SOMASUNDERAM VANNIASINGHAM
v.
FORBES AND ANOTHER

SUPREME COURT.
BANDARANAYAKE, J.
PERERA, J. AND
WIJETUNGE, J.
S.C. APPEAL 2/90.
CA APPLICATION 1658/84.
MAY 25TH 1993.

Certiorari and Mandamus – Arbitration award under Industrial Disputes Act – Statutory right to repudiate Award under s. 20(1) of the Industrial Disputes Act – Right to move for Certiorari without exhausting alternative remedies.

A party to an arbitration award under the Industrial Disputes Act is not required to exhaust other available remedies before he could challenge illegalities and errors on the face of the record by an application for a writ of certiorari. This is so even though he had the right to repudiate the award under section 20 (1) of the Industrial Disputes Act.

The difference between review as to the legality of the matter and an administrative appeal on the facts must be borne in mind.

Delay in securing an effective other remedy has been considered unsatisfactory. The mere existence of some power to resist the binding effect on an unacceptable

settlement order should not itself be hastly regarded as a satisfactory alternative remedy to the Court's discretionary powers of review. There is no rule requiring the exhaustion of administrative remedies.

The case of *Obeysekera v. Albert and others* (1978 – 79) 2 Sri LR (CA) 220 was wrongly decided as also were cases like *E. S. Fernando v. United Workers Union* et–al CA appl. 444/80 (CA Minutes of 17.5.86) and *United Workers Union v. W. H. Navaratne et–al* CA Application No. 2260/80 CA Minutes of 7.5.86) and are not binding and should not be followed.

Per Bandaranayake J.

" As I have said there is no rule requiring alternative administrative remedies to be first exhausted without which access to review is denied. A Court is expected to satisfy itself that any administrative relief provided for by statute is a satisfactory substitute to review before withholding relief by way of review.

Cases referred to :

1. *Obeysekera v. Albert and others* (1978 – 79) 2 Sri LR 220 (CA).
2. *Baldwin & Francies Ltd. v. Patents Appeal Tribunal et–al* (1959) 2 all ER 433 (HL).
3. *E. S. Fernando v. United Workers Union et–al,* CA application 444/80 – CA Minutes of 17.5.1986.
4. *United Workers Union v. W. H. Navaratne et–al,* CA Application 2260/80 CA Minutes of 7.5.1986.
5. *R. V. Patents Appeal Tribunal et–al, Exparte J. R. Geigy, Societey Anonyme* (1963) 1 all ER 85 (QBD).
6. *Linus Silva v. University Council of Vidyodaya University* (1961) 64 NLR 114, 116, 117.
7. *Colombo Commercial Co. v. Shanmugalingam* 66 NLR 26.
8. *Virakesari Ltd. v. P. O. Fernando* 66 NLR 145.

APPEAL from judgment of the Court of Appeal.

Motilal Nehru, P.C. with *S. Sivapathan* watching the interests of the 2nd respondent University of Jaffna, Sri Lanka.

Cur. adv. vult.

October 26, 1993.

BANDARANAYAKE, J.

Upon an oral application for leave to appeal on a question of law, leave was granted to the appellant by the Court of Appeal from its order dismissing the petitioners application for writs of Certiorari and Mandamus to quash an order and award made by the arbitrator under the provisions of the Industrial Disputes Act. The questions of law discernible from the matters adverted to by Counsel before the Court of Appeal and adopted by that Court are :

(i) Is a party to an arbitration award under the Industrial Disputes Act required to exhaust other available remedies before

he could challenge illegalities and errors on the face of the record by an application for a writ of Certiorari ;

(ii) Is the right to repudiate an Award available to a party under Section 20 (1) of the Industrial Disputes Act a remedy equally appropriate and expedient as a Writ of Certiorari quashing an Award would be.

The Minister of Labour by Order dated 17.7.81 referred the following dispute for settlement by Arbitration to the 1st Respondent, viz; whether the Jaffna Campus of the University of Sri Lanka and its successor the University of Jaffna, Sri Lanka (2nd Respondent) is under obligation to employ Mr. S. Vanniasingham (Appellant) from the date of the takeover of the undergraduate department of the Jaffna College by the Government for the purpose of establishing the Jaffna Campus of the University of Sri Lanka.

If so (a) On what terms and conditions he should have been employed ;
(b) To what relief is he entitled?

After enquiry, the Award of the Arbitrator 1st Respondent was published on 23.4.84. The terms of the award in summary were :

(i) The Jaffna Campus and its successor were under no obligation to employ the applicant from date of takeover by Government in 1974 ; The Appellant had reached retiring age in 1979.

(i) The 2nd respondent to make an exgratia payment of Rs. 10,000/- to the applicant.

The Appellant was dissatisfied with the award. He did not however exercise his statutory right to repudiate the award under Section 20 (1) of the Industrial Disputes Act. Instead the appellant filed Writ application before the Court of Appeal supported on 17.1.85 for a writ of Certiorari seeking to quash the award on the grounds of ultra vires and error on the face of the record. The Court of Appeal is now vested with jurisdiction in this area of the law by the Constitution – Article 140.

Notice was issued returnable on 4.3.85. The 1st Respondent did not appear on notice. The 2nd Respondent appeared and informed Court it was not filing written objections. When the matter was taken up for support on 22/11/89, the 2nd Respondent took a preliminary objection that the appellant could not maintain an application for a writ of Certiorari without having first exhausted his statutory remedy of repudiation of the award after due notice afforded him by section 20 (1) of the Industrial Disputes Act.

The Court of appeal upheld the preliminary objection and dismissed the application. It is from this order of dismissal that the matters of law raised come before us.

It was argued on behalf of the Petitioner that in the ordinary course the Petitioner awaited the award. The award did not give him the relief sought regarding the dispute. It merely provided for an ex gratia payment. It was submitted the statutory provision in the Act enabling repudiation merely means that the award is not binding on the parties once repudiated. But it leaves the award intact. Repudiation does not afford any alternative just and equitable relief. No further relief is available from the Minister after an award. The Petitioner cannot revive the dispute and it cannot be adjudicated upon again. The Petitioner remains aggrieved. Counsel complained that the Court of Appeal in the instant case adopted the finding of the Court of Appeal in the case of *Obeysekera vs. Albert and others* [1] *which held that " Certiorari being a discretionary remedy will not ordinarily be granted..... unless and until other remedies reasonably available and equally appropriate have been exhausted ". The Court had not given any reasons as to why it considered repudiation to be a satisfactory alternate remedy to the remedy of review. The Court had failed to consider this most important aspect whilst withholding the remedy of review. It was submitted that the case of Obeysekera vs. Albert et.al. (Supra) was wrongly decided in this respect. It was submitted that that case was in respect of an application to quash an award of an arbitrator.* That Court had merely applied the minority dictum of Lord Denning in *Baldwin & Francis Ltd: vs. Patents Appeal Tribunal et al* [2], which was the only case refered to in the argument. It may be noted that the majority had found no error whereas Denning J. had found an error but refrained from giving discretionary relief for reasons, to wit : that even where there is an error on the face of the record (as was evident in that case) that when the party aggrieved has another remedy open to him (in that case to sue for infringement of patent rights which at best is a futuristic event) the Court in its discretion should refuse Certiorari. So it was that in the case of

Obeysekera vs. Albert the Court of Appeal held that a party to an award if aggrieved has to proceed under S 20 (1) to repudiate it (instead of seeking Certiorari). That Court has also stated that when the right of appealing to the Commissioner of Labour is available, a petitioner cannot seek a discretionary remedy like Certiorari. It is not clear from the judgment, as to the circumstances or the provision of law in that case which created a right of appeal to the Commissioner of labour. No right of appeal to the Commission of labour was available in the instant case. It was submitted that the dicta of Lord Denning should not have been extended. That dicta should have been confined to the facts of that case and should not be extended in any general way. Consequent to the misapplication of the dicta as aforesaid, a stream of cases had been wrongly decided by the Sri Lankan Courts without realising the difference between review as to the legality of the matter and an administrative appeal on the facts. It had merely been assumed that repudiation was a satisfactory remedy.

Petitioners Counsel further submitted that the decisions of the Court of Appeal in *E. S. Fernando vs. United Workers Union et at* [3] of 17.5.86 and *United Workers Union vs. W. H. Navaratne et al* [4] which followed the decision in *Obeysekera vs. Albert et al* was followed by the Court of Appeal in the instant case, the Court's decision that it was bound by those decisions was wrong in law and should not be followed. It was submitted repudiation of the award could never be considered as being an alternative remedy to obtaining a Writ of Certiorari to quash the award.

R. V. Patents Appeal Tribunal et al, Ex parte J. R. Geigy, Societe Anonyme [5] (Parker C. J., Winn And Lawlor J. J.) which held that an order of Certiorari should issue as there was no satisfactory alternative relief available, was itself a case which raised an issue under Section 9 of the Patents Act as in the earlier case of *Baldwin vs. Francis* (supra). Their Lordships in *R. V. Patents Appeal Tribunal* whilst differing from the opinion of Denning J had this to say about the minority decision of Lord Denning :

(a) there had been no argument placed before Lord Denning as to the principles on which the Court's discretion should be exercised apart from a general proposition made by Counsel that in the case of an aggrieved person the order of Certiorari should be made ;

(b) Lord Denning gave another reason for his refusal to exercise the discretion of issuing writ namely that the party may

have gone back to the tribunal and indicated that it had overlooked the matter of making a special reference under Section 9 (1) of the Patents Act 1949 the material parts of which read ; " If in consequence of investigations required..... under the Act..... it appears to the Controller that an invention in respect of which application for a patent has been made cannot be performed without substantial risk of infringement of a claim of any other patent he may direct that a reference to that other patent shall be inserted in the applicants complete specification by way of notice to the public. " (the application for Certiorari was to have this reference inserted.)

(c) the alternative remedy Lord Denning had in mind was an infringement action if the time came where a person aggrieved could find evidence of an infringement. The aggrieved would have to await an infringement and obtain evidence of it. An aggrieved is not bound to wait. Accordingly the Court in *R. V. Patents Appeal Tribunal Ex Parte J. R. Geigy (supra)* did not apply the dicta of Lord Denning.

Counsel for the Petitioner also referred us to Halsbury's Laws of England, 4th Edition, Vol 11 p. 805 : para 1528 : – " There is no rule in certiorari as there is in mandamus, that it will lie only where there is no other equally effective remedy, and provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. "

Professor Wade in his book Administrative Law 5th Edition p593 states :

" There is no rule requiring what is called the exhaustion of administrative remedies.....one aspect of the rule of law is that illegal administrative action can be challenged in the Court as soon as it is taken or threatened. There is therefore no need to pursue any administrative procedure or appeal in order to see whether the action in the end will be taken or not. An administrative appeal on the merits is something quite different from judicial determination of the legality of the whole matter. This restates the essential difference between review and appeal.....The Court may (however) withhold discretionary remedies where the most convenient step is to appeal. Certiorari being a discretionary remedy the Court may withhold it if it thinks fit. "

S. M. Mehta in his book Indian Constitutional law 1990 Edition at page 334 has this to say : quote : " The existence of an alternative remedy may be a ground for refusing a writ of certiorari, where the defect of jurisdiction is not patent on the face of the record and fundamental rights are not involved. This is a rule of convenience and not a rule of law and hence certiorari may be issued even when an alternative remedy is available. Thus an alternative remedy that is not speedy, effective or adequate is no ground for refusing a writ of certiorari.

S. A. de Smith in ' Constitutional and Administrative Law ' edited by Street and Brazier. 4th Edition p. 599 puts it this way : " The principles governing the discretion of the Court to award certiorari have partly crystallized.....The application for certiorari may exceptionally be refused because there is a more appropriate alternative remedy. "

Of interest is the Supreme Court decision in *Linus Silva vs. University Council of Vidyodaya University* [6]. In that case the services of the petitioner who was employed by the University (Professor and Head of the Department of Economics and Business Administration at the University) were terminated by the Council. The petitioner made a direct application to the Supreme Court for a writ of Certiorari to quash the order of termination. It was argued for the Respondents that a statutory remedy was available under Section 31 B of the Industrial Disputs Act and that therefore Certiorari was inapplicable. It was in this context that T. S. Fernando J held that going before a Labour Tribunal and thereafter possibly appealing to the Supreme Court was not an adequate remedy as the writ application already before Court was (by comparision) a more convenient, speedy and effective remedy. However the Privy Council – Vide (1964) 66 NLR 505, allowing an appeal from the Supreme Court judgment was of the view that as the dispute was upon an ordinary contract between master and servant, there was no failure to comply with statutory provisions enforceable by certiorari and mandamus. A remedy would be damages for wrongful dismissal/breach of contract. The grant of certiorari was therefore misconceived. The Privy Council did not however touch on the aspect of how one should deal with alternative remedies contained in the Supreme Court judgment no doubt as in their view it was no longer relevant. The Supreme Court judgment is mentioned to indicate consistency in requiring effective satisfactory alternative statutory remedies which has been the law in Sri Lanka, if they were to take the place of review.

It may be mentioned in passing that wherever there is an infringement of a fundamental right, the Supreme Court is obliged to afford just and equitable relief for such infringement even though there may be other remedies available in public or private law as the right to relief is itself a fundamental right.

The instant case poses the question as to whether the right to repudiate an unacceptable award under Section 20 (1) of the Industrial Disputes Act is in the nature of a sufficient administrative remedy. There has been no due repudiation of the award within time so that the award remains binding on the scheme. Repudiation results in the award ceasing to bind the parties. Once repudiated the award no longer regulates or determines the rights or duties of the parties in respect of the dispute. But though rendered ineffective it remains part of the record. The dissatisfied party complains he has had no relief in relation to the dispute. There is no other relief he can have access to under the statute. In no sense therefore could it be said that repudiation of the award could have afforded him an equally appropriate and effective remedy as the discretionary remedy of certiorari which could strike down the award if illegality is present. The appellant complains of errors on the face of the award. The appellant seeks review of the award to correct those errors. There are no words in the statute suggesting exclusion of ordinary remedies either expressly or by implication. In any case, review is a remedy within his rights to seek. He challenges illegalities in the award. This he can do in the circumstances. The Court of Appeal should have enquired into his application and in the exercise of its discretion made an order on the merits. This the Court failed to do.

On the other hand there may be instances where the law provides for satisfactory relief under the statute. A Court may in the exercise of its discretion withhold review in such situations. But it is the duty of the Court to consider whether certiorari is more appropriate in the circumstances.

Where overlapping remedies exist for identical purposes a question may arise as to whether the statutory remedy is exclusive or concurrent. The language of the enactment must first be examined. If concurrent the Court's decision may be determined by deciding whether the statutory remedy provides a sufficient satisfactory alternative to the discretionary remedy by way of writ. As we have seen in the cases disussed, an alternative remedy may be available only upon the existence of other factors which are hard to find and difficult to establish which then does not render that remedy satisfactory.

Delay in securing an effective other remedy has been considered unsatisfactory. The mere existence of some power to resist the binding effect of an unacceptable settlement order should not of itself be hastily regarded as a satisfactory alternative remedy to the Court's discretionary powers of review. Therefore the fact that the appellant did not repudiate the award does not make a difference. It may be that even though the statute provides for an administrative appeal either to an administrative tribunal or a Minister, the Court may not regard such an arrangement as impliedly excluding review if the applicant is entitled as a matter of law to have the order quashed as it is pointless then to have him pursue an administrative appeal on the merits. There is thus no rule requiring the exhaustion of administrative remedies. A statutory remedy may be for a different purpose being usually an appeal on the merits whereas the ordinary discretionary remedy of review is for prevention of illegality. There could be situations where rights of appeal in a statute may legitimately restrict review by the Court (ie) where the language of the statute expressly or impliedly excludes recourse to ordinary discretionary remedies (eg) where a power is expressly conferred by statute on a named authority or the statutory remedy is the only available remedy as in tax matters. Upon an examination of the reported judgement of the Court of Appeal in the case of *Obeysekera vs. Albert et. al.* (CA) aforesaid which held that Certiorari will not be granted..... until other remedies available and equally appropriate have been exhausted it is found that there has been no examination of the nature of the power of repudiation or its consequences and no evaluation of its effectiveness as an alternate satisfactory remedy to that of review. That decision does not set out the law correctly in this area and should not be followed. As I have said there is no rule requiring alternative administrative remedies to be first exhausted without which access to review is denied. A Court is expected to satisfy itself that any administrative relief provided for by statute is a satisfactory substitute to review before withholding relief by way of review. Those decisions adverted to in the judgement which followed the decision in *Obeysekera vs. Albert et al.* in this area of law have also been wrongly decided and should not be regarded (as was done in the instant case) as having a binding effect on the Court of Appeal. They should no longer be followed.

In this area of the law, where there is no illegality, the Court should first look into the question whether a statute providing for alternative remedies expressly or by necessary implication excludes judicial review. If not, where remedies overlap, the Court should consider whether the statutory alternative remedy is satisfactory in all the.

circumstances..... If not, the Court is entitled to review the matter in the exercise of its jurisdiction. Of course if there is an illegality there is no question but that the Court can exercise its powers of review. Vide *Colombo Commercial Co. vs. Shanmugalingam* [7], *Virakesari Ltd vs. P. O. Fernando* [8].

The appeal is allowed. The order of the Court of Appeal dated 05/12/89 upholding the preliminary objection taken on behalf of the 2nd respondent and dismissing the application before it with costs is set aside. The Court of Appeal is directed to proceed to enquiry into the application of the Applicant and decide the matter on its merits. No costs.

P. R. P. PERERA, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal allowed.