SHELL GAS COMPANY
v.
ALL CEYLON COMMERCIAL AND INDUSTRIAL WORKERS' UNION

COURT OF APPEAL
JAYASURIYA, J.
C.A. 587/97
ARBC 1/1496/97
JULY 24, 1997
SEPTEMBER 1, 1997.

Writs of Certiorari and Prohibition – Arbitration record defective – Could the record be contradicted ? – Arbitrator biased – Grounds – Likelihood of bias or reasonable suspicion of bias – S. 92 Civil Procedure Code – S. 114 Evidence Ordinance.

The petitioner-company sought to quash the appointment of the 2nd respondent as arbitrator made by the 3rd respondent Minister. The petitioner complains that the proceedings as recorded are defective and do not contain a true and accurate reflection of the matters pleaded and sought to tender an affidavit from its Manager, and further alleged bias.

Held:

(1) It is irregular and improper to file a convenient and self serving affidavit in the Court of Appeal to add to the record and to amplify the record or to contradict the record.

(2) There is no right in a litigant to demand that a Judge do disqualify himself from hearing the case but it is a matter for the exercise of the unfettered discretion of the particular Judge to do so, if he personally thinks in the circumstances it is prudent to do so.

(3) As regards bias, the burden on a person seeking to show reasonable cause is to satisfy the objective test on a balance of probability, the criterion is objective and not subjective.

An APPLICATION for Writ of Certiorari/Prohibition.

Cases referred to:

1. *Jayaweera v. Assistant Commissioner of Agrarian Services Ratnapura* – 1996 – 2 SLR 70.
2. *Vannakkar and 6 others v. Urhuma Lebbe 1996* – 2 SLR 73.
3. *King v. Jayawardena* – 48 NLR 489 at 503.
4. *Gunawardena v. Kellart* – 48 NLR 522.
5. *Seebert Silva v. Aroana Silva* – 60 NLR 272 at 275.
6. *Sameen v. Abeywickrema* – 61 NLR 442.
7. *ABN-AMRO Bank NV v. Conmix (Pvt) Ltd. and others* – 1996 1 SLR 8 at p. 14.
8. *Kumarasena v. Data Management Systemes Ltd.*, 1987 2 SLR 190
9. *Hoggton v. Hoggton* – 2 WNT 849.
10. *Nadarajah v. Krishnadasan* (DB) – 78 NLR 255.
11. *Metropolitan Properties Company v. Lannon* – 1968 3 All ER.
12. *Negombo South Fishermen's Co-operative Society Ltd. v. The Co-operative Employees Commission* – CA 590/91 C.A.M. 2.10.85.
13. *In Re Ratnagopal* – 70 NLR 409.

Faiz Musthapa, PC with *Nigel Hatch* and *Sanjeewa Jayawardena* for the petitioner.

Ms. Chamantha Weerakoon-Unamboowe with *Ms. Dilhani Perera* for the 1st respondent.

Cur. adv. vult.

September 17, 1997

JAYASURIYA, J.

The petitioner-company in its application for the issue of a mandate in the nature of a writ of certiorari and prohibition has prayed, *inter alia*, that this court be pleased to issue a mandate in the nature of a writ of certiorari quashing the appointment of the second respondent as arbitrator made by the Minister of Labour (vide document marked P5), and also quashing the determination, decision and order of the second respondent-arbitrator dated 26.3.97 as contained in document marked P13 and for a writ of prohibition prohibiting and restraining the second respondnet-arbitrator from inquiring into and determining the aforesaid dispute referred to him by document marked P5.

The petitioner has produced marked as P9 the proceedings and orders made by the second respondent-arbitrator on 12. 6. 97 and the proceedings and orders made by the arbitrator on 23. 6. 97 as P13. The proceedings P9 contains the following recording: "that the

representatives of the parties had discussions before the arbitrator in regard to the dispute referred to, for the purpose of arriving at a settlement." In paragraph 22, of its petition the petitioner complains that the proceedings of 12. 6. 97 as recorded in P9 are "defective and do not contain a true and accurate reflection of the matters pleaded herein" and has attempted to tender to this court an affidavit sworn to by Nihal de Silva, its Manager, Personnel and Human Resources Division marked P10, a fax message from the said Nihal Silva to Messrs. Julius & Creasy marked as P10A and a facsimile message from its Attorney-at-law marked P11. It is significant that the petitioner has not tendered the aforesaid affidavit and other documents before the arbitrator and made an application to add to, amplify and correct the proceedings conducted on 12. 6. 97.

Our courts have constantly drawn the attention of learned counsel that it is not open to a petitioner to file a convenient and self-serving affidavit for the first time before the Court of Appeal and thereby seek to contradict a judicial or a quasi-judicial record and that if a litigant wishes to contradict the record, he ought to file the necessary papers before the court or tribunal of first instance, initiate an inquiry before such authority, obtain an order from the deciding authority of first instance and thereafter raise the matter in appropriate proceedings before the Appeal Court so that the appellate court would be in a position on the material before it to make an appropriate adjudication with the benefit of the order of the deciding authority in the first instance. Vide *Jayaweera v. Assistant Commissioner, Agrarian Services, Ratnapura*[1] ; *Vannakar v. Urhuma Lebbe*[2] ; *King v. Jayawardena*[3] at 503 ; *Gunawardena v. Kelaart*[4].

It is irregular and improper for a petitioner to file a convenient and self-serving affidavit in the Court of Appeal seeking to add to the record and to amplify the record or to contradict the record. Justice Dias in *King v. Jayawardena (supra)* after a review of a series of decisions, held that no party ought to be permitted to file a self-serving and convenient affidavits to contradict or to vary the record. In Vannakar's case, *(supra)* the Court of Appeal Judge observed : "If the party had taken such steps to file papers before the presiding officer of the court of first instance, then an inquiry would be held by him and the self-serving statements and averments would be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry. If such a procedure was adopted the Court of Appeal would have

the benefit of the recorded evidence which has been subjected to cross-examination and the benefit of the findings of the judge of the court of first instance. When such a procedure is not adopted, Justice Dias ruled that the Court of Appeal could not take into consideration self-serving and convenient averments in the affidavit to contradict or vary the record".

It is manifest that in this matter no such effort was made by the petitioner and its legal advisers to file an application with affidavits before the arbitrator and seek to amplify and add to the record of proceedings held on 12. 6. 97. Even on a perusal of the proceedings of 23. 6. 97, it appears that a motion had been filed on behalf of the petitioner and in that motion there was no attempt made to add to and amplify the proceedings held on 12. 6. 97. But certain averments were made in regard to the making of certain alleged observations by the arbitrator and the petitioner merely moved that the arbitrator be pleased not to proceed to inquiry into the matter in dispute in order to enable the parties to have the matter in dispute referred to such ***other arbitrator as the Minister of Labour may be pleased to appoint.*** Thus, there was no motion nor an application made before the arbitrator to add to and amplify the proceedings conducted on the 12th of June, 1997.

In regard to the motion that the petitioner-company was not satisfied with the conduct of proceedings held on 12. 6. 97, and that therefore the arbitration inquiry be not commenced before the second respondent-arbitrator, the second respondent-arbitrator has held that he does not accept the matters urged by learned counsel who appeared for the petitioner.

There was some argument at the bar in regard to the interpretation of the Sinhala expression: 'එම නිසා වගඋත්තරකාර සමාගමේ නීතිඥවරයා විසින් ඉදිරිපත් කරන ලද කරුණු මම පිළි නොගනිමි." appearing in the said order. A perusal of the proceedings of the 12th of June, 1997 and of the 23rd of June, 1997 and a consideration of the order clearly establishes that the learned counsel for the petitioner has erred in failing to make an application to add to and amplify the proceedings of 12. 6. 97 before the arbitrator on 23. 6. 97.

Learned president's counsel contended that it was open to the petitioner-company to rebut the presumption of accuracy and regularity of the proceedings of the 12th of June, 1997 by filing the affidavit

marked P10 from the Manager of the petitioner-company. He relied on the decision in *Seebert Silva v. Aroana Silva*[5] at 275 and the decision in *Sameen vs. Abeywickrema*[6]. In Seebert Silva's case, the judgment of the Divisional Bench was delivered by Justice K. D. de Silva. In the course of his judgment at page 275, Justice K. D. de Silva remarked thus: "Section 92 of the Civil Procedure Code provides for the maintenance of a ***journal*** in which shall be minuted, as they occur, all events in the action and the journal so kept shall be the principal record of the action. A journal has been maintained in this action and the court is entitled to presume that it was regularly kept. This presumption which arises under section 114 of the Evidence Ordinance is based on the *maxim - omnia praesumuntur rite et solemniter esse actae.* This presumption is, of course, rebuttable but the respondents on whom is the burden have not placed before this court sufficient material to rebut it".

Justice Mark Fernando in the *Amro Bank*[7] decision, at page 14, refers to the aforeasaid Divisional Bench decision when he dealt with the possibility of rebutting the correctness of a journal entry. In this instance we are not concerned with the journal entry, but we are concerned with events that took place in the course of proceedings and Justice Mark Fernando emphasizes that it is ***only*** in exceptional circumstances and in extreme situations that even the correctness of a journal entry could be rebutted by a party. Inasmuch as the present petitioner has not adopted and pursued the course of action spelt out in the decision in *Vannakar v. Urhuma Lebbe (supra),* I hold that the petitioner-company is not entitled to amplify and add to the proceedings of the 12th of June, 1997 by filing a self-serving and convenient affidavit, as it has done through its Manager. It would be open to the petitioner to scrupulously follow the procedure spelt out in the said cases of *Jayaweera v. Assistant Commissioner of Agrarian Services, Ratnapura (supra)* and in *Vannakar v. Urhuma Lebbe (supra)* before the second respondent-arbitrator and, thereafter, to file a fresh application before the Court of Appeal so that the Court of Appeal would have ample material before it to adjudicate upon the petitioner-company's fresh application.

This determination is sufficient for the disposal of the present application. However, learned president's counsel contended that the petitioner-company is invested with the legal right to demand that the second respondent-arbitrator do disqualify himself from hearing and

determining the said dispute. He relied on the decision in *Kumarasena v. Data Management Systems Ltd.* [8] In this matter I have already held that the petitioner-company has not proved in a legal and proper manner its assertions. It is to be emphasized that Justice Goonewardena in *Kumarasena v. Data Management Systems Ltd. (supra)* expressly desisted from making the order prayed for by the petitioner upon that application. Justice Goonewardena on that occasion emphasized that "any other order, it must also be observed, would ***open the flood gates to a multitude of similar applications*** by parties dissatisfied with some incidental order made by the judge or ***otherwise unhappy with the case continuing before him anxious to take it elsewhere".*** What must be stressed is that Justice Goonewardena, on that occasion, deliberately refrained from making an order that further proceedings in that case should not be taken by the particular judge. However, he remarked that it would be open to the particular District Judge ***in the exercise of his unfettered discretion*** to disqualify himself from hearing the case. Justice Goonewardena, in this context, remarked thus : "It is, however, ***open*** to the District Judge if he thinks it ***prudent*** to do so having regard to the lack of confidence in his impartiality expressed by one of the parties to disqualify himself and direct that further proceedings be had before another, taking also into account that if he were to hold against the party so complaining, at the conclusion of the trial he could leave himself open to the further charge of prejudice against such party consequent upon such allegation being made". Thus, it is evident there is no ***right*** in a litigant in such circumstances to ***demand*** that a judge do disqualify himself from hearing the case but it is a matter for the exercise of the unfettered discretion of the particular judge to do so, if he personally thinks in the circumstances it is prudent to do so.

I have already observed that the petitioner-company has adopted an improper procedure upon this application to add to and amplify the proceedings of 12th June 1997 held before the second respondent-arbitrator. Thus, there is no legal proof in the legitimate manner of the facts asserted by the petitioner-company. Nevertheless, it is relevant to refer to the appointment of the arbitrator and the making of the reference of the dispute to the arbitrator in considering the first respondent's contentions. P5 establishes that the Minister of Labour, in pursuance of the powers vested in him by section 4 (1) of the Industrial Disputes Act, has referred the dispute in question to the second respondent for ***settlement*** by arbitration. When such matter

is taken up for settlement by arbitration, it is the recognised and legal practice to proceed to conciliation in the first instance and in the process of conciliation representations are made by the parties and statements are made by the arbitrator with the intention of arriving at a settlement. If a settlement by conciliation recedes, then the matter is taken up for adjudication on a consideration of evidence. The second respondent, who is an experienced lawyer and a President of a labour tribunal, would be conversant with the principle that all negotiations, representations and submissions made during the process of conciliation can never be looked into and taken into consideration if the negotiations fail to produce the necessary result. As Lord Mansfield has often observed: "All men must be permitted to buy their peace without prejudice to them should the offer not succeed". Vide Taylor on Evidence. Thus, in consonance with the policy of the law courts of law will be disposed to infer that the parties did not intend evidence to be given of facts communicated in the course of and on the faith of pending negotiations". Vide *Hoggton v. Hoggton*[9]. I am of the view that the arbitrator, with his legal qualifications and experience would have been aware of these principles of law. He has expressly stated in his order dated 23. 6. 97 that it is the duty of the arbitrator when a matter is referred to him for settlement by arbitration, to resort to conciliation between the parties to arrive at a settlement of the dispute. He has stated that if the efforts to arrive at a settlement by conciliation recede into failure, thereafter the arbitrator would proceed to arrive at an adjudication. Thus, whatever was uttered by the parties and whatever was stated by the arbitrator on such matters would not engage the attention to the arbitrator when he proceeds to an adjudication on a consideration of the evidence placed before him. It is implicit in his order that whatever has transpired in conciliation proceedings would not influence or affect his determinations to be arrived at on an adjudication on a consideration of the evidence.

At the hearing of this application, learned counsel appearing for the first respondent trade union forcefully and eloquently argued that the instant application was a veiled and disguised attempt to revoke the said reference to arbitration and change the arbitrator at the whims and fancies of the agents of the petitioner-company. She stressed that prayer B of the petition seeks an order to quash the appointment of the second respondent as arbitrator. She contended that once a reference is made to an arbitrator for the settlement of a dispute, the Minister himself has no power to revoke the said order of reference.

This contention is well founded. Vide the decision in *Nadarajah v. Krishnadasan*[10]. Justice Sharvananda having considered the scheme reflected in the provisions of the Industrial Disputes Act, held that "having regard to the scheme of the Act the Minister of Labour does not come into the picture once he had made a reference under section 4 (1) of the Industrial Disputes Act and he cannot frustrate such reference on second thoughts. That arbitrator proceeds with the reference without interference and directions from the Minister. Once he has acquired jurisdiction over the dispute between the parties, the Minister cannot divest himself of that jurisdiction". The learned counsel for the first respondent contended although the Minister of Labour has no right to revoke a reference once made, the petitioner-company is seeking indirectly upon this application to change the Arbitrator, which attempt this court will certainly thwart.

In paragraph 27E, of the petition, the petitioner has stated that the ***petitioner has lost confidence*** in the second respondent-arbitrator and has substantial and credible grounds to believe that there would be a ***denial*** of justice if the second respondent were to continue to inquire into and determine the said dispute. In paragraph 27C, the petitioner has stated that the said arbitrator is disqualified in law from hearing or determining the said dispute on the ***grounds of bias.*** In law what is material is not the subjective belief and the standard of the petitioner himself. On the issue of bias, Lord Denning, Master of the Rolls in *Metropolitan Properties Company v. Lannon*[11] outlined the test to be applied in determining the issue of the likelihood of bias in the following terms : "In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself . . . It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The court looks at the impression which would be given to ***other people. Even if*** he was as impartial as could be, nevertheless, if ***right minded persons would think*** that in the circumstances there was a real likelihood of bias on his part, then he should not sit . . . There must appear to be a real likelihood of bias. Surmise or conjecture is not enough . . . there must be circumstances from which a reasonable man would think it likely or probable that the justice. . . ***would or did favour one side unfairly at the expense of the other. The court will not inquire whether he did in fact favour one side unfairly. Suffice it that reasonable people might think he did".*** The reason is plain enough. Justice must be rooted

in confidence. . . and the confidence is destroyed when ***right minded people*** go away thinking – "the Judge was biased". (at page 707).

Lord Denning has laid down the test in such clear terms and I state with respect that this is a correct statement of the law. In the circumstances, I am unable to agree with the dicta of Justice Siva Selliah expressed in the decision in *Negombo South Fishermen's Co-operative Society Ltd. v. The Co-operative Employees' Commission*[12] when His Lordship stated that : "Manifestly the purpose of inquiry is lost ***if the second respondent had no confidence in the inquiring officer"*** . His Lordship Justice Siva Selliah proceeded to state "at the hearing held before us, it has been conceded that bias has been alleged by the second respondent against the inquiring officer Mr. Ranasinghe and there was no purpose in holding that inquiry. We are in agreement with the view that manifestly the purpose of an inquiry is lost if the ***second respondent*** had no confidence in the inquiring officer. In the circumstances we quash all the proceedings and determinations and send this case back for the appointment of another inquiring officer". Justice Siva Selliah erred when he adopted a subjective test. The correct test to be applied is the objective test as enunciated by Lord Denning in Metropolitan Properties Company Ltd. case. (supra)

That the criterion is objective and not subjective is put beyond all doubt by Justice T. S. Fernando in *re Ratnagopal*[13] when His Lordship observed : "The proper test to be applied is, in my opinion, an ***objective*** one and I would formulate it somewhat on the following lines : Would ***a reasonable man*** in all the circumstance of the case believe that there was a real likelihood of the Commissioner being biased against him? I agree with the respondent's counsel that the burden on a person seeking to show reasonable cause is to satisfy this objective test on a balance of probability." Though Justice T. S. Fernando was dealing with a case where a person had been called upon to show cause for his refusal to be sworn as a witness under Section 12 (1) of the Commissions of Inquiry Act, yet the principle enunciated would be applicable to the present situation where the petitioner-company is complaining of bias on the part of a person acting in a quasi-judicial capacity.

The reasonable man in the application of the objective test would certainly consider the incidents, implications and the import of the

process of conciliation embarked upon by the second respondent-arbitrator, in determining the issue of the likelihood of bias.

I hold that there has been no ***legal*** proof of bias or likelihood of bias or reasonable suspicion of bias adduced on an ***objective standard*** against the second respondent-arbitrator in the circumstances of this application. For the aforesaid reasons, I refrain from issuing notice of this application on the respondents and I refuse the application of the petitioner-company without costs. But I reserve the right of the petitioner-company to take the legal course of action spelt out by me before the arbitrator and thereafter to file another application for a writ of certiorari seeking relief, if it is so advised. Application is dismissed with costs in a sum of Rs. 2,100/- payable by the petitioner-company to the first respondent.

Notice Refused.