KALAMAZOO INDUSTRIES LTD. AND OTHERS
v.
MINISTER OF LABOUR & VOCATIONAL TRAINING AND OTHERS

COURT OF APPEAL
JAYASURIYA, J.
C.A. APPLICATION NO. 60/93
ARBITRATION INQUIRIES
2160, 2161, 2162, 2163
23RD, 30TH, MAY 1997.

Writs of Certiorari and Prohibition – Arbitration Award – Sections 17 (1), 40 (1)(m) of the Industrial Disputes Act.

The dispute was 'whether the demand of the Eksath Kamkaru Samitiya an increase of Rs. 1,000 on the present salary paid to each of its members employed in the four respondent companies is justified and to what relief each of them is entitled'. All parties to the dispute consented at the outset of the arbitration inquiry that the dispute is common to all four companies and the inquiry into the claim for all demands be consolidated and amalgamated. Both the applicant trade union and the respondent companies were given time to tender their written submissions with the documents produced on their behalf. The applicant handed in the written submissions with the documents but the four respondent companies failed to submit their written submissions and documents until the time that the award was drawn up and signed by the arbitrator (3rd respondent) marked documents relied on by the four respondent companies were not tendered.

In the absence of adequate evidence beyond stating that the increase claimed was beyond the financial capability of the companies the arbitrator stating he would consider the matter on the basis of equity and human grounds and decided on an increase of Rs. 250 per worker.

Held:

(1) Although section 17 (1) of the Industrial Disputes Act stipulates that the abitrator shall make all inquiries into the dispute, hear evidence and thereafter make his award, no duty is cast on him to invade private offices of litigants and take forcible possession of documents. It is not now open to the petitioners to annex the documents R1 to R35 and on their strength assail and impugn the award.

(2) A dispute between persons standing in the relationship of employer and employee need not exist at the point of reference provided the dispute has arisen while the earlier contract of employment existed. It is not necessary that the contractual relationship should exist at the commencement of the arbitration or at the date of reference by the Minister.

(3) The fourth respondent trade union had gone out on a strike and the services of the workmen had been terminated on the ground of vacation of post but the strike was not unlawful. Notice of the strike had been given orally and in writing.

Per Jayasuriya, J.:

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

(4) The physical and the mental element should co-exist for there to be a vacation of post in industrial law. Just because the workmen failed to report for work in prosecution of the strike, it is unreasonable and unrealistic in such circumstances to impute to them an intention of abandoning their employment. The concept of vacation of post cannot be invoked at all and the workmen ought to be looked upon as members of the trade union who were employees in the four petitioner companies.

(5) The rights of parties must be ascertained and determined as at the date of the institution of the action or as at the date of reference for arbitration.

(6) There is no unlawfulness and/or illegality in the award and it is lawful.

Cases referred to:

1. *Hadley v. Clarke* 8 Times Reports 259, 267.
2. *Eager v. Surnivall* 17 Chancery Division 115, 121.
3. *Rex v. National Arbitration Tribunal* (1947) 2 All ER 693.
4. *Simca Garments Ltd. v. Ceylon Mercantile Industrial and General Workers' Union* CA Application No. 735/96 – CA Minutes of 13.11.96.
5. *Perera v. Standard Chartered Bank and C. Carthigeson* – (1995) 1 Sri L.R 73.
6. *Stanley Perera v. Yusuf Shah* 65 NLR 193, 194.
7. *Nelson de Silva v. Sri Lanka State Engineering Corporation* (1996) 2 Sri L.R 342.
8. *Silva v. Fernando* 15 NLR 499 (PC)
9. *Mohamed v. Meera Saibo* 22 NLR 268.
10. *Bartleet v. Marikkar* 40 NLR 350.

APPLICATION for Writ of Certiorari and Prohibition in respect of arbitrator's award.

Faiz Mustapha PC with *V. C. Motilal Nehru* PC, *S. Mahenthiran* and *K. Balakrishnan* for petitioners.

S. Sinnetamby with *Nimal Muttukumarana* for 4th respondent.

Cur. adv. vult.

August 01, 1997.

JAYASURIYA, J.

The petitioners are seeking an order from this court, upon their application for a writ of certiorari and prohibition, quashing the award made by the third respondent which has been produced marked 'K'. This award has been published in the *Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary)* bearing No. 718/14 dated 10th June, 1992. The Minister of Labour had made a reference on 24.11.89 referring a dispute that had arisen between the petitioners and the fourth respondent for settlement by arbitration to the third respondent. The Commissioner of Labour has specified the matters in dispute in his statement dated 24.11.89 in relation to the claim of the fourth respondent trade union against the four petitioner companies as follows: "whether the demand of Eksath Kamkaru Samitiya of 51/17, St. Michael's Road, Colombo 3, for an increase of Rs. 1,000 on the present salary paid to each of its members employed in the four respondent companies (which are enumerated in the caption to the award) is justified and to what relief each of them is entitled". All parties to the dispute consented at the outset of the arbitration inquiry that the dispute is common to all four companies and the inquiry into the claim for all demands be consolidated and amalgamated. I emphasize and stress this fact particularly in view of certain contentions which are raised in the present petition of the petitioners. All parties to the dispute filed statements of their cases and the inquiry commenced before the third respondent on 12.2.90 and was concluded on 17.12.91. Both the applicant trade union and the respondent companies were then given time to tender their written submissions with the documents produced on their behalf. The applicant union, accordingly, handed over the written submissions with the marked documents to the third respondent on the 27th of January, 1992. The petitioners, who were the four

respondent companies in the arbitration proceedings, had failed and omitted to tender their written submissions and the marked documents even up to the 4th of May, 1992, which is the date of the award. The third respondent in his order dated 4th of May, 1992, specifically states as follows: "The written submissions with all the documents marked on behalf of the four respondent companies have still not reached me". Thus, there has been culpable remissness and unpardonable failure on the part of the petitioners to tender their written submissions and the marked documents to the third respondent arbitrator upto the date that the award was drawn up and signed by the arbitrator. Documents which are marked at an arbitration inquiry, after being initialled by the arbitrator, are handed back to the counsel appearing for the parties for the purpose of preparing the written submissions and on condition that they are to be tendered to the Arbitrator with a list, together with the written submission, on the day fixed by the arbitrator. The aforesaid remissness and omission to tender the marked documents on the part of the petitioners was sought to be overcome by learned President's counsel appearing for the petitioners by making a feeble reference to section 17 (1) of the Industrial Disputes Act. He contended that notwithstanding such lapse, the arbitrator was bound by the aforesaid provision to make all such inquiries into the dispute: "Shall make such inquiries into this dispute as he may consider necessary, hear evidence as may be tendered by the party to the dispute and thereafter make such award as may appear to him just and equitable". The powers conferred by this provision do not extend to the arbitrator invading the offices of party litigants and tracing documents which are not tendered to him. The powers conferred by section 17 (1) refer to making such inquiries into the dispute as he may consider necessary upto the point of termination of the inquiry. It does not contemplate any authority to invade the private offices of party litigants and taking forcible possession of marked documents which are not tendered to the arbitrator. It must be further stressed that an arbitrator is required by law to give priority to the proceedings for the settlement of any dispute that is referred to him for settlement by arbitration and a labour tribunal president who is appointed an arbitrator is mandatorily required to give such priority to arbitration proceedings over other matters in his role. Where marked documents are wrongfully not tendered to an arbitrator to prepare his award, the party litigant who commits such a default must bear the full consequences of his remissness. The law does not compel an arbitrator to do what is humanly and physically impossible.

Vide the *maxim lex non cogit ad impossibilia.* The law does not compel a man to do that which he cannot possibly perform.

Even where the law creates a duty or charge and the party is disabled to perform, without any default in him and has no remedy over, then the law will in general excuse him. Vide dicta of Justice Lawrence in the case of *Hadley v. Clarke*[1] at 267 quoting the decision in *Paradine v. Jane. Impotentia excusat legem.* Also, note the dicta of Jessel Master of Rolls in *Eager v. Sumivall,*[2]. But in this instance there was no such duty or charge on the third respondent arbitrator.

In the circumstances, it is not open to the petitioners in the present application to annex documents R1 to R35 and on the strength of the contents of those documents to impugn and assail the award of the arbitrator when those aforesaid documents were never tendered to the arbitrator for the preparation of his award. The arbitrator's award has to be judicially reviewed having regard to the oral testimony and the documentary evidence that were tendered to him before he prepared his award.

The third respondent arbitrator, having considered the oral and documentary evidence, which were placed before him, has held that he is of the view that "the claim and demand for a wage increase by the workmen in 1988 was reasonable and justifiable but the claim of wage increase has to be considered on the ground whether such increase in wages all round among the workmen will affect the financial stability of the companies adversely. In fact, the Chairman and Managing Director of the companies has stated in his evidence that if a Rs. 1,000 increase in wages is granted to the workmen, he had his doubts whether the companies will be able to survive. But he did not expand on this matter further and state the quantum of wage increase that the companies will be able to offer so that the financial stability will be maintained. If such a statement was made on behalf of the four companies at the inquiry before me, the decision on the application for salary increase by the workman referred to me for arbitration would have been considerably easier. In the absence of any such criteria regarding the quantum of the increase in salary to be awardee, I have to decide to consider this matter on the basis of equity and human grounds. It is my view that the wage paid to the workmen in the respondent companies is low and needs revising. A basic wage

varying from Rs. 160 to Rs. 378 is, in my opinion, hardly an income for an individual who could live against the rising cost of living for sometime here. Therefore, I feel that some kind of relief in the way of an increase in wages should be granted. I have been informed that a wage increase of Rs. 500 is under consideration to the workers in the printing industry by the Wages Board. Having considered all these facts carefully a salary increase of Rs. 250 on the present salary paid to each of the workers with effect from 24.11.89 employed in the four companies, to wit, Ceylon Printers Ltd. (Arbitration No. 2163), Paragon Ceylon Ltd. (Arbitration No. 2162), Kalamazoo Industries Ltd. (Arbitration No. 2160) and Dataset Equipment Ltd. (Arbitration No. 2161) is justified and equitable. The workmen in the said four companies are entitled to the reliefs as stated above. This payment should be made within 45 days of the date on which this award is published in the *Gazette.* I make award accordingly".

The petitioners in their petition and through the contentions of their senior counsel have attempted to impugn this award on the ground that the evidence led at the inquiry disclosed the fact that *at the commencement of the arbitration* there existed no contractual relationship between the workmen and the companies and the workmen's services had been terminated on the basis of vacation of posts and there existed no master and servant relationship which was a *sine qua non* for an award to be made in their favour. It is complained on behalf of the petitioners that no ruling had been given by the arbitrator on this fundamental issue and that the arbitrator had chosen to ignore this vital and fundamental point. This court is of the considered view that the arbitrator has very rightly and deliberately omitted to give a ruling on this issue as it is a wholly untenable and unsustainable issue, having regard to the law, Lord Goddard, dealing with such an issue in *Rex v. National Arbitration Tribunal* [3] succinctly remarked that "A dispute that has arisen while the contract of employment existed could be referred for settlement by arbitration even though the contract had been later terminated and whether such termination had been initiated or brought about by the employer or by the workmen". Thus, a dispute between those persons standing in the relationship of employer and employee need not exist at the point of reference provided the dispute has arisen while the earlier contract of employment existed. This dictum pronounced by Lord Goddard was cited with approval and applied in *Simca Garments Ltd. v. Ceylon Mercantile Industrial and General Workers' Union*[4]

and by Justice Amerasinghe in the Supreme Court in *S. B. Perera v. Standard Chartered Bank and C. Carthigeson*[5] which Supreme Court judgment overruled the Court of Appeal judgment pronounced by Justice Grero in C.A. 456/92. In the circumstances, the aforesaid point which was strenuously urged at the hearing of this application is without substance and is wholly unsustainable. The claim and demand for an increase in the monthly salaries of the workmen by Rs. 1,000 on account of the rising cost of living was preferred by the fourth respondent by its letter dated 12.3.1998 (vide document marked 'D' at page 26 File marked D.) This demand led to the present dispute and 'It' arose at a time when the contractual relationship of employer and employee existed between the members of the fourth respondent trade union and the four petitioners.

Labouring under a misconception as to the law and grievously erring in regard to the relevant and applicable point of time, learned President's counsel who appeared for the petitioners contended that *at the commencement of the arbitration* there existed no contractual relationship between the workmen and the companies. He stressed that both *at the date of reference* by the Minister and of *the statement of the second respondent of the matter in dispute* that there existed no such contractual relationship of master and servant and there was no warrant, right and authority for an award to be made. In terms of the aforesaid judgment of Lord Goddard, I hold that this is a wholly untenable and unsustainable contention in law. The aforesaid letter marked "D" dated 12th March, 1988, clearly discloses that when the dispute arose, the relationship of employer and employee existed between the four petitioner companies and the members of the fourth respondent trade union.

Learned President's counsel contended that at the arbitration inquiry, the fourth respondent trade union led the evidence of workman S. N. Donald Dias who was previously employed by the third petitioner company and the evidence of Sarath Ilangakoon who was previously employed by the third petitioner company and no evidence was led in respect of the salaries and wages of the other workmen employed by the first and second petitioner companies and on this ground alone the award is liable to be struck down. I hold that this contention too is untenable and unsustainable for, at the inquiry, Selvam Kanagaratne, the Chairman and Managing Director of Ceylon Printers

Group of Companies gave evidence on behalf of the petitioner companies and produced in the course of his evidence the Collective Agreement No. 3J of 1971 which was marked as R2 (extract from the *Government Gazette* No. 14,975 dated 10th September, 1971) relating to the printing trade and the Collective Agreement No. 3 which was marked as R3 (Government Gazette – General, Part 1: Section 1 dated 10th September, 1971) relating to the engineering trade and the second schedule to both these collective agreements sets out the scales of consolidated monthly wages for all categories of workmen employed by the four petitioner companies. It was his evidence that the workmen employed, who were members of the fourth respondent trade union, were in receipt of the monthly wages set out in the second schedule to the said collective agreements. At the argument, when this court was pleased to refer learned President's counsel to the provisions of the aforesaid collective agreements, he irresponsibly argued that a collective agreement would set out only articles and would not contain scales of consolidated monthly wages. Contents of documents marked R2 (c) and the contents of the second schedule to R3 completely belie the aforesaid assertions of learned senior counsel. In the circumstances, the feeble attempt made by learned President's counsel to strike down the award on this basis falls to the ground and is unsustainable.

A further contention was advanced that whilst arbitration proceedings bearing No. A 1996 was pending, the Minister of Labour had no jurisdiction, right and authority to refer for settlement by arbitration the instant reference to the third respondent and that the second respondent Commissioner of Labour had no right and authority to draw up a statement of the matters in dispute and issue such a statement to the third respondent. This contention is equally untenable and unsustainable on a consideration of the contents of the matters referred to arbitration in arbitration inquiry No. A 1996 and in the instant reference to the third respondent. It is manifest that the two references are in respect of two distinct and separate matters. The statement of one of the matters in dispute drawn up by G. Weerakoon, Commissioner of Labour, dated 12th September, 1983, which has been marked as "C" in the file marked "A" is as follows:

"Whether the demand of Eksath Kamkaru Samitiya made on behalf of its members employed by the aforesaid employers is justified and to what relief the said members of the union are entitled under (1) consolidation of salaries. (2) The monthly salary now paid to each member of the union be increased by an amount constituting the non-recurring cost or living gratuity calculated on a monthly basis as opposed to a yearly formula".

Thus, the reference of the matter in dispute in arbitration inquiry No. A 1996 is related to the consolidation of the monthly salary with the monthly non-recurring cost of living gratuity, whereas the instant reference was in regard to the dispute relating to the demand of the fourth respondent union on behalf of its members for an increase of Rs. 1,000 per month on the present monthly salary paid to each of its members. The Court of Appeal, by its judgment in C.A. 45/89 (Court of Appeal minutes dated 6.12.89) held that the strike which was the subject matter of that proceeding was legal and that did not violate section 40 (1) (*m*) of the Industrial Disputes Act, as the strike in question was not in the same industry in which the dispute had been referred to arbitration in Arbitration Inquiry No. A 1996/83 in 1983 (1995) and was still pending. The petitioner's application to the Supreme Court for special leave to appeal (S.C. 27/90) against the judgment of the Court of Appeal in the aforesaid application was also dismissed by the Supreme Court. In the circumstances, the matters averred in paragraph 36 of the petition of the petitioners are misconceived and bereft of any substance.

Learned counsel contended that the strike launched by the fourth respondent trade union on behalf of its members with effect from 25.3.88 was without lawful notice; in breach of and in repudiation of the contract of employment; illegal and in violation of section 40 (1)(*m*) of the Industrial Disputes Act, as the strike was commenced and continued after the dispute was referred to arbitration and was pending (numbered A 1996) but before an award could be made. I have already adverted to the fact that there was no violation of section 40 (1) (*m*) of the Industrial Disputes Act, as the strike was in connection with a dispute relating to an increase in monthly salary of Rs. 1,000 for each workman, whereas the dispute referred to arbitration and which was pending in arbitration inquiry No. A 1996 related to a dispute revolving on the consolidation of salaries with the non-recurring cost of living gratuity. Learned counsel argued that by registered letter dated 14.4.88 (which has been marked "F" in the file marked "D" the

petitioner companies who were adversely affected by the lightening wild-cat strike informed the workmen who failed to report for work from the 20th of April, 1988, that their contracts of employment would cease. Learned counsel reiterating his submissions submitted that the members of the fourth respondent trade union had gone out on a wild–cat strike and their services were terminated *on the basis of vacation of post* and *on the ground of vacation of post* their contracts of employment had been terminated by letters dated 14.4.88. This contention is also reflected in paragraphs 2, 31, 22 and 20 of the petition of the petitioners. On the aforesaid premises, learned senior counsel for the petitioners contended that on the workmen deciding on 23.7.88 to call off the strike and when they reported for work on 26.7.88, these *ex-workers* were informed clearly that they *had cased to be employees* of the petitioners in April, 1988. I propose to analyse and evaluate the aforesaid submissions of learned counsel for the petitioners. Was the strike commenced without lawful and sufficient notice as contended for on behalf of the petitioners? A pointed reference was made to a letter written by the fourth respondent trade union dated the 23rd of March, 1988, which has been marked as 'E'. In that letter, the General Secretary of the fourth respondent trade union states thus: "We therefore inform you, *as our representatives have already informed you,* members employed by Ceylon Printers Ltd., Paragon Ceylon Ltd., and Kalamazoo Industries Ltd., will be on strike from the 25th of March, 1988, until you grant our demands". There is a reference in the said document marked 'E' that the representatives of the fourth respondent trade union *had already informed* the management antecedently that the strike would be launched from the 25th of March, 1988. In the statement of objections dated 16th of March, 1993, filed on behalf of the fourth respondent trade union, it has been specifically pleaded thus: "However, under the circumstances adequate notice of the strike was given *orally* as well as in writing". The veracity of this averment and plea has not been impugned or challenged by a counter-affidavit and in the circumstances this court has to accept the assertion that prior oral and adequate notice of the strike to be held on 25.3.88 had been given to the petitioners by the fourth respondent trade union.

Is the strike launched on the 25th March, 1988, by the members of the fourth respondent trade union *unlawful* as contended for on behalf of the petitioners? The right to strike has been recognised by necessary implication in the Labour and 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 workmen to be resorted to by them for asserting their bargaining power and promoting their collective demands upon an unwilling employer. Vide the judgment in *Stanley Perera v. Yusuf Shah,*[6] at 194 where Chief Justice Basnayake reproduces a part of the award of the arbitrator, Mr. P. O. Fernando, in the industrial dispute between United Engineering Workers' Union and Taos Ltd. The arbitrator after reviewing a series of Indian decisions observes that a right to strike is a fundamental right in that award. However, I would prefer to refer to the right to strike as a basic right conferred on workmen for the advancement and promotion of their collective demands and in the assertion of their bargaining powers with the employer. In the circumstances if the workmen in question exercised their basic right to launch a strike with a view to obtaining an increase in their monthly wages on account of the rising cost of living and in pursuance of that strike kept away from work, can it be reasonably and legitimately contended that they acted with an intention to abandon their employment? On the attendant circumstances relating to the keeping away from work, after having launched a strike with effect from 25th March, 1988, could any court or tribunal hold that there was a voluntary and intentional vacation of post on the part of the workmen in question? It is trite law that physical and the mental element should co-exist for there to be a vacation of post in industrial law. Just because the workmen failed to report for work in prosecution of the strike, it is unreasonable and unrealistic in such circumstances to impute to them an intention of abandoning their employment. It is logical and realistic to infer in such circumstances that they kept away from work with the intention of successfully prosecuting the strike and with the intention of obtaining their demands for an increase in their monthly wages. Vide in this connection for a review of the legal principles and a discussion of Sri Lankan decisions of the concept of vacation of post – the decision in *W. Nelson G. de Silva v. Sri Lanka State Engineering Corporation*[7]. On an application of the principle enumerated above, I hold that the contention of learned counsel that the services of the workmen were terminated *on the basis of vacation of post* in terms of the letters dated 14.4.88 and that their contracts of employment had ceased on vacation of post and that the workmen ceased to be employees of the petitioners in April, 1988, is wholly misconceived and untenable. Even the contents of this letter do not specifically state that "the contracts of employment of the workmen had ceased".

But its contents set out, "You have wilfully kept away from work with effect from 25th March, 1988, without leave or permission and you have failed to report for work thereafter to date. Your conduct is unlawful, illegal, you have repudiated your duties and obligations under this contract of employment . . . we have no alternative but to replace you if our industry is to survive. You are accordingly hereby advised that unless you offer yourselves for employment and commence work by 20th of April, 1988, we shall take all such steps as are necessary to continue our industries". There is no reference to a termination of employment *by vacation of post* or that the *contracts of employment* of the workmen had *ceased.* Thus, the basis for the averments in the petition that the fourth respondent trade union represented workmen "who were *earlier* in the employment of the petitioners and who have *vacated* their respective *posts* . . . contracts of employment have been *terminated* in terms of letters of 14.4.88 . . . when workers came to the petitioner company on 26.7.88 and they were told that they *ceased* to be employees in April, 1988, that the purported reference is bad in that there was *no contractual relationship of employment between* the petitioners and the fourth respondent members on the *relevant dates"* are all untenable and unsustainable averments. Learned counsel for the petitioners objected to the use of the expression "employed" appearing in the statement of the matters in dispute as framed by the Commissioner of Labour. His contention was to the effect that the increase of Rs. 1,000 on the present salary paid to each of the members of the trade union *employed* in the four petitioner companies was the adoption of an unrealistic and non-existent state of relationship. He strenuously argued that the workmen were *no longer employed* in the four petitioner companies relying wholly *on the concept of vacation of post* and on the strength of the letters dated 14.4.88. Inasmuch as no imputation of an intent to abandon their employment could factually and realistically be attributed to the workmen in question, the concept of vacation of post cannot be invoked at all in the attendant circumstances of this arbitration inquiry and these workmen ought to be looked upon as members of the trade union who were *employed* in the four petitioner companies.

Likewise, in launching the aforesaid strike, it could not be reasonably and realistically asserted that the workmen in question had acted in breach of or in repudiation of the contract of employment and in violation of the provisions of the collective agreement. It was contended that as the collective agreement was in operation and

its provisions were applicable to the parties that the arbitrator had no jurisdiction to proceed with the arbitration inquiry. On the same ground the vires of the arbitration proceedings in arbitration inquiry A 1996 were challenged before the arbitrator, Mr. H. C. Gunawardena. Mr. H. C. Gunawardena pronounced his order on the aforesaid point of law raised before him and stated, *inter alia:* "according to my interpretation of the wording, the union is not bound by any form of agreement and it is at liberty to request for any benefits relating to the items in the clauses mentioned in this order and for any other benefits it may consider warranted. The question of any repudiation does not come in. In fact, I would go to the extent of even saying, there is no provision for any repudiation under section 9 where the union is concerned, since the union is not a party to any agreement. I hold that the Minister is, in law, justified in referring this dispute to arbitration under the powers vested in him by section 4 (1) of the Industrial Disputes Act. The arbitration will consequently be proceeded with". Vide document marked R15. Vide also the Court of Appeal judgment in C.A. Application No. 1485/83, Industrial Court Arbitration No. A 1966/83 pronounced by Justice Sarath Silva.

It was further contended that the provisions of the collective agreements marked R2 and R3 and the extension of the aforesaid collective agreement to the printing and engineering industries by the Hon. Minister of Labour by *Gazette* Notification *(Ceylon Government Gazette Extraordinary* No. 14995/8 dated 1.2.72) marked as R4, stood in the way of the workmen's claim for a salary increase of Rs. 1,000 per month and the making of a lawful reference of such dispute to arbitration by the Minister of Labour. This contention, which was founded on the extension of the aforesaid collective agreements to the printing and engineering industries does not bear any further examination or consideration in view of the judgments pronounced by the Court of Appeal in C.A. Application No. 1485/83, Industrial Court Arbitration No. A 1996/83 and the Supreme Court judgment in S.C. Appeal No. 31/88. In the Court of Appeal judgment, Justice Sarath Silva held that the aforesaid extension order made by the Minister of Labour related to only certain portions of the collective agreement and that such a selective extension was invalid in law and therefore cannot bar the subsequent reference to arbitration. Justice Sarath Silva observed thus: "As the Minister is not empowered to make a selective extension of only certain terms and conditions of the collective agreement that is in force, as has been done in this instance . . .

For the reasons stated above, the petitioner cannot rely on the extension order of the Minister to challenge the validity of subsequent reference to arbitration made in terms of section 4 (1)". In the Supreme Court judgment, Justice Mark Fernando upheld the judgment of Justice Sarath Silva in the Court of Appeal and remarked thus: "I therefore hold that the extension order made by the Minister is bad. That the doctrine of severability cannot be applied. The objection to the reference by the Minister and to the jurisdiction of the arbitrator based on the extension order fails". These judgments pronounced between the present petitioners and the present fourth respondent trade union conclude the petitioners and the petitioners are prevented from raising the same issue by the doctrine of estoppel by record.

In conclusion, learned counsel for the petitioners submitted that the third respondent, in his award dated 4th of May, 1992, had decreed and granted a salary increase of Rs. 250 on the present salary paid to each of the workers, *with effect from 24.11.89,* employed in the four petitioner companies and contended that his award in this respect was tainted with jurisdictional error on account of an increase of payment decreed with retrospective effect from 24.11.89, when the award was made on the 4th of May, 1992. I venture to wholly disagree with the contentions of learned counsel for the petitioners. It is trite law that a court or tribunal must *determine* and *ascertain* the rights of parties as at the date of the institution of the action or as at the date of the making of the reference for arbitration. Commencement of the action is the time at which the rights of the parties are to be ascertained. Vide *Silva v. Fernando,*[8] ; *Mohamed v. Meera Saibo,*[9]; *Bartleet v. Marikkar,*[10]. The claim and demand on behalf of the workers who were members of the fourth respondent trade union had been made on 12th of March, 1988. The reference by the Minister of Labour for settlement by arbitration had been made on the 24th of November, 1989 and the statement of the matter in dispute has been framed by the Commissioner of Labour and specified on the 24th of November, 1989. In the circumstances, the arbitrator had jurisdiction, authority and right to decree the grant of a salary increase of Rs. 250 with effect from 24.11.89.

There is no misdirection in point of fact or law which vitiates the award. There is no failure on the part of the arbitrator to take into consideration the effect of the totality of the oral and documentary

evidence placed before him and there is no improper evaluation of the evidence placed before the arbitrator on a consideration of the award and the totality of the evidence placed before him in this matter. This court must keep prominently in forefront 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 forthcoming 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 irrational or unreasonable or is guilty of an illegality. 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. It is pertinent to refer to the principles laid down by Prof. H. W. R. Wade on "Administrative Law" 12th edition at pages 34 to 35 wherein the learned author states: "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 whether the act or order under attack should be allowed to stand or not". In the circumstances the objective 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 of an award of an arbitrator.

Having carefully considered the grounds of impugnment advanced by learned President's counsel on the third respondent's award, I hold for the reasons already enumerated by me that there is no unlawfulness and/or illegality in the said award and that the award is lawful. I have reproduced extensively the last two paragraphs of the said award. In view of the matters spotlighted in the said two paragraphs by the arbitrator, I hold that this award is eminently rational and reasonable and that it is a just fair and equitable award viewed from the standpoint and the interests of all the parties to the arbitration

inquiry. In the circumstances, I proceed to dismiss the applications of the four petitioners with costs in a sum of Rs. 7,500 payable by the four petitioner companies to the fourth respondent trade union who represented the workmen as its members.

Application dismissed.