions referred to above, I cannot agree that the Union is a mere agent looking after the workman's interests at the Tribunal like Counsel representing his client and that he is not a party to the proceedings. In the petition of appeal in the instant case the Trade Union being the other party should have been mentioned as a respondent to the appeal. This has not been done."

The last case relied upon by learned President's Counsel is the decision of this Court in the case of *All Ceylon Commercial and Industrial Workmen's Union v. Collettes Ltd.*[6] In that case an application was filed by a union on behalf of a workman whose services were terminated. The Labour Tribunal dismissed the application and the union filed an appeal to this Court from that order. When the appeal was pending the workman concerned died and it was submitted by the employer that since the workman had ceased to be a member of the union, the union cannot prosecute the appeal on his behalf. It was held that the union can continue to appear notwithstanding the death of the workman since the heirs and successors of the workman would have a right to pursue any claims

that the workman may have had for compensation, back wages or gratuity.

It is seen from an examination of the foregoing judgments that there is no specific pronouncement either by the Supreme Court or by this Court that when an application is filed by a union on behalf of a workman, the union functions as principal. The tenor of the judgments appear to be that when a union takes up the cause of a workman that becomes the cause of the union and not of the workman. That, the union becomes the applicant party and not a mere agent looking after the interests of the workman. Similarly, none of these judgments go into the question whether a workman could be substituted in place of an applicant-union in a proceeding before the Labour Tribunal; where the union has failed to prosecute the application. On the contrary, learned Counsel for the workmen-respondents, relied upon a judgment of this court and of the former Supreme court where such substitution was considered appropriate. In the case of *Sherman de Silva & Co. Ltd. v. United Tea, Rubber and Local Produce Workers Union* [6] an application was filed in the Labour Tribunal by a union on behalf of a workman whose services were terminated. However, the application was not subscribed by the President or the Secretary of the union as required by form 'D' of the first schedule to the Regulations made under the Act and published in Government Gazette No.11688 of 02.03.1959. When this matter was discovered later, the workman moved to have himself substituted in place of the applicant-union. This was allowed by the Labour Tribunal. In appeal Manicavasagar, J. considered the matter of substitution as an amendment of the application. On a perusal of the judgment, it appears that the question whether the amendment should be allowed was considered in the light of the rules then applicable to the amendment of a plaint in a civil action. He concluded that if the amendment was refused and the original application rejected it would have given an unjust advantage to the employer and caused a travesty of justice.

In the case of *Peiris v. Laksalite Roche Co.*[7] the President of the Labour Tribunal dismissed an application filed by a union on the ground that the union was not present to prosecute the application

although summons had been issued previously. It was recorded that the workman was present on this day. In appeal, a bench of two Judges of this Court set aside the order of dismissal and held that the proper course was for the President to have asked the workman whether he desires to be substituted in place of the union and on his agreeing, to substitute the workman as the applicant and proceed with the inquiry. In the course of his judgment Tambiah, J. cited a passage from "Legal Framework of Industrial Relations in Ceylon" by S. R. de Silva (pp. 325, 326), where the learned author expressed the view that the status of a union before the Labour Tribunal is one of agent and not of principal. It is also stated that a workman on whose behalf an application is made to a Labour Tribunal can move that his name be substituted for that of the union as applicant.

The decision in the above case is directly in point. It is seen that learned President has in this case done precisely what this court considered as being proper in the *Laksalite Roche* case. However, learned President's Counsel submitted that in the *Laksalite Roche* case the observations made by the Supreme Court and this Court in the other cases referred above were not considered. It was also submitted that the judgment does not go into "the objective and intention of section 31B(1).

It is correct that the judgment in the *Laksalite Roche* case was delivered on the same day the matter was argued and that none of the previous cases are referred to in that judgment. The only reference is to the passage from the work of S. R. de Silva. However, that by itself does not detract from correctness of that judgment from which no appeal was filed.

Section 32B (1) referred above is contained in Part IV A of the Industrial Disputes Act introduced by Act No. 62 of 1957. This Part provides for the establishment of Labour Tribunals. It is clear that the legislative purpose, in introducing this Part is to provide a separate forum from which relief or redress may be sought in an instance where a workman's services is terminated by his employer. Section 31C (1) enjoins a Labour Tribunal to make all such inquiries into an application for relief or redress and to hear all such evidence as may

be considered necessary and thereafter to make an order as may appear to be just and equitable. In terms of section 31 B (4) relief or redress may be granted by a Labour Tribunal to a workman notwithstanding anything to the contrary in the contract of service between the workman and his employer. Section 31 B (1) which enables a union, of which the workman is a member, to make an application to a Labour Tribunal for relief or redress "on behalf of a workman " should properly be construed in the light of this legislative scheme.

Learned President's Counsel submitted that a union makes an application to the Labour Tribunal as principal and that the phrase "on behalf of a workman" should be interpreted as meaning "for the benefit of a workman". In other words that where an application is made by the union the workman does not have any control of the proceedings and that he is merely the recipient of what benefit the union, as applicant, may obtain for him. A question will then arise as to what will happen when the union fails to prosecute the application as in the *Laksalite Roche* case and in this case, bringing the workman to a situation where his case is not effectively presented to the Tribunal. The submission of learned President's Counsel is that even where the union fails to prosecute an application, there is no failure of justice since the President should continue with inquiries and recording of evidence as provided for in section 31 C (1). It is indeed the duty of the Tribunal to make all inquiries and hear all evidence as may be considered necessary. However, the statutory duty thus cast on the Tribunal does not detract from the basic premises that there are two parties to the proceedings, from the beginning to end. This is clearly demonstrated by the provisions of section 31 D as amended by Act No. 32 of 1990. Section 31 D (1) requires a Labour Tribunal to make an order at the conclusion of the proceedings, to be pronounced at a sitting of the Tribunal on a date "which shall be notified in advance to all the parties to such application". Section 31 D (3) gives a right of appeal from such an order, to the High Court, on a question of law, to the workman who made the application, or the trade union which made the application and the employer. Therefore, if a President continues inquiries into an application, which is not prosecuted by the applicant union, the date

of the order will be notified only to that applicant union (and not to the workman) and the right of appeal will also be in that applicant union and not the workman. I am of the view that such an interpretation is inconsistent with the legislative purpose in providing a separate forum from which relief or redress may be sought in the event of a termination of employment of a workman. The legislature never intended inquiries to proceed, with the employer fully represented and the workman saddled with an applicant-union that is not looking after his interests. In my view a trade union is empowered by section 31 B (1) to make an application "on behalf of a workman" to a Labour Tribunal only on the premise that the union will effectively prosecute the cause of securing relief or redress to the workman in all stages of the proceedings. If at any stage the applicant union fails or neglects to effectively prosecute this cause, it is in accord with the legislative purpose referred above, to permit the workman to substitute himself as the applicant and to proceed with the application from that point onwards. The matters of substitution of a party and the amendment of the caption of the application for that purpose, pertain to procedure. There are no provisions in the Act or the regulatons that deal with these matters. In these circumstances I am of the view that a Labour Tribunal may permit such substitution and amendment, in keeping with the ultimate objective of making a just and equitable order as required by section 31 C(1). Therefore, I see no illegality in the order that has been challenged in the application. The application is accordingly dismissed. The Petitioners will pay a sum of Rs. 2500/- as costs to the 1st Respondent.

Application CA 458/89 to 463/89 are also dismissed with costs.

Appeal dismissed.