RANAWEERA
v
MAHAWELI AUTHORITY OF SRI LANKA AND ANOTHER

COURT OF APPEAL
SALEEM MARSOOF, P.C., J., P/CA
SRIPAVAN, J.
CA. APPLI. NO. 1326/02
MAY 18, 2004

Writ of Mandamus – Enforce Order of re-instatement made by a Labour Tribunal and confirmed by the High Court – Does writ lie? Alternative remedy – Industrial Disputes Act – Section 31(c), section 40 1 (q), section 43, section 43(A)3, section 44B – Court of Appeal (Appellate Procedure) Rules 1990 – Rule 3(4) N (i), 3(14) – Non compliance – When should the objection be taken ?

Held:

i) The Industrial Disputes Act has provided an effective procedure for the enforcement of *Orders of Labour* Tribunals. The non compliance of an order made by a Labour Tribunals is declared to be an offence under section 40(1) (q).

ii) The writ of *Mandamus* would not be available when there is an effective alternative remedy.

Per Marsoof, J. (P C/A)

> "The petitioner in his Counter Affidavit pointed out that the respondents have failed to comply with Rule 3(4) (b) (1). I am of the view that the petitioner should have in the first instance invited the attention of the Court to the alleged non-compliance of the Rules and got the matter listed for an Order of Court as contemplated under Rule 3(A)....by filing Counter affidavits, the petitioner has waived the right to take objection to the non-compliance of the Rules.

Per Marsoof, J. (P C/A)

> "The petitioner has failed to produce evidence to show that he had demanded compliance with the Order of the Labour Tribunal and the High Court from the 1st respondent Authority – this by itself is sufficient to disentitle the petitioner to any relief prayed for by him."

iii) The petitioner has failed to establish that there is any duty of a Public Nature owed by the respondents to comply with the Order of the Labour Tribunal.

AN APPLICATION for a writ of *Mandamus* .

Dr. Jayatissa de Costa with *D. Epitawala* and *C. Siriwansa* for the petitioner.

M.N.B. Fernando, S.S.C., for respondents.

October 18,2004

SALEEM MARSOOF, J. P.C. (P/ C/A)

In this application the petitioner, who has been in the service of the 1st respondent Mahaweli Authority of Sri Lanka since 1978, seeks a mandate in the nature of writ of *mandamus* to compel the 1st and 2nd respondents to enforce the order of reinstatement

made by a Labour Tribunal and confirmed with a slight adjustment by the provincial High Court of the Central Province.

The facts briefly are as follows : The petitioner joined the 1st respondent Authority as a Stores Assistant on 1st September 1978 and was promoted as a Store Keeper Grade III with effect from 1st January 1982. The petitioner claims that his services were unjustly terminated on 30th October 1986, and at the time his services were terminated he was serving in the capacity of a Store Keeper Grade III and was drawing a monthly salary of Rs. 1,250 /- The petitioner instituted an application in terms of section 31 (B) (1) of the Industrial Disputes Act No. 43 of 1950 against his employer in the Labour Tribunal of Kandy claiming that his services have been unjustly terminated by his employer. He complained that the aforesaid termination of his services was wrongful and unjust, and sought reinstatement in services with back wages upto the date of reinstatement, payment of EPF and ETF dues, incremental credit, promotions and any salary revisions during the period of termination and other fringe benefits.

The petitioner states that the learned President of the Labour Tribunal delivered her order dated 26th March 1998 in favour of the petitioner holding *inter alia* that the services of the petitioner were unjustly and unreasonably terminated by his employer and had ordered the reinstatement of the petitioner effective from 28th April 1998 with back wages for 84 months for the period that the petitioner was out of employment. The petitioner further states that being aggrieved by the quantum of the aforesaid award (Salary of 84 months at the rate of Rs. 1250/- per month), the petitioner appealed to the Provincial High Court of the Central Province holden in Kandy on the ground *inter alia* that:-

a) the quantum of the aforesaid award was unlawful and contrary to law;

b) the aforesaid relief in relation to quantum is against the evidence led;

c) the learned President has misdirected herself with regard to the evidence led;

d) the learned President has erred in law; and

e) the award in relation to the quantum was not a just and equitable award in terms of section 31 (c) (1) of the Industrial Disputes Act.

The petitioner states that the High Court made its order on 21st February 2002 in favour of the petitioner varying the order of the learned President of the Labour Tribunal of Kandy only to the extent that the petitioner was held entitled to back wages of 138 months i.e. Rs.172,500/- and it was further held that subject to this adjustment, the other orders made by the learned President of the Labour Tribunal Kandy would stand. The petitjoner states that the effect of the order of the said learned President of the Labour Tribunal and the High Court of the Central Province was the reinstatement of the petitioner with back wages for 138 months which tantamount to the reinstatement of the petitioner without any break in service.

The petitioner states that he is entitled to the undermentioned payments if the order of the learned President of the Labour Tribunal of Kandy and the Judgement of the Hon. High Court Judge of Kandy are correctly interpreted considering the changes that have taken place during the period in which the petitioner was out of employment:-

a) Payment of E.P.F and E.T.F since 30th October 1986.

b) Payment of lost annual salary increments,since 30th October 1986 to date.

c) Payment of all the allowances paid such as professional allowance,special cost of living allowances and non recurrence costs of living allowance etc.

d) Payment of Rs. 350,000/- as the lost compensation based on the retrenchment scheme which came into force in November 1997 during such time the petitioner was out of employment.

e) Payment on the basis of differences in salary and compensation based on salary which is Rs.1,170,630/-

The main complaint of the petitioner is that although the High Court of the Central Province holden in Kandy pronounced its judgement on 21st February 2002, the 1st respondent Authority has failed and neglected to give effect to same and thereby failed

and neglected to reinstate the petitioner and to effect the payments enumerated above. The petitioner claims that the failure of the 1st respondent Authority to carry out the order of the learned President of the Labour Tribunal of Kandy and the judgement of the High Court of the Central Province holden in Kandy is arbitrary, capricious, unlawful, unreasonable and unjustifiable and had caused prejudice to the petitioner.

The 1st and 2nd respondents did not file a Statement of Objections but instead filed only the affidavit of the 2nd respondent, who is the Director General of the 1st respondent Mahaweli Authority of Sri Lanka by way of objections. It is necessary to mention at the outset that the petitioner has in Paragraph 3 of his counter affidavit pointed out that the respondents have failed to comply with Rule 3 (4)(b)(i) of the Court of Appeal (Appellate Procedure) Rules 1990, and therefore the affidavit filed by the 2nd respondent by way of objections should be rejected. I am inclined to the view that the petitioner should have in the first instance invited the attention of the Court to the alleged non-compliance with the rules and got the matter listed for an Order of Court as contemplated by Rule 3(14) of the aforesaid Rules. The said rule is quoted below:

> "Where the parties fail to comply with the requirements set out in the preceding rules, the Registrar shall without any delay, list such application for an Order of Court."

The objective of this Rule appears to be to give an opportunity to a party in default to take steps to comply with the rules of Court. In my view of the petitioner should have objected to the alleged "Objections" filed by the respondents by way of motion and had the matter referred for an Order of Court. Instead, the petitioner has chosen to file counter affidavit wherein he taken up the question of non-compliance with Rules in the said counter affidavit. In terms of Rule 3 (4)(b)(i) counter affidavits have to be filed by the petitioner within 4 weeks of the date of receipt of the Statement of Objection, unless a different date is fixed by Court which was what happened in this case. By filing counter affidavits the petitioner has waived the right to take objection to the non-compliance of the rules by the respondents.

In paragraph 4 of the counter affidavit of the petitioner a further objection has been taken to the affidavit of the 2nd respondents on the basis that the date of affirmation is not set out in the Jurat, and the petitioner has annexed marked C (1) a copy of the affidavit of the 2nd respondent served on the petitioner in which the date of affirmation is in clearly left in blank. In the original of the affidavit available in the docket the date of attestation appears in the Jurat as 30th June 2003. However on a comparison of the copy of the affidavit of the 2nd respondent served on the petitioner with the original in the docket, it appears that what has been served on the petitioner is a photocopy of the original affidavit of the 2nd respondent found in the docket, which raises doubts as regards whether the figure "30" had been inserted in the original of the said affidavit available in the docket after the same was filed in Court in an unscrupulous manner. The ink used to insert the figure "30" appears to the naked eye to be different from the ink which the 2nd respondent and the Justice of the Peace had used to sign on the affidavit. In the circumstances, I am inclined to uphold the objection taken by the petitioner to the said affidavit and disregard its contents.

Having carefully considered the application made by the petitioner to this court without taking into consideration any of the averments contained in the so called 'Objection' of the respondents, I have come to the conclusion that the petitioner is not entitled to the reliefs prayed for by him. The petitioner has sought a writ of *mandamus* with a view of enforcing the order of the Labour Tribunal as modified by the order of the Provincial High Court. Mandamus simply does not lie to enforce an order of the Labour Tribunal or an order made on appeal by the Provincial High Court.

The Industrial Disputes Act has provided an effective procedure for the enforcement of orders of Labour Tribunals. The non-compliance of an order made by a Labour Tribunal is declared to be an offence under section 40 (1) (q) of the said Act. Furthermore any money due to any employee may be recovered from the employer in terms of section 43 (A) of the Act. The writ of *mandamus* would not be available where there is an effective alternative remedy. In any event the petitioner in this case has

failed to produce any evidence to show that he had demanded compliance with order of the Labour Tribunal and the Provincial High Court from the 1st respondent authority. This by itself is sufficient to disentitle the petitioner to any relief prayed for by him.

In this context, it is necessary to quote from H.W.R. Wade and C.F Forsyth, *Administrative Law,* 8th Edition, page 615 in which the authors have succinctly stated the law in the following words:-

> "It has been said to be an 'imperative rule' that an applicant for *mandamus* must have first made an express demand to the defaulting authority, calling upon it to perform its duty, and that the authority must have refused. But these formalities are usually fulfilled by the conduct of the parties prior to the application, and refusal to perform the duty is readily implied from conduct. The substantial requirement is that the public authority should have been clearly informed as to what the applicant expect it to do, so it might decide at its own option whether to act or not."

As it is abundantly clear from the Journal Entries in this case dated 26th February 2003 and 24th March 2003, the petitioner was offered reinstatement even after the filing of this application, and he has chosen not to go back to work with the 1st respondent's authority. Furthermore it is to be noted that the public duty that may be enforced by *mandamus*, should be owed by the respondents. The petitioner has failed to establish that there is any duty of a public nature owed by the respondents in this case to comply with the order of the Labour Tribunal as modified by the judgement of the Provincial High Court. In fact, it is apparent from section 43 A(3) and 44 B of the Industrial Disputes Act that the responsibility of recovering any money due to a workman from an employer is cast on the Commissioner of Labour.

For the Foregoing reasons, I am inclined to dismiss the application of the petitioner with costs fixed at Rs. 5000/- payable to the 1st respondent.

SRIPAVAN, J. - I agree.

Application dismissed.