COMMERCIAL AND INDUSTRIAL WORKERS UNION
v.
ASSOCIATED BATTERY MANUFACTURERS (CEYLON) LTD., AND THREE OTHERS

COURT OF APPEAL.
F. N. D. JAYASURIYA, J.
C.A. 598/96
ARBITRATION INQUIRY
NO. A 2287
OCTOBER 30, 1996
DECEMBER 18, 1996.

Arbitration - Secretary of a Trade Union - Unlawful and unauthorised meeting inside Company premises - Inflammatory speech to arouse the workers - Dismissal - Collective Agreement - Probationers - Misconduct - Justifying termination - Plea of acquiescence/waiver - Testimonial trustworthiness and credibility.

The Arbitrator held that the workman, who was the Secretary of the petitioner Union had held an unlawful and unauthorised meeting and addressed the workmen making an inflammatory speech, at such meeting inside the work place, and in the circumstances the termination was justified.

Held: *Per* Jayasuriya, J.,

"Relief by way of Certiorari in relation to an award made by an Arbitrator will be available to quash such an award if the Arbitrator wholly or in part assumes a jurisdiction which he does not have or exceed that which he has or acts contrary to Natural Justice or pronounce an award which eminently is unreasonable or is guilty of a substantial error of law. This remedy cannot be utilised to correct errors or to substitute a correct order, for a wrong order and if the Arbitrators' award was not quashed in whole or in part, it had to be allowed to stand unreversed."

(1) It is misconduct for a worker to absent himself from a specific place of duty to engage in an Union meeting, specially when the meeting is unauthorised or illegal;

(2) No evidence had been adduced that the employer had acted with *mala fides* or was actuated by improper motives in terminating the services of the probationers. The employer had the right to terminate the services of such employees.

(3) The Arbitrator may have erred in some trivial and venial respects in holding that it had been proved beyond reasonable doubt that the workman made an inflammatory statement against the Company in addressing the workers at such meeting, **but** that slight and trivial error certainly does not vitiate his order.

(4) As regards the contention that it was the practice to hold such meetings without authorisation to which the Company did not object in the past – estoppel, waiver and acquiescence are all matters of evidence and cannot be established inferentially by means of large conjecture.

APPLICATION for the issue of a Writ of Certiorari

Cases referred to:

1. *Commonwealth Aircraft v. Australasian Society of Engineers* – 48 Commonwealth Arbitration Reports 362
2. *In Re. Iron Steel Work Employees* – 1956 Arbitration Report (New South Wales) 615
3. *In Re. Hutcherson Bros. (Pvt) Ltd.* – 88 Commonwealth Arbitration Report 800.
4. *Australian Builders Labour Federation v. Arcos Industries (Pvt) Ltd.*, – 92 Commonwealth Arbitration Reports – 156
5. *Ravalgoon Sugar Farm Ltd., v. Its Employees* 1946-47 – Bombay Industrial Courts Reports 474 at 485
6. *Indian Malleable Casting Ltd., v. Their Employees* 1952 – (1) Labour Law Journal 254
7. *Bank of Bikaner Ltd., v. Indrajit Mehta* – 1954 (1) Labour Law Journal 189 at 191
8. *A. R. Hettiarachchi v. Vidyalankara University* – 76 NLR 47
9. *Small Holdings Development Authority v. Rajaratnam* – CA 490/85.
10. *M. Z. Jasmine v. G.C.E.C.* – CA 142/89 C.A.M. 24.2.87
11. *University of Moratuwa v. H. M. Podi Banda* – HC LTA 647/83. High Court minutes 10.7.95
12. *K. T. P. D. Siyaguna v. Nelu's Advertising Services* – HCLTA 168/91 HCA Minutes 30.3.92
13. *Silva v. Reginahamy* – 41 NLR 56 at 58.
14. *Jayetillake v. Jayawardena* – 56 NLR 73 at 79

Gomin Dayasiri with *Manourie Jinadasa* and *Manjula Sirimanne* for petitioner.

Cur. adv. vult.

March 12, 1997.
JAYASURIYA, J.

The petitioner Trade Union has preferred this application for the issue of a mandate in the nature of a writ of certiorari to quash the award made by the fourth respondent – arbitrator dated 18.6.96, which has been annexed to the petition marked P12. The aforesaid arbitrator, after a careful arbitration inquiry, has held on the totality of the evidence placed before him that the workman J. T. Shantha, who held the post of secretary of the Petitioner Union had held an unlawful and unauthorised meeting and addressed the workmen at such meeting inside the work place of the employer company, namely, the premises owned by Associated Battery Manufacturers (Ceylon) Ltd. without obtaining prior approval and permission from the management, as required by the provisions of the Collective Agreement which was binding on the employer company and the workman and which document was marked in the arbitration inquiry as R1. It was alleged on behalf of the employer that the aforesaid workman Shantha made an inflammatory speech against the management, addressing the workers at such unauthorised meeting to raise discontent among the workers and to arouse the workers against the employer company. The Arbitrator has stated that act imputed to Shantha of making the aforesaid inflammatory statements at such meeting, is proved even beyond reasonable doubt by the evidence of witness W. A. D. L. Karunatillake (Factory Administration Manager) which evidence was coroborated by the evidence of Mr. U. K. K. P. de Silva who was the Personnel Manager of the employer company. However, these witnesses, in the course of their evidence, conceded that they did not hear clearly the actual words used by the workman Shantha. Nevertheless, the evidence given by them manifests the gesticulations, gestures and actions used by the aforesaid workman, Shantha, in addressing the workers at such unauthorised meeting because one witness was able to observe the actions, gesticulations and gestures through the glass windows of his office as the said meeting was held within the work place and in close proximity to the office occupied by the Factory Administration Manager. It is the case for the employer that as a result of this speech, the workers were induced to resort to accelerated and

renewed violence and in consequence of the resulting general mayhem that occurred between 26.11.92 and 27.11.92 there was a rapid fall and decline in discipline in hurling missiles which finally led to a closure of the factory of the employer because the employer reasonably anticipated and apprehended resulting damage to property of the employer and persons within the work place. In the circumstances, the said Arbitrator in his award has held that the dismissal of workmen J. T. Shantha, D. W. Dharmadasa, E. N. D. Harischandra and M. P. Fernando by the employer company is justified and that the workmen are not entitled to any relief on the ground of wrongful dismissal. Although a feeble attempt was made at the arbitration inquiry and before this court to assert that the aforesaid meeting held on 26.1.92 took place outside the work place, the effect of the totality of the evidence adduced before the arbitrator clearly establishes that the aforesaid meeting took place within the work place of the employer and at a point in close proximity to the office of the Factory Administration Manager, Mr. Karunatillake. In the circumstances, I reject as unfounded the contention to the contrary advanced by learned counsel for the petitioner before this court.

It was sought to be argued that the aforesaid meeting was lawful and authorised. On this issue, Mr. de Silva, the Personnel Manager, has quite clearly stated in his evidence that prior approval from the management was imperative and necessary for the holding of the meeting on the 26th of November, 1992, at which workman Shantha addressed the workers within the work place and during working hours. Neither was approval or permission ever sought or ever given by the management for the convening and holding of such a meeting. The employer has produced and marked in evidence the Collective Agreement as R1. Clause 3 of Part II of R1 provides as follows:

(a) In respect of each meeting which the Trade Union desires to hold at the Associated Battery Manufactures (Ceylon) Limited – employer's premises – an application for permission shall be previously made to the employer:

(b) if the employer decides to grant permission, the employer shall be entitled to impose certain conditions which are expressly enumerated;

(c) It shall be the duty of the union and its office bearers to ensure that the terms on which permission to hold a meeting of such union is granted, are duly complied with;

(d) it shall be the duty of the union and its office bearers to ensure that no damage is caused in the course of or in connection with a meeting of the union to the employer's property or any other persons at the employer's premises and the union shall indemnify against any such damage.

It is crystal clear, having regard to the facts established at the arbitration inquiry, that no application for permission to hold the aforesaid meeting had been made by either the trade union or by Shantha in his capacity as secretary of the Trade Union and, consequently, no authority and permission had been granted by the management to hold the aforesaid meeting. Thus, the holding of the meeting and addressing the workers at such a meeting, were clearly unlawful and unauthorised acts on the part of Shantha. It appears a legitimate inference to draw that workman Shantha's conduct in acting in defiance of the provisions of the Collective Agreement and the rule contained in it and his instigation to workers, was the basis of a show cause letter (marked R3 and dated 8.12.92) which was served on him. The holding of this unauthorised and unlawful meeting led to further unrest in the factory of the employer and to high indiscipline among the workers. It is in evidence that pieces of rubber and lead were thrown at superior management officers and there was indiscriminate hooting and ridiculing of officers of the management. In such circumstances, the management apprehended danger to property within the factory and danger to the lives of the staff members and the workers within the factory, particularly because in this factory were stored items like sulphur, coal dust, acid and rubber which were highly inflammable items and if by chance the factory caught fire, the entire Ratmalana area would have been in imminent danger. It is in evidence that this meeting led to accelerated and renewed unrest and high indiscipline among the workmen and the apprehensions of danger to property of the management and lives of all persons inside the factory premises was, in the circumstances, a reasonable and a prudent apprehension entertained by the management.

If meetings of this nature and character are held without obtaining prior approval and permission [as provided for in the binding provisions of the Collective Agreement signed by the management and the trade union representing the workmen], as and when workmen and trade union officials decide to hold meetings at their complete whims and fancies, there would be disruption of work in the factory which would necessarily lead to loss of production and immense detriment and loss to the management. The management would, as a result be unable to comply with the date frames set in export quotas allocations. Foreign orders for purchase of batteries manufactured locally, would be cancelled resulting in irreparable loss and detriment to the management and also consequent detriment to the economy of the country.

It is interesting to consider the principles laid down in foreign jurisdictions relating to Industrial Law and Labour Law. In *Commonwealth Aircraft v. Australasian Society of Engineers* [1], it was affirmed that it is misconduct for a worker to absent himself from a specific place of duty to engage in a union meeting, specially where the meeting is unauthorised or illegal. This principle was reiterated in the decision *In re Iron Steel Work Employees* [2]. The principle has been clearly laid down that it is misconduct to hold an unauthorised meeting on the employer company's time – *Hutcherson Bros. (Pvt) Ltd.,*[3]. Vide also the decision in an *Australian Builders' Labour Federation v. Arcos Industrial (Private) Limited* [4]. In India, the view has been taken that it is misconduct to use the Company's premises for an unauthorised meeting without permission. See the decision in *Ravalgoon Sugar Farm Limited v. Its Employees* [5]. Upon this arbitration inquiry it has been clearly established that the unauthorised meeting held on 26.11.92 was held during the working hours of the employees of Associated Battery Manufacturers (Ceylon) Limited. In fact, the overwhelming evidence is to the effect that the meeting was held during working hours, subsequent to the milk interval and long after the second bell had been rung after the interval. In the Indian decision in *Indian Malleable Castings Limited v. Their Employees* [6] the principle was laid down that a union official who leaves his department and specified place of work **without permission** and proceeds into another section, summons a meeting and makes a speech, is guilty of misconduct.

It has sometimes been urged in defence of trade union officials that the contents of a speech made at a union meeting can never form the basis of a charge of indiscipline against an employee. However, such a contention was rejected in the decision in *Bank of Bikaner Limited v. Indrajit Mehta* [7]. The Labour Appellant Tribunal of India remarked thus in relation to such a contention: "We regard this case as a serious act of indiscipline which merits dismissal. It has been urged before us that the contents of a speech made at the union meeting cannot form the basis of a charge of indiscipline against an employee but it is quite clear that where an employee threatens or intimidates with violence a superior officer on account of some grievance connected with his work, whether it is during office hours or out of office hours or whether it is in the bank premises or outside of it, it is misconduct." In the instant arbitration inquiry it was clearly established that this meeting had been summoned and the worker Shantha had addressed the meeting with violent gestures, gesticulations and actions clearly during the working hours fixed by the management for the labour of the workmen.

The matters which were referred to arbitration and which were the matters in dispute between the parties in the particular arbitration were as follows:

(1) Whether the demand of the union that long-term interest-free loan paid to the employees of Associated Battery Manufacturers Ceylon Limited be incerased from Rs. 25,000 to Rs. 50,000 is justified and , if not, to what relief they were entitled;

(2) Whether the non-employment of the aforesaid five workers by the Associated Battery Manufacturers (Ceylon) Limited is justified and, if not, to what relief each of them is entitled.

After the aforesaid matters had been referred for arbitration, it had been brought to the notice of the arbitration court that the aforesaid issues in regard to the demand relating to the long-term interest-free loan, had been settled by a communication addressed by the Commissioner of Labour dated 11.6.93 to the said court. In regard to the second issue, which also covered the question of non-

employment of workman Raymond Perera, had also been settled between the parties as evidenced by a letter furnished to the court by the Ministry of Labour and Vocational Training and which letter has been marked and produced as R23. In the circumstances, the arbitrator concluded that he had only to determine the issue whether the non-employment of the remaining four workmen, namely, J. T. Shantha, D. W. Dharmadasa, E. W. de Harischandra and N. P. Fernando was justified and, if not, to what relief each of them was entitled. In regard to the aforesaid workmen, except J. T. Shantha, the arbitrator has held that the services of these three employees had been terminated during their period of probation for misconduct during the strike, in terms of the provisions of the Collective Agreement marked R1 (namely, clause 6). The employer had the right to terminate the services of such employees on probation without notice. At the arbitration inquiry, no evidence has been adduced on behalf of the union or the workman that the employer company had acted with *mala fides* or were actuated by improper motives in terminating the services of the aforesaid probationer. In view of the aforesaid undisputed facts, the arbitrator has very correctly held that the employer was entitled in law to extend the period of probation for these probationers [*vide A. R. Hettiarachchi v. Vidyalankara University*[8], *Smallholdings Development Authority v. Rajaratnam*[9], *M. Z. Jasmine v. G.C.E.C.*[10], *University of Moratuwa v. H. M. Podi Bandara*[11], and that the termination of the services of the aforesaid three Probationary Officers was justified and lawful. *Vide K. T. P. D. Siyaguna v. Nelu's Advertising Services*[12], where all the landmark decisions of the Court of Appeal are collated and discussed].

The arbitrator very correctly, in his order, states as follows:

"In regard to workman Shantha's active participation in the preceding strike, undoubtedly this strike now settled without meeting the demands, was sponsored by the applicant union and Shantha being the Secretary of the union took an active part in it ... This court does not fault Shantha for taking an active part in union activities and in the strike but does for the leadership given for and the summoning of the unlawful meeting of 26.11.92 and the

general mayhem and inflammable unrest that occurred up to 27.11.92 resulting in a rapid decline in discipline and finally a closure of the factory on account of grave apprehension and fear of loss and destruction to life and property which undoubtedly affected production and the economy of the land."

The principles and the authorities substantiating such propositions which have been laid down in foreign jurisdictions adverted to by me, support the view that the aforesaid conduct of Shantha constituted misconduct justifying termination of his services. The petitioner in paragraph 23(b) of the petition complains that the fourth respondent-arbitrator erred in law by stating in his order that the charge-sheet marked R3 contained a charge of addressing the workers at a meeting not authorised by the company and that this fact had been proved even beyond reasonable doubt, **whereas** the charge-sheet R3 did not contain any such allegation at all. I hold that this is a wilful and deliberate attempt to mislead and deceive this court by stating an undoubtedly false and inaccurate representation and a statement of fact on the part of the petitioner and this fact alone entitles this court to reject this application claiming the grant of discretionary relief from this court. To substantiate the findings of this court, I would proceed to quote the contents in document marked R3 which is the charge-sheet served on workman Shantha who was required to explain in writing as to why disciplinary action should not be taken against him for conducting the aforesaid unauthorised meeting during working hours. The relevant portion of R3 reads as follows:

"It has been noted that during the disturbance that prevailed in our premises ... you have, on the 26th of November, 1992, at or around 10.15 a.m. led a group of employees to the yard opposite the main gateroom and conducted a meeting. At this meeting you addressed the workers who had gathered for well over ten minutes while your address was inflammatory in content and nature, in that the workers were also aroused and in a belligerent mood. Your conduct as mentioned in the preceding paragraph was partly responsible for aggravating the chaos which already prevailed at the work place."

Thus, it is crystal clear that the averments in paragraph 23(b) are demonstrably false and incorrect. The witness Karunatillake, Factory Manager, has stated in evidence that he observed through the glass windows the gesticulations, gestures, actions and the movement of hands, face and lips of Shantha in addressing the workers at such meeting , but, as he was in his air-conditioned office, he did not hear the words which worker Shantha had used in addressing the workers. The Personnel Manager, Mr. de Silva, giving evidence, has stated that he heard Shantha, *inter alia*, stating:

" පනස්දාහ ගත්තකත් සටන අත්හරින්නේ නැහැ. දිගටම ගෙනියනවා. පාලකයන්ව දැකගන්නත ඕනෙ."

The arbitrator has been guided by the evidence led in regard to the gestures, gesticulations and actions of Shantha in making the aforesaid speech. The Arbitrator may have erred in some trivial and venial respects in holding on such evidence that it had been **proved beyond reasonable** doubt that Shantha made an **inflammatory** statement against the company in addressing the workers at such meeting but that slight and trivial error certainly does not vitiate his order where he held that Shantha had on the 26th of November, 1992 summoned, convened and held an unauthorised meeting without permission of the management during working hours within the factory premises belonging to the employer. To that extent there is no substantial error of law appearing on the record.

Learned counsel for the petitioner, after his oral submissions, in supporting this application has tendered to this court a written submission on the 18th of December, 1996. That written submission refers to the evidence of the Personnel Manager, Mr. Prem Silva where he had clearly stated in the course of his evidence that the trade union officials and the workers were always in the habit of making applications in writing to hold meetings within the factory premises. The evidence of Shantha in regard to that point was that the trade union officials, when they had to summon meetings suddenly, were in the habit of calling a meeting of members **without permission** during working hours or during the lunch break and that the Management **was aware** of such meetings and **did not object** to

such meetings. The Arbitrator has arrived at a finding in favour of the testimonial trustworthiness and the credibility of the two witnesses called on behalf of the employer. It is on that factual basis that the plea of acquiescence and waiver trotted out by learned counsel for the petitioner in his written submissions, ought to be adjudicated upon. The learned counsel for the petitioner in his written submissions states: "Insofar as the charge of addressing workers at a meeting not authorised by the company is concerned, it has been the established practice for meetings to be held in the premises without authorisation. Notwithstanding the Collective Agreement, it was the practice to hold such meetings without authorisation, to which the Company did not object in the past. Therefore there was waiver of the requirement of authorisation by the company. Even the terms of the Collective Agreement can be varied by way of waiver ... These aspects have not been considered at all by the learned Arbitrator. Therefore, it is evident that there is an important question of law to be determined arising from waiver which aspect has not been considered by the learned Arbitrator." In regard to this contention, I hold that estoppel, waiver and acquiescence are all matters of evidence and cannot be established inferentially by means of large conjecture, as learned counsel for the petitioner attempted to do upon this application. *Vide* the judgment of *Soertsz J in de Silva v. Reginahamy*[13]. I hold that the petitioner has altogether failed to establish the plea of waiver and acquiescence on the part of the employer, in this regard. On a consideration of the totality of the evidence led at the inquiry, though the rule of estoppel by acquiescence could also be called in aid in Sri Lanka (*Vide* the decision in *Jayetillake v. Jayawardena,*[14] per Justice Gratian) the factual foundation for such a plea of estoppel by acquiescence or waiver has not been established by the petitioner upon this application and, in the circumstances, it was idle to contend that the province of waiver and acquiescence had not been considered by the learned arbitrator in the attendant circumstances of this case.

J. T. Shantha, the applicant, has given evidence at the inquiry stating that he addressed the aforesaid meeting outside the factory premises of the management; that he did so during non-working hours and that it was practice to hold meetings without the authority

and permission of the management inside the work place and that such a practice had been permitted by the management, although the Collective Agreement provided for the express obtaining of permission and authorisation. Learned counsel for the employer at the inquiry has made cogent submissions to the Arbitrator that he should, on the media set forth by learned counsel, arrive at an adverse finding in regard to the testimonial trustworthiness and credibility of the workman Shantha. Learned counsel submitted with cogency that the version of Shantha is that he addressed the aforesaid meeting on the said date outside the factory premises during the interval and that in no way did he arouse the workers into a belligerent mood. If that was the correct position, learned counsel submitted it was wholly unnecessary and irrelevant for Shantha to take great pains and efforts with manifested discomfiture to testify that on numerous occasions, meetings have been held inside the factory premises without the approval of the management and further to assert that such meetings without permission of the management were held even during working hours. If the meeting was held outside the gates of the premises, why was it that workman Shantha did labour and strive, manifesting discomfiture and unconvincing demeanour, to testify that permission was not necessary having regard to the practice that prevailed with the management. It was contended forcefully that Shantha in his evidence took two alternative positions and was seeking to have two strings to his defence bow which in turn demonstrated the incredibility of his version. Further, it was forcefully argued that in Shantha's reply to the show cause notice, which reply was marked as A9, that Shantha has not trotted out the afterthought that meetings were held within the factory premises even during working hours without the approval of the management. In A9 there is a complete omission to assert this fact and if that was the true position, one would expect to find that position asserted in the contemporaneous document A9 written by Shantha. This glaring omission was utilised by learned counsel for the employer to impugn Shantha's credibility and testimonial trustworthiness. These submissions have weighed with the Arbitrator when he impliedly rejected Shantha's evidence as uncreditworthy. Unfortunately, the findings on this point of the arbitrator have been expressed in a rather inarticulate and inexact terms as follows:

"These matters have been elicited in evidence by learned counsel for the company and the learned counsel for the union has been unable to meet the position and contentions taken up by the company as regards **Shantha** and others."

The Arbitrator, in the circumstances, has upheld the position of the employer and the evidence that the holding and addressing of the unauthorised meeting (held on 26.11.92) fanned and inflamed the unrest and the fall in discipline which in turn led to the workers threatening the Transport contractors who arrived at the factory premises to remove the manufactured batteries and as a result the contractors refused to perform their contractual duties; that the workers pasted posters at the entrance to the General Manager's room, inside the cubicle of Mr. Malcolm Jayawardena and inside the cubicle of Mr. Lucky de Silva to the effect – "first to obtain the loan and then work" – "these cubicles will be closed from Monday" and then that the workers hurled missiles, of lead and rubber at the staff officers of the management and the resulting mayhem induced the closure of the work place.

In arriving at a decision upon this application, I stress and emphasize that I must be mindful of the nature of Certiorari proceedings as distinct from the exercise of Appellate Jurisdiction. Relief by way of Certiorari in relation to an award made by an Arbitrator, will be available to quash such an award 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 Natural Justice or pronounces an award which eminently is unreasonable or is guilty of a substantial error of law. This remedy cannot be utilised to correct errors or to substitute a correct order for a wrong order and if the Arbitrator's award was not quashed in whole or in part, it had to be allowed to stand unreversed. I am supported in this view by the views expressed by Wade on "Administrative Law" where he 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 an appeal the question is 'right or

wrong? On review, the question is 'lawful or unlawful'? ... Judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, a court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not." (1) 2nd Edition at pages 34 and 35).

In the result, I hold that there is no substantial error of law arising on the record on a perusal of the award of the Arbitrator. The order pronounced by him is eminently reasonable and satisfies the requirement of reasonableness as laid down in the Rule in Wednesbury's case. There is no substantial misdirection in point of fact or law, there is no failure whatsoever to take into account the effect of the totality of the material adduced at the Arbitration inquiry and there is no improper evaluation of evidence and neither is there any defect of procedure on a consideration of the entirety of the evidence led at the inquiry and on a consideration of the award of the said Arbitrator. Therefore, I proceed to refrain from issuing notice of this application on the respondent and I proceed to dismiss the application without costs. Application is dismissed without costs.

Application dismissed.