COLOMBO DOCKYARD LTD.
v.
DE SILVA AND OTHERS

COURT OF APPEAL.
JAYASURIYA, J.
C.A. NO. 148/96.
ARBITRATION PROCEEDINGS
NO. A/2444.
MARCH 13, 1997.
MARCH 27, 1998.
JULY 23, 1998.

Arbitration – Industrial Disputes Act s. 4 (1) – Award – Release and secondment of employees – Temporary and permanent release – Vacancy filled without notice – Can the confirmed position be changed unilaterally? – Transferred – Refusal – suspension – Is it justifiable?

The 1st respondent was the ship repair Manager of the petitioner Company. On 20.12.1990 he was temporarily released on a full time basis to perform duties in terms of the Merchant Shipping Act – for 6 months. He continued to work beyond the stated period of 6 months. However, the salary and all other allowances were paid by the petitioner Company. In January, 1991, the petitioner Company appointed 'A' as acting Repair Manager. The 1st respondent, however, continued to receive his salary until 14.9.92.

In May, 1991 'A' was appointed as the permanent Shipping Repair Manager. On 28.8.1992, the 1st respondent was released to work in his substantive post with the petitioner Company. However, when he reported for work he was informed that he had been appointed as Manager, Trincomalee Branch with effect from 1.1.92. The 1st respondent thereafter requested that he be given his substantive post. As the 1st respondent did not report to the Trincomalee Branch, his services were suspended. The matter was referred for Arbitration, the Arbitrator held that the suspension is unjustifiable, and the employee is entitled to have the suspension revoked with backwages and that he should be permitted to resume duties as the Ship Repair Manager.

Held:

1. The impugned transfer was legally justified and lawful, there is no finding reached by the Arbitrator that the transfer was effected *mala fide* or to achieve ulterior purposes or that it was the result of a process of victimisation of the 1st respondent.

   "It is an inherent right of an employer to transfer its workman from one establishment to another under its management depending on the exigencies of its service."

   The Arbitrator in impliedly holding that the said transfer was unlawful and unjustified has reached a conclusion which is manifestly contrary to law.

2. The Order for backwages is a wrongful exercise of discretion and is unreasonable, and made in the wrongful exercise of his discretion.

3. The adjudication that the services were unjustifiably suspended without pay is a correct adjudication and it is legal and lawful.

APPLICATION for a writ of *Certiorari.*

Cases referred to:

1. *Tamilnad Electricity Workers' Federation v. Madras State Electricity Board* – 1962 11 Lahore Law Journal 136 (Madras).
2. *Hotel Imperial v. Hotel Workers' Union*–1959 11 *Labour Law Journal* 544 at 551 (SC).
3. *T. Cajee v. U. Jurmanik Siem.*
4. *R. P. Kapoor v. Union of India* – AIR 1964 SC 707 AT 792.
5. *Phulbari Tea Estates v. Its Workmen* – 1959 11 LLJ 663 (SC).
6. *Sasamusa Sugar Works (P) Ltd v. Shebrati Khan* – 1959 LLJ 388 (SC).
7. *Canara Banking Corporation Ltd v. Vittal* – 1963 *vol. II Labour Law Journal* 354 at 357 (SC).
8. *Syndicate Bank Ltd v. Its Workmen* – 1966 1 LLJ 440 (SC).
9. *Bareilly Electricity Supply Company Ltd. v. Sivajuddin* – 1960 LLJ 556 at 557 (SC).
10. *Ceylon Mercantile Union v. Millers Ltd., Ceylon Govt. Gazette No.* 12,417 of 16.06.1961.
11. *Ceylon Mercantile Union v. Cargills Ltd. – Ceylon Govt. Gazette No.* 14,864 of 24.07 1969.
12. *Sri Lanka Nidhahas Velanda Saha Karmika Ayatanaya Sevaka Samithiya v. Ceylon Leather Products Corporation* – CA 302/77 – CAM 8.06.1982.

13. *Ceylon Estate Staff Union v. Superintedent, Middlecombra Estate* – 73 NLR 278.
14. *Ceylon Workers Congress v. JEDB* – 1987 2 Sri L.R. 73.
15. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* – 1948 1 KB 222 at 229.
16. *Pearlman v. Keepers and Governors of Harrow School* – 1979 Queens Bench 56.
17. *Racal Communication case Re A Company* – 1981 AC 374.
18. *O Riley v. Macman* – 1983 Appeal cases 273 at 279.
19. *Anisminic Ltd. v. Foreign Compensation Tribunal* – 1969 2 AC 147.
20. *Somaratne v. Pullimadan Chetty and Sons* – SC 160/71 – SC. M 7.06.1972.
21. *Nelson de Silva v. Sri Lanka State Engineering Corporation* – 1996 2 Sri L.R. 342.

L. C. Seneviratne, PC with *Gomin Dayasiri.*

Nihal Fernando and Hemantha Situge for the petitioner.

C. V. Motilal Nehru, PC with *M. A. Sumanthiran, C. T. Jesudasan* and *Ms P. N. Joseph* for 1st respondent.

No appearance for 2, 3, 4 respondents.

Cur. adv. vult.

June 10, 1999.

JAYASURIYA, J.

The petitioner, Colombo Dockyard Ltd. (hereinafter to be referred to as CDL) has preferred this application praying for the issue of a writ of *certiorari* to quash and set aside the award pronounced by the second respondent K. J. Roland Anthony, an Arbitrator appointed by the third respondent in terms of section 4 (1) of the Industrial Disputes Act as amended. This award dated 19th December, 1995, has been produced marked P8. The Commissioner of Labour has drawn up the matter in dispute between the parties for settlement by arbitration by the second respondent in the following terms:

> "The matter in dispute between the parties is whether the suspension of the services of Mr. H. S. de Silva (the first respondent) without pay with effect from 14th September, 1992, by Colombo

Dockyard Ltd. is justified? If the aforesaid suspension is not justified what relief is Mr. H. S. de Silva entitled to?"

The second respondent, Arbitrator at the conclusion of the arbitration inquiry held that he was of opinion that suspension of Mr. H. S. de Silva was unjustifiable and in the circumstances he was entitled to have the order of suspension revoked with back wages and that he should also be permitted to resume his duties as Ship Manager (works) and in the event of the failure to reinstate him in the aforesaid post that he should be granted adequate compensation.

The petitioner sought to impugn the aforesaid award on the ground that the award is a verbatim transcript of the written submissions tendered to the said Arbitrator by the first respondent and therefore the award has been prepared in a manner devoid of procedural fairness to which the petitioner was legally entitled. Further, it was contended that the aforesaid Arbitrator had not taken into consideration principles of Industrial Law relating to the province of transfers and in the circumstances the award was illegal and unreasonable.

It is relevant to set out the pertinent facts which led to the aforesaid dispute between the petitioner and the first respondent. The first respondent was appointed as an executive of CDL with effect from 1.4.1985 and in terms of his letter of appointment it was specifically stipulated that the first respondent will be liable to serve in any part of the island or in any division or department of the employer. (vide documents marked P4 and R1).

In the course of his services he was appointed to the post of Additional Ship Repair Manager. Thereafter, he was appointed as Ship Repair Manager (works) with effect from 1.1.1990. On the 3rd of August, 1990, the first respondent informed the Chairman of CDL that he was assigned the functions and duties of Chief Surveyor of Ships Sri Lanka and the Registrar of Ships in the port of Colombo by the Minister of Ports and Shipping until further notice and the first respondent attached to his communication to the said Chairman a copy of his letter of appointment dated 25.7.1990 issued to him by the said Minister.

In the said communication dated 3rd August, 1990, which was marked as R6 at the inquiry, the first respondent requested permission from the said Chairman to be away from his post and from his office between 10.30 am and 11.30 am to attend to his new statutory duties under the provisions of the Merchant Shipping Act, No. 52 of 1971. The aforesaid Chairman of CDL whilst granting the permission sought in his letter (marked R7) specifically drew the attention of the first respondent that he was performing vital duties in his substantive post as Ship Repair Manager (works) and that permission should be obtained if the first respondent is compelled to overstay the aforesaid time period.

Thereafter, the Chairman CDL by his letter dated 20.12.1990, which was produced marked R8, informed the first respondent that he had been *temporarily released* on a *full time basis* to perform his duties in terms of the Merchant Shipping Act, on the Chairman receiving a telephone message from the Secretary, Ministry of Ports and Shipping.

In a letter dated 21. 12. 1990 (marked P5) emanating from the Secretary, Ministry of Ports and Shipping addressed to the Chairman, it was stated that the services of the first respondent will be made use of in the shipping division for only a *maximum period of six months* and that at the termination of which period the said Ministry was expecting to fill the said statutory posts; nevertheless, the first respondent continued to work *beyond the stated period of six months.* The Secretary to the Ministry of Ports and Shipping further requested the petitioner company to continue to pay the first respondent his salary and other allowances with all fringe benefits that he had enjoyed up to that point of time. After an initial order made by the said Chairman only to pay the first respondent the salary without allowances, at the repeated instance of the Secretary of the said Ministry the aforesaid Chairman proceeded to pay not only the salary but even the allowances to the first respondent until the 14th of September, 1992.

In January, 1991, CDL appointed Mr. R. F. C. Amerasinghe as *Acting* Ship Repair Manager due to the importance of the functions and duties of the said post to the CDL, which was a company engaged in the business of carrying out repairs and construction of motor

vessels and a direction was given by the aforesaid Chairman of CDL to his Finance Manager to stop payment of salary to the first respondent with effect from February, 1991. This communication was produced marked R10. In response to his direction the Administrative Officer of the aforesaid Ministry wrote a communication to the Chairman of CDL which has been marked R11 directing CDL to pay the first respondent his salary and allowances for a *further three months period.* Upon receipt of this direction the said Chairman of CDL informed his Finance Manager to pay the first respondent only his salary without other allowances till the end of May, 1991. Vide document marked as R12. However, the first respondent continued to receive his salary from CDL until the 14th of September, 1992.

Even after the end of May, 1991, the first respondent continued to function in his aforesaid two statutory posts under the aforesaid Ministry. In May, 1991, CDL appointed Mr. Amerasinghe who was then functioning as the Acting Ship Repair Manager as the *Permanent Shipping Repair Manager* (works). It is a highly significant fact which *must be stressed and emphasised that CDL never addressed a* communication to the first respondent either that they were intending to appoint another officer as acting Ship Repair Manager or even later an officer as the permanent Ship Repair Manager, giving notice of such fact to the first respondent and affording him the option and the opportunity of reverting back to his substantive post in the CDL. Neither did his employer CDL by any communication direct and request the first respondent to revert back to his substantive post of Ship Repair Manager (works) which he throughout retained. (vide the evidence recorded at pages 68 and 70 of the proceedings).

In both Government service and in the Corporation service the process of releasing an officer from his substantive post often arises. The release could be of two kinds. (*a*) Temporary Release. (*b*) A Permanent Release. In the case of a temporary release the issue arises whether it is not the *bounden duty* and *obligation* of the employer to give notice to an officer who is temporarily released of an intention on the part of the employer to fill his substantive post by appointing another officer and directing him to revert to his substantive post and thereby terminate the temporary release voluntarily

granted by such employer. If that issue is to be answered in the *affirmative* on the application of the principles governing the *contract* of hire of services taking place between the employer and employee, – *Contract of Employment* – then certainly both the Personnel Officer and the management of CDL had committed a grave default and grievous omission in failing to inform the first respondent of the intention of the management to fill his substantive post by recruiting another officer and also in failing to give him notice of a direction requiring the first respondent to revert back to his substantive post with CDL. This Court *answers* the aforesaid issue in the AFFIRMATIVE. The object of Industrial law is to prevent *unilateral action* on the part of the employer changing the terms and conditions of service to the prejudice of an employee. Vide *Tamilnad Electricity Workers' Federation v. Madras State Electricity Board*[1] per Veera Swami, J.

This Court invited written submissions on this issue from learned President's Counsel who appeared for the petitioner and from learned counsel who appeared for the first respondent. Learned President's Counsel has failed to assist us on this province despite the fervent request extended by this Court to him.

However, learned counsel for the first respondent in his written submissions has contended in the following vein:

"The first respondent had a legitimate expectation and a right to be given the option to revert back to his post before the same was filled. The facts clearly show that he still held his substantive post in the petitioner company and received the salary attached to that post and was only released to work as Manager on *a temporary basis.* The petitioner was not entitled to appoint another person to the post since it was not vacant. If the petitioner wished the person holding the said substantive post to work full time at the petitioner company's premises the first respondent should have been directed to return to the petitioner company or have been given the option to decide whether he was returning or not. . . *The transfer is bad* and *vitiated* because it was issued solely on

account of the fact that the petitioner company had wrongly appointed another person to the post that the first respondent was holding at that time."

The first part of this written submission is well-founded and is tenable in view of the Principles of Labour and Industrial Law applicable in this island. The principles governing release and secondment of employees have to be read in the light of the controls emanating from general principles of the law which abhor and exclude unilateral action. The Arbitrator on this issue in his award holds "that there is also no evidence before me that Colombo Dockyard Limited informed the applicant at any stage requesting him to revert back to CDL or else the vacancy would be filled. I further hold that CDL appointed a Ship Repair Manager without any reference to the applicant – who may have taken a different course of action if noticed. Further, he was aware of his vacancy being filled only on receipt of the document marked R15". Learned President Counsel appearing for the petitioner conceded at the argument that such notice was not given to the first respondent. The statement of its case filed by CDL before the Arbitrator was marked as P2 and in it the petitioner company *merely* states that "because of the expectation that Mr. Silva *will be offered* a permanent position in the Ministry, the Acting Repair Manager (works) in the company was made permanent".

This was clearly a misguided and misconceived expectation and hence the consequent appointment was wrongful and unlawful. The aforesaid wrongful and unlawful appointment paved the way for the ensuing dispute between CDL and the first respondent and viewed in the light of this wrongful appointment and its ensuing dispute, the suspension of the first respondent's services *without salary* with effect from 14th September, 1992, was wrongful, unlawful and therefore unjustifiable. In the attendant circumstances leading to the making of the order of suspension, the suspension of services WITHOUT PAYMENT OF SALARY OR ANY PART OF IT, cannot by any conceivable standard be described as JUST and EQUITABLE. Besides, there has been no evidence led at the inquiry that the employer,

CDL, has held a proper inquiry and come to the *conclusion* that this employee (first respondent) should be *dismissed* and an investigation and a clarification in regard to emoluments on the transfer and in consequence suspended him *WITHOUT PAY* – Vide the principles of law laid down to that effect in *Hotel Imperial v. Hotel Workers' Union*[2] at 551 per Justice Wanchoo. Vide also – *T. Cajee v. U. Jurmanik Siem*[3] per Justice Wanchoo; *R. P. Kapur v. Union of India*[4] at 792 per Justice Wanchoo; *Phulbari Tea Estates v. Its Workmen*[5] *Sasamusa Sugar Works (P) Limited v. Shobrati Khan*[6]. The statement of case filed by CDL (marked as P2) merely sets out that "in view of Mr. de Silva's *refusal* to go on transfer as *directed* by the company, *his services were suspended with effect from* 14th September, 1992, *without pay*". In the circumstances the findings of the Arbitrator on the suspension of services of the first respondent were both legal, lawful and pronounced with jurisdiction.

The employer – CDL – has found itself in this unfortunate predicament entirely due to its imprudent subservience and slavish obedience to the dictates and orders emanating from high ranking officials of the Ministry of Ports and Shipping and in implicitly complying with these orders the management of CDL has in fact acted against the interests of the employer company. I have already specifically adverted to these orders and communications received from the said Ministry in detailing the salient facts relating to this application.

In regard to the submission advanced on behalf of the petitioner that the Arbitrator's award adopts verbatim the written submissions filed before the Arbitrator on behalf of the respondent, it must be stressed that he has not adopted and incorporated the language used in the superlative in those written submissions. In regard to the plea of procedural fairness, it must be observed that the petitioner was afforded a full and unrestricted right and opportunity of placing its evidence at the inquiry and all matters raised in the submissions of the petitioner have been sufficiently considered by the Arbitrator. I hold that there has been no breach of the rules of Natural Justice and there has been procedural fairness in the proceedings conducted at the inquiry.

The first respondent was offered a somewhat different post – Government Engineer and Ship Surveyor by the Ministry of Ports and Shipping (vide R14) and the first respondent refused to accept this different post. Whereupon, the Secretary to the Ministry of Ports and Shipping by his letter dated 28.8.1992 terminated the appointment of the first respondent and released him to work in his substantive post with the CDL and directed him to report for work to the Chairman of the CDL.

When the first respondent returned for work to his substantive post with the CDL, the Chairman of CDL informed the first respondent by letter dated 31.8.1992 that CDL had filled the post of Ship Repair Manager (works) and informed the first respondent that he had been appointed as Manager of the Trincomalee branch of CDL with effect from the 1st of September, 1992.

Whereupon, the first respondent requested that the appointment made to the post of Ship Repair Manager (works) be cancelled and thereby to enable him to resume duties in his original substantive post as Ship Repair Manager (works). The management of CDL by its letter dated 4.8.1992 informed the first respondent that it could not accede to his request and directed him to report to his new post of Manager, Trincomalee branch of CDL. However, the first respondent reiterated his earlier stand and insisted on getting back to his original substantive post and reported for work at his substantive post on 7th September, 1992. The management by its letter of 7th September, 1992, again requested the first respondent to report to the Trincomalee branch on or before 14th September, 1992, asserting that the first respondent was not entitled to resume work at his original substantive post as it had been already filled by another officer as far back as the 3rd of January, 1991.

Thereupon, the first respondent by his letter dated 9th September, 1992, notified CDL that he would be reporting for work at the head office of CDL till the dispute is resolved by the Commissioner of Labour on representations made by the first respondent. The management

of CDL promptly informed the first respondent that unless he reports for duty at the Trincomalee branch on the 14th of September, 1992, that his services with CDL will be suspended without pay.

The first respondent thereafter took up the position that his confirmed position in the substantive post with CDL *cannot be changed unilaterally.* The management of CDL by its letter dated 14th September, 1992, *without a proper inquiry* conducted to ascertain whether the first respondent *ought to be dismissed* and a clarification in regard to emoluments on the transfer decided to *suspend* the services of the first respondent *without* pay until further notice and informed the first respondent of its decision taken on the ground that the first respondent had failed to comply with the order of CDL to report for work on the 14th of September, 1992, as Manager of the Trincomalee branch of CDL.

In regard to the aforesaid *transfer order* there is no finding reached by the Arbitrator that the transfer was effected *mala fide* or to achieve ulterior purposes and objects or that it was the result of a process of victimisation of the first respondent. The Arbitrator states that the management of CDL produced the letter of appointment with a view to establish that in terms of the letter of appointment the first respondent was liable to serve in any part of the island or in any division or department of the employer/company – CDL and that at the appropriate time CDL had its branches in Galle and Trincomalee. Vide clause 9 of the document marked R1.

The Arbitrator further states in his award:

"I am of the view that he has been assigned with duties and the company has failed to prove whether the applicant was paid the same salary or less."

Thereafter, in his award marked P8 the Arbitrator holds thus:

"I am of opinion that the suspension of H. S. de Silva is unjustifiable and as such he is entitled to have the suspension revoked with *back wages* and that he should also be *permitted to resume duties as Ship Repair Manager (works).*"

Thus, the Arbitrator has impliedly determined that the aforesaid transfer was unlawful and he has purported to set it aside and pronounce an order that the first respondent be permitted to resume his duties as Ship Repair Manager (works) at Colombo. The Arbitrator has not given adequate and cogent reasons for his aforesaid determination and adjudication in regard to the said transfer and the order for resumption of duties as Ship Repair Manager (works) at Colombo. He has not held that the transfer was effected *mala fide* or with an ulterior object or purpose or that it was the result of a process of victimisation practised on the first respondent. In the circumstances, of this application, the said transfer is certainly not vitiated in these respects.

It is an undoubted principle in Labour law that an employer is in the best position to judge and to determine the manner to distribute his employees to different jobs, department or branches. He is entitled to decide on a consideration of the necessities or exingencies of his business whether a transfer of an employee should be made from one job, department or branch to another. Vide the decision in *Canara Banking Corporation Ltd. v. Vittal*[7] at 357 (SC) per Justice Das Gupta – the propriety of such transfers is an internal arrangement of the management and the management therefore is in the best position to judge how the distribution of its man power should take place and whether a particular transfer can be avoided or not.

It is not feasible for Industrial Courts or Labour Tribunals to have before them all the material which are relevant for such an adjudication and even if such material can be made available, the aforesaid Tribunals are *by no means suited* for making decisions in matters of this nature. In the circumstances, such Tribunals should be extremely careful and cautious before they decide to interfere with the order of employers made in the discharge of their managerial functions. Vide *Syndicate Bank Limited v. Its Workmen*[8] per Justice Ramaswami. To this general rule there is a well-recognised and exceptional situation in which such Tribunals would interfere and investigate into the representations of employers, where there is reason to believe that

the management has resorted to the device of transfers *mala fide*, or by way of victimisation, or to achieve some other ulterior and improper purpose not connected with the business interests of the employer. Vide *Canara Banking Corporation v. Vittal* (*supra*) at 357 per Justice Das Gupta.

The principle behind this exception and the resulting interference is that a *mala fide* exercise of power is no legal exercise of power. Hence, a charge of *mala fide* victimisation or actuation by improper and ulterior purposes, would necessarily have to be inquired into, in the course of industrial adjudication for the purpose of ascertaining whether a transfer is properly made or not. But, a finding of *mala fides* should only be reached by an Industrial Tribunal after sufficient and cogent evidence is led in support of it. Vide *Bareilly Electricity Supply Company Limited v. Sivajuddin*[9] at 557 per Justice Gajendragadkar. *Syndicate Bank Limited* v. *Its Workmen* (*supra*) per Justice Ramaswami. Such a finding should never be made light-heartedly in a casual manner or on flimsy grounds or capriciously. The facts in the instant application certainly militate against the reaching of such a finding.

Learned President's Counsel in his written submissions tendered to this Court has referred to certain Sri Lankan decisions. In *Ceylon Mercantile Union v. Millers Ltd.*[10] the Supreme Court observed:

> "Transfers are a matter of internal administration and as such fall within the purview of the employers prerogative. However, one should generally expect that this prerogative would be exercised in a just and fair manner and not in accordance to the whims and fancies of the individual."

Again in *Ceylon Mercantile Union v. Cargills Ltd*[11] the Supreme Court remarked:

> "It is still a principle of Industrial Law that the internal management should be left entirely in the hands of the management unless some act or deed of the management amounts to a lack of *bona fides*."

Besides, the Court of Appeal in *Sri Lanka Nidahas Velanda Saha Karmika Ayathanaya Sevaka Samitiya v. Ceylon Leather Products Corporation*[12] echoed the principles laid down in the aforesaid Indian decisions in the following words:

> "It is an inherent right of an employer to transfer its workmen from one establishment to another under its management depending on the exigencies of its service."

Vide also *Ceylon Estate Staff Union v. Superintendent, Meddecombra Estate*[13]; *Ceylon Workers Congress v. Janatha Estate Development Board*[14].

In the instant application it is manifestly clear that none of the circumstances contemplated in the exception to the general rule have been established or have been relied upon by counsel for the first respondent who cross-examined the witnesses called on behalf of the employer at great length and in the circumstances the aforesaid exception to the general rule has no application whatsoever to the present case. In the circumstances, this Court is of the view that the impugned transfer was legally justified and lawful. The Arbitrator in *impliedly* holding that the said transfer was unlawful and unjustified has reached a conclusion which is manifestly contrary to the applicable legal principles. Hence, his award in this respect is vitiated by illegality. There is a substantial error on the face of the record. His implied findings on this point are wholly unreasonable and irrational, in terms of the test of "unreasonableness" and "unfairness" as laid down by Lord Greene, MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*[15] at 229 where His Lordship in discussing the connotation of the word "unreasonable" stated thus:

> "For a person entrusted with the discretion must, *so as to speak, direct himself properly in the law.* He must call his *own attention* to the matters which he is *bound to consider.* He must exclude from his consideration matters which are irrelevant to the matters that he has to consider. If he does not obey those rules he may

truly be said and often is said to be acting *unreasonably*. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. *In another sense* it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things run into another."

This concept of unreasonableness has been clarified and developed in subsequent cases in *Pearlman v. Keepers and Governors of Harrow School*[16], *Racal Communications* case Re A Company[17], *O'Riley v. Macman*[18] at 279 and in *Anisminic Ltd. v. Foreign Compensation Commission*[19].

The learned Arbitrator has held that the first respondent is entitled to have his suspension revoked *with back wages* and also that he should be *permitted to resume duties as Ship Repair Manager (works)*. I hold that the order for back wages is a wrongful *exercise of discretion* and is unreasonable having regard to the principles of law laid down in *Somaratne v. Pullimadan Chetty and Sons*[20] and in *Nelson de Silva v. Sri Lanka State Engineering Corporation*[21] at 346. In the circumstances, I hold that the finding, opinion and view expressed by the Arbitrator that the suspension of the services of Mr. H. S. de Silva is unjustifiable is a lawful and legal finding which is wholly justified having regard to the attendant circumstances elicited in this application.

However, I hold that his implied finding that the aforesaid transfer of Mr. H. S. de Silva to the post of Manager, Trincomalee branch of CDL is unlawful and unjustified, is an unreasonable and irrational adjudication which is tainted by error on the face of the record and is liable to be quashed and set aside and accordingly it is quashed. This Court holds that the consequential order contained in his award that the first respondent should be *permitted* to resume duties as Ship Repair Manager (works) is an equally unlawful, unreasonable and an unjustifiable order. In the result it is quashed. His findings that the first respondent is entitled to back wages is an unreasonable order

made in the wrongful exercise of his discretion and is also quashed and set aside.

In the circumstances, this Court makes order holding that the adjudication of the Arbitrator that the services of Mr. H. S. de Silva were unjustifiably suspended without pay, is a correct adjudication and it is legal and lawful in all respects. This Court proceeds to set aside and quash in the exercise of its powers of *certiorari*, the Arbitrator's implied findings that the aforesaid transfer was unreasonable, and his consequential order that Mr. H. S. de Silva be allowed to resume duties as Ship Repair Manager (works). His order granting the first respondent back wages is also quashed and set aside. The application was pressed and argued for several dates on the issue relating to the suspension of services. Learned President's Counsel strenuously contended that the central issue in this application is whether the *suspension of the services* of the first respondent *without pay* by the employer – CDL was justified or not. As the petitioner/company has failed in that respect, we proceed to dismiss the application of the petitioner/company subject to the reservation contained in this judgment and we direct the petitioner/company to pay a sum of Rs. 10,000 as costs to the first respondent. The award of the Arbitrator is set aside in regard to the order of back wages and in regard to his order directing that the first respondent be *permitted* to resume his duties as Ship Repair Manager (works).

KULATILAKE, J. – I agree.

Award varied.