THE

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Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2011] 1 SRI L.R. - PART 12

PAGES 309 - 336

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D I G E S T

Page

INDUSTRIAL DISPUTES ACT – Section 3(1)(d) – Of consent, parties to the Industrial dispute refer the dispute for settlement by Arbitration to an Arbitrator, for settlement by Arbitration. – Section 4(1) – Powers of the Minister in regard to industrial disputes – Section 17(1) – Duties and powers of Arbitrator – Section 36(4) – In the Conduct of Proceedings in respect of an industrial dispute any industrial court, Labour Tribunal, Arbitrator or the Commissioner is not bound by any provisions of the Evidence Ordinance. 309

Brown & Company PLC V. Minister of Labour And 6 others

(Continued from Part 11)

VALIDITY OF A PROXY – objections raised belatedly after five years, at the very end of the proceedings – Failure to take jurisdictional objections. 328

Hatton National Bank Ltd.,V. M.S.Hebtulabhoy & Co. Limited And Others

the rate of Rs. 35 per litre. It was alleged by the relevant employees that the payment of such allowances were necessary to ensure that they will not be worse off working for Browns Engineering than when they worked for Brown & Co.

Since the appeals made by the relevant employees to the management of Browns Engineering and later to the Board of Directors of Brown & Co., did not bring any favourable results, the dispute was referred to the 2nd Respondent-Respondent-Respondent Commissioner of Labour for conciliation in or about January 1995. However, since this too was unsuccessful, the 1st Respondent-Respondent-Respondent Minister of Labour, having been satisfied that an industrial dispute was in existence, by an order dated 30th May 1997, referred the dispute to the 3rd Respondent-Respondent-Respondent Arbitrator for settlement by arbitration under Section 4(1) of the Industrial Disputes Act of 1956. The statement of matters in dispute, which formed part of the said order, set out several disputes involved primarily the alleged withholding of official transport facilities, non-payment of salaries and other ex-gratia payments and professional fees, and the alleged non reimbursment of certain medical bills, all of which arose after 1st June, 1992.

The Arbitrator commenced his inquiry into the matters in dispute between the relevant employees, Brown & Co. and Browns Engineering on 18th September 1997 and concluded the inquiry on 25th October 2002. It is significant to note that when the matter was inquired into by the Arbitrator, despite notice being issued on Browns Engineering, it deliberately refrained from participating in the said inquiry. On the other hand, Brown & Co., which participated in the inquiry,

took up the position that the grievance had arisen after the relevant employees commenced working for Browns Engineering, which it was submitted, was on a fresh contract of employment, and that their contracts of services with Brown & Co., had come to an end in January 1992.

At the conclusion of the inquiry, the Arbitrator concluded that the relevant employees had continued to serve as employees of Brown & Co. even after the transfer to Browns Engineering, and that the original letters of appointment issued to them had contemplated the possibility of such transfers to or from "any of the company's departments or branches or associate or subsidiary companies, whether such department, branch, or associate or subsidiary is or is not in existence at the time of the commencement of this contract of employment". He specifically determined that they had not been issued with any letters of appointment by Browns Engineering, and the letter of transfer dated 17th January 1992 served on them, did not in fact or in law, effect any change in their status as employees of Brown & Co. He also found that they were engaged in the work of Browns Engineering for and on behalf of Brown & Co., and that they had reasonable grounds to expect that the official transport facilities provided to them by the latter will be continued even after they were so transferred to Browns Engineering, which expectation was strengthened by the fact that the said facilities had been continued even after the date of the transfer for five more months.

The Arbitrator, taking all relevant evidence into consideration, by his award dated 31st January 1996, which was published in the Government Gazette bearing No. 1299/18 dated 1st August 2003, determined that the relevant employees

are each entitled to receive a sum of Rs. 270,000.00 as travel expenses from 1st June 1992 up to the termination of their services with effect from 23rd November 1994. He also found that when the said amounts were added to the other claims that the 4th, 5th and 6th Respondents had made, they were entitled to receive respectively sums of Rs. 349,095.37, Rs. 346,907.00 and Rs. 346,219.00 as total dues, and further directed Brown & Co. to pay the said sums.

Being aggrieved by the said award of the Arbitrator, Brown & Co. filed the writ application from which this appeal arises, seeking a mandate in the nature of a writ of *certiorari* quashing the said award and a writ of prohibition to prevent the Commissioner of Labour from taking steps to enforce the said award. Upon the conclusion of arguments, the Court of Appeal by its judgment dated 30th November 2007, dismissed the application of Brown & Co. and refused the relief prayed for in the petition, without costs. This Court has granted special leave to appeal, at the instance of Brown & Co. against the said judgment of the Court of Appeal dated 30th November 2007 on the several substantive questions set out in paragraph 29 of the petition of Appeal. These included several questions as to the legality of the award against Brown & Co. raised on the basis that the transfer from Brown & Co. to Browns Engineering in effect constituted the termination of the services of the relevant employees with the former and the offer of employment by the latter with new and better conditions of service, and the proper party against whom any claim could be made, if at all, was Browns Engineering.

However, at the hearing before this Court, learned President's Counsel for the Appellant Brown & Co. indicated that he would not press any of those grounds, and confined

his submissions to the issue relating to the withholding of official transport facilities, raised in paragraph 29(vi) of the petition of appeal, which is quoted below in full:-

(vi) Did the Court of Appeal totally fail to take into consideration that-

(a) the claim for cost of travelling was admittedly not in the terms of the contract;

(b) the 4th to 6th Respondents (relevant employees) did not claim that they were entitled to a company maintained vehicle, but only claimed that the 7th Respondent (Brown Engineering) did not provide a loan facility to purchase;

(c) the Arbitrator himself has stated in his award that the provision of a vehicle by the company has not been included as a term of the Letter of Appointment which is the Contract of Employment, and therefore the provision of this facility cannot be considered as obligatory on the employer; and

(d) in any event, the Arbitrator's award granting the cost of travelling for all 30 days of the month for the entire period of 30 months is arbitrary and capricious.

It is material to note that this particular dispute involving the withholding of official transport facilities was set out in the statement of matters in dispute, which formed part of the order made by the Minister of Labour dated 30th May 1997 by which the reference to arbitration was made in terms of Section 4(1) of the Industrial Disputes Act No. 43 of 1950, as subsequently amended, in the following manner:-

"1 (a) whether the withholding of the transport facilities of these three officers (relevant employees), that is vehicle maintained by the company and fuel from the month of June 1992; and

(b) the withdrawal of the services of a driver to Mr. S.N. Wickramasinghe (4th Respondent-Respondent-Respondent) from the said date, is justified and if not, to what relief each of them is entitled?"

The reasoning of the 3rd Respondent-Respondent-Respondent Arbitrator contained in his Award dated 20th June 2003 relating to the allowance of Rs. 270,000.00 for travelling expenses incurred by the relevant employees after 1st June 1992 was as follows:-

> "It is to be mentioned here that provision of a vehicle by the company has not been included by the Company as a term in the letter of appointment, which is the contract of employment. Therefore the provision of this facility cannot be considered as obligatory on the Employer. *It could rather be considered as a concession that had been provided to the applicants.* Therefore I would consider the payment of Rs. 300/- as transport expenses per day for the 30 days in question as a fair rate of calculation. I would award Rs. 30x30x30 = Rs. 270,000/- as being a fair claim in this regard to each Applicant." *(emphasis added)*

Learned President's Counsel for the Appellant Brown & Co. submitted that the Arbitrator's award was perverse, insofar as the relevant employees had no legal entitlement to official transport in terms of their letter of appointment. He also complained that the Arbitrator had awarded

Rs. 270,000.00 to each of the relevant employees on the basis that they had incurred an expense of Rs. 300 per day on all 30 days of the month for the entire period of two and half years (30 months), even though certain days included therein may have been public holidays and Saturdays and Sundays, which he submitted were non-working days. He submitted that on an average, there were only 20 working days in each of the months that fell within the relevant period, and that the Arbitrator's award was fundamentally flawed as it was founded on the fallacious basis that the relevant employees reported for work on all 30 days during the entire period of 30 months. He also contended that the Arbitrator had relied upon the documents marked A, B and C which had been tendered with the written submission of the relevant employees after the conclusion of evidence, and to that extent, the said award is irrational and was extraneous material.

Learned President's Counsel for Brown & Co. submitted that for all these reasons, the part of the award of the Arbitrator relating to the official transport facilities ought to be quashed on the ground of "Wednesbury Unreasonableness", which has acquired the well known tag from the recognition Green MR accorded to irrationality as a major ground for judicial review of administrative action in the now famous decision in *Associated Provincial Picturehouses v. Wednesbury Corporation*(1). Lord Diplock in the later case of *Council of Civil Service Unions v Minister for the Civil Service*(2) identified illegality, irrationality and procedural impropriety as the three grounds for such review, and went on to describe Wednesbury unreasonableness at 410 thus:-

"It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no

sensible person who had applied his mind to the question to be decided could have arrived at it."

In my opinion, these words are applicable with equal force to the discretionary powers exercised by an arbitrator, such as the 3rd Respondent-Respondent-Respondent in an industrial arbitration under Section 4(1) of the Industrial Disputes Act. It is noteworthy that the said Act provides for the resolution of Industrial Disputes in various ways. Such disputes may be settled through collective agreements in terms of Sections 5 to 10 of the said Act, and may also be referred under Section 4(2) of the Act to an Industrial Court for settlement. Industrial disputes may also be settled by the Commissioner of Labour (which term includes a Labour Officer) by conciliation or any other means under Section 2 read with Section 3(1)(b) of the Act, or may be referred by the Commissioner to an authorized officer for settlement by conciliation under Section 3(1)(c) read with Sections 11 to 15 of the Act. An Industrial dispute, irrespective of whether it is a minor or major dispute, may be referred for arbitration by the Commissioner with the consent of the parties to the dispute as contemplated by Section 3(1)(d) read with sections 15A to 21 of the Industrial Disputes Act. In terms of Section 4(1) read with Section 15A to 21 of the said Act, the Minister may also refer a minor industrial dispute for arbitration to a Labour Tribunal or to an Arbitrator nominated by the Minister "notwithstanding that the parties to such dispute or their representatives do not consent to such reference". The dispute that arose between the relevant employees with Brown & Co. and Browns Engineering, has been referred for settlement by arbitration in terms of Section 4(1) of the Industrial Disputes Act, and the parameters of judicial review of such arbitration has been explored by this Court in

decisions such as *Thirunavakarasu v. Siriwardena and others*[3], and *Brown & Co. Ltd., and Another v Ratnayake, Arbitrator and Others*[4]. As this Court noted in *Thirunavakarasu v. Siriwardena and others (supra)*, the Arbitrator in such an industrial arbitration "has much wider powers both as regards the scope of the inquiry and the kind of orders he can make than an arbitrator in the civil law" (*per* Wanasundera, J. at 191).

Arbitration under the Industrial Disputes Act is intended to be even more liberal, informal and flexible than commercial arbitration, primarily because the Arbitrator is empowered to make an award which is " just and equitable". When an industrial dispute has been referred under Section 3 (1)(d) or Section 4(1) of the Industrial Disputes Act to an Arbitrator for settlement by arbitration, Section 17(1) of the said Act requires such Arbitrator to "make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable". In my view, the word "make" as used in the said provision, has the effect of throwing the ball in to the Arbitrator's court, so to speak, and requires him to initiate what inquiries he considers are necessary. The Arbitrator is not simply called upon "to hold an inquiry", where the ball would be in the court of the parties to the dispute and, it would be left to them to tender what evidence they consider necessary requiring the arbitrator to be just a judge presiding over the inquiry, the control and progress of which will be in the hands of the parties themselves or their Counsel. What the Industrial Disputes Act has done appears to me to be to substitute in place of the rigid procedures of the law envisaged by the

"adversarial system", a new and more flexible procedure, which is in keeping with the fashion in which equity in English law gave relief to the litigants from the rigidity of the common law. The function of the arbitral power in relation to industrial disputes is to ascertain and declare what in the opinion of the Arbitrator ought to be the respective rights and liabilities of the parties as they exist at the moment the proceedings are instituted. His role is more inquisitorial, and he has a duty to go in search for the evidence, and he is not strictly required to follow the provisions of the Evidence Ordinance in doing so. Just as much as the procedure before the arbitrator is not governed by the rigid provisions of the Evidence Ordinance, the procedure followed by him need not be fettered by the rigidity of the law.

It is in this light that I proceed to examine the submissions made by learned President's Counsel for Brown & Co., learned State Counsel who appeared for the Minister of Labour and Commissioner General of Labour, and learned Counsel for the relevant employees in the light of the evidence produced in the course of the arbitration proceedings. As already noted, the task of the Arbitrator was no doubt hindered by the fact that Browns Engineering, which was presumably aware of the material facts and circumstances, chose not to participate in the inquiry and to present its case. Although, Brown & Co. took up the position that it was not aware of the material facts and circumstances relating to the dispute as it had arisen after the transfer of the relevant employees to Browns Engineering, a position which is not too convincing in the light of the relationship between Browns & Co. and Browns Engineering, the relevant employees have testified before the Arbitrator with respect to the material facts and circum-

stances and they have been subjected to cross-examination by learned President's Counsel for Brown & Co.

Learned President's Counsel for Brown & Co. has submitted that the relevant employees had no legal entitlement to official transport in terms of their letters of appointment, which did not expressly provide that they were entitled to the facility of a company vehicle for their official and/or personal transportation. However, this submission completely overlooks the facts that the jurisdiction of the Arbitrator is an equitable one, and he is not constrained by the provisions of the contract of employment. Furthermore, the Arbitrator had in his award viewed the provision of a company vehicle as a "concession" rather than a legal obligation, and the Court of Appeal has in its impugned judgment, endorsed this view and concluded that there was no error of law in the award to justify the exercise of its supervisory jurisdiction. I see no reason to differ from the approach of the Arbitrator and the Court of Appeal.

It is clear from the testimony of the relevant employees before the Arbitrator that they were each provided by Brown & Co. with a company vehicle for not only official but also personal travel, and that the vehicles so provided were in fact sold to them within five months of the transfer to Browns Engineering. The 4th Respondent-Respondent-Respondent, S.N. Wickramasinghe, who was the Assistant Works Manager at the Ratmalana workshop has testified that during the period prior to 1st January 1992, he was provided with a company owned petrol vehicle with a driver and 150 litres of petrol (vide page 196 of the brief). He also produced in the course of his testimony, a copy of the circular letter on the subject of consumption of fuel dated 24th August 1989 marked

AB 19 signed by the Administration Manager of Brown & Co (vide proceedings at page 207 and the document AB 19 at page 613 of the brief), which is clear evidence of the fact that a company vehicle had been provided to him and other senior engineers in service for official and personal use. He further testified that just after the transfer to Browns Engineering, the Management of that company "agreed to provide us with better vehicles with the same facilities, but they did not keep up the promise". The testimony of this respondent as well as the other two relevant employees clearly show that the facility of a company vehicle had been extended to them even after their transfer to Brown's Engineering for five more months till the end of May 1992, which no doubt created a legitimate expectation in their minds that the facility will be continued throughout their service. It also appears from the testimony of the 4th Respondent-Respondent-Respondent that in May 1992 Brown & Co. sold to them the official vehicles that had been used by them, and the facility of providing a company vehicle with a driver and fuel, was discontinued with effect from June 1992. (page 196 of the brief).

The testimony of 6th Respondent-Respondent-Respondent, S.T.N. Perera was substantially to the same effect, and at pages 391 to 392 of the brief, he has stated that he too was provided with a petrol vehicle for official and personal use. He was specially questioned about the quantity of fuel he was entitled to, and he responded in the following manner:-

Q- Who paid for the fuel?
A- The Company.

Q- Was there a limit on the fuel?
A- 150 Litres per month.

Q- Were there any restrictive conditions attached to the use of vehicles? Were you allowed to use for your personal travelling?

A- Yes.

Q- If you use more than 150 Litres, then what will happen?

A- I will have to pay for that.

It appears from the evidence of the 5th Respondent-Respondent-Respondent, P.A.Q. Fernando, that unlike in the case of the 4th and 6th Respondent-Respondent-Respondents, he was provided with a diesel vehicle, and he has testified at page 418 of the brief that he was given Rs. 3000 worth of diesel fuel per month, and that whenever he had to travel to distant outstations like Nuwara Eliya, he was given an extra fuel allowance.

It is also apparent from the evidence recorded by the Arbitrator that the facility of a company driver was provided only to S.N. Wickramasinghe, the 4th Respondent-Respondent-Respondent, and the other two relevant employees have been agitating that they too should be provided with company drivers, or in the alternative an allowance sufficient to hire a driver of their own. The divergence in the manner in which the company vehicle was provided to each of the relevant employees, is in fact reflected in the different amounts (set out in the table below) claimed by them as travelling expenses on account of the said facility being discontinued with effect from June, 1992. The amounts set out in the table that appears below have been extracted from the claims of the relevant employees which were tendered to the Arbitrator along with their written submission marked A, B and C.

Respondent-Respondent Respondent	Monthly rental for the vehicle (Rs)	Monthly expense incurred for fuel for official travel (Rs)	Driver's Salary (Rs)	Total claimed per month (Rs)
4th	15,000	5,250	3,000	23,250
5th	15,000	3,000	-	18,000
6th	10,000	3,500	-	13,500

Learned President's Counsel has strongly objected to the reliance placed by the Arbitrator on the documents marked A, B and C, which were not marked in evidence and tendered only with the written submissions of the relevant employees to the Arbitrator. However, it is clear that these documents were not intended to be evidence in the case, as learned President's Counsel for Brown & Co. seems to contend, but were merely summaries of their respective claims under different heads which were helpful not only to the Arbitrator, but also to the Court of Appeal and this Court in understanding their case.

Learned President's Counsel has also submitted that the Arbitrator's award was perverse, as a uniform sum of Rs. 270,000.00 has been awarded to each of the relevant employees on the basis that they had incurred an expense of Rs. 300 per day on all 30 days of the month for the entire period of two and half years (30 months), despite the differences in the facts and circumstances relating to the claims of each relevant employee, and the fact that on an average, there were only 20 working days in each of the months that fell within the relevant period. There is no doubt that there was some disparity in the nature of the transport facility extended

by Brown & Co. and Browns Engineering to the relevant employees, and it would appear that the Arbitrator has made an award on the lower side, based on the comparatively lower claim of the 6th Respondent-Respondent-Respondent, whose total claim amounted to only Rs. 13,500.00 per month. What has been awarded by the Arbitrator to all the relevant employees was Rs. 9,000.00 per month (Rs. 300 x 30 = 9,000), which is substantially lower than what has been claimed by the relevant employees. In fact, the award at first sight appears to be grossly inadequate from the perspective of the 4th Respondent-Respondent-Respondent, who was the relevant employee who was actually provided with a company driver, but he has chosen not to invoke the writ jurisdiction of the Court of Appeal in this regard, and has suffered most by reason of the long period of time to resolve the dispute.

I do not consider that there is any merit in the other submission of learned President's Counsel that any redress afforded by the Arbitrator by his award should have been on the basis of 20 working days per month. In the first place, there is clear evidence to the effect that the relevant employees had to report for work of travel on duty even on non-working days, and in any event, the relevant employees have all testified that they were permitted to utilize the company vehicles for their personal use as well, which is now the norm in the private sector.

It is abundantly clear that the Arbitrator has relied on the testimony of the said employees and the documents marked in the course of their testimony, in arriving at his findings. The 4th Respondent-Respondent-Respondent, has produced in evidence a copy of the circular letter on the subject of consumption of fuel dated 24th August 1989 marked AB 19,

wherein it is specifically stated that "it has been decided to allocate a fixed quantity of fuel to each vehicle per month to be used by the engineers" (vide proceedings at page 207 and the document AB 19 at page 613 of the brief). He has testified that in his case the allocation was 150 litres of petrol per month, which at the then prevailing price of petrol, which learned President's Counsel conceded was Rs. 35.00 per litre, justified the award of Rs.5,250 per month or Rs. 175 per day as petrol allowance alone. I find that the rate of Rs. 300 per day allowed by the arbitrator as travelling expenses was a composite sum intended to cover three heads of expenditure, namely, the rental value of the vehicles belonging to the relevant employees which they had graciously made available for their official travel from 1st June 1992, driver's salary and cost of fuel. It is relevant to note that with respect to each of these heads the relevant employees had claimed much higher sums in the documents tendered with the written submissions marked A, B and C. Of course, it is in evidence that the 4th Respondent-Respondent-Respondent, who used a diesel vehicle, was paid only Rs. 3000.00 by Brown & Co. as the monthly fuel allowance, which works out to only Rs. 100 per month, and what the Arbitrator has endeavored to do was to arrive at a reasonable and uniform figure for the cost of fuel, car rental and driver's salary. In my considered opinion, even if one takes Rs. 100 to be the daily cost of fuel, the award of Rs. 300.00 per day as the travelling allowance, appears to be very reasonable, as they had to use their own personal vehicles and fuel for their official travel from 1st June 1992 and allowing an additional sum of Rs. 200 per day to cover the car rental and driver's salary is not excessive. The award is certainly supported by evidence, and is very reasonable.

It is important not to lose sight of the fact that this appeal arises from an application for the writ of *certiorari* to

quash the award of the Arbitrator in an industrial arbitration, and the Court of Appeal which refused the application in the circumstances of this case did so in the exercise of its supervisory jurisdiction and not in its capacity as an appellate court. In this context, it is important to recall the following words of Green MR in *Provincial Picturehouses v. Wednesbury Corporation (Supra)*, at 228 to 230:-

> "As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters........
>
> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and

is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in 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 what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably"………

It is true to say that, *If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.* That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to ……." *(emphasis added)*

In all the circumstances of this case, I am of the considered opinion that the award is not vitiated by a failure to consider relevant facts or taking into consideration irrelevant facts and in particular does not suffer from what had been termed "Wednesbury unreasonableness" and is certainly not "outrageous" in the sense of the term used by Lord Diplock in his *dictum* in *Council of Civil Service Unions v Minister for the Civil Service (supra)* which has been quoted earlier in this judgment.

For the aforesaid reasons, I hold that –

(a) the Court of Appeal did not err in affirming the finding of the Arbitrator that although reimbursement of the cost of travelling was not expressly provided for in the letter of appointment issued to the relevant employees by Brown & Co., it was just and equitable to award them an allowance to meet the official travelling expenses, specially considering the fact that they had been provided with a company vehicle for their official and personal travel in the past and the withholding of this facility had given rise to an industrial dispute;

(b) the 4th to 6th Respondent-Respondent-Respondents had in fact, claimed that they were entitled to a company maintained vehicle, and not merely a loan facility to purchase a vehicle;

(c) the Court of Appeal has affirmed the finding of the Arbitrator that the provision of a company vehicle was not obligatory but was a concession granted to the relevant employees with respect to the continuation of which they had a reasonable expectation and

(d) the Arbitrator's award granting the cost of travelling for all 30 days of the month for the entire period of 30 months was justified and supported by evidence and was not arbitrary or capricious.

I am of the opinion that the impugned award of the Arbitrator is just and equitable, and there are no errors on the face of the record to justify intervention by way of writ of *certiorari.* However, before parting with this judgment, I also wish to observe that the inquiry before the Arbitrator which commenced on 18th September 1997 concluded on 25th October 2002, and the lengthy proceeding and the consequent

delay has defeated the objective of the reference for arbitration made by the relevant Minister in terms of Section 4(1) of the Industrial Disputes Act. In particular, it is observed that the proceedings before the Arbitrator very much resembled court proceedings, and demonstrated a failure on the part of the Arbitrator to take advantage of the equitable jurisdiction conferred, and the flexibility in proceedings envisaged, by the said Act, which has expressly provided in Section 36(4) that the provisions of even the Evidence Ordinance will not apply thereto. It is a great pity that due to the delay resulting from the protracted arbitration proceedings and the subsequent judicial proceedings, a minor dispute that arose in 1992 is still unresolved after the lapse of nearly two decades.

I affirm the judgment of the Court of Appeal dated 30th November 2007, and dismiss the appeal. In all the circumstances of this case, I award the 4th, 5th, and 6th Respondent-Respondent-Respondents a sum of Rs. 35,000.00 each as cost of this appeal.

J.A.N. DE SILVA, C.J. -I agree.

RATNAYAKE, J. - I agree.

Appeal dismissed.

HATTON NATIONAL BANK LTD.,V. M.S.HEBTULABHOY & CO. LIMITED AND OTHERS

SUPREME COURT
AMARATUNGA J.
IMAM, J. AND
SURESH CHANDRA, J.
S.C.APPEAL NO. 134 A/2009
C.H.C. CASE NO. 281/2001 (1)
SEPTEMBER, 17TH , 2010

Validity of a proxy – objections raised belatedly after five years, at the very end of the proceedings – Failure to take jurisdictional objections.

The plaintiff filed action against the defendant on 19.11.2001 praying for the recovery of a sum of Rs. 89.3 million together with interest thereon. The case has proceeded up to the stage of filing of the answer and thereafter much time has been spent on technical objections in connection with the filing of proxies by the plaintiff.

The substituted Plaintiff filed a petition and affidavit dated 10th January 2008 along with a fresh proxy dated 9.1.2008 of the original plaintiff signed by the Power of Attorney holder of the Plaintiff – bank and prayed that the said proxy dated 9.1.2008 be accepted. The defendant filed objections to the said application, the learned Judge of the Commercial High Court delivered his order dated 8th July 2009 refusing to accept the said proxy dated 9.1.2008 on the ground that the original Plaintiff was no longer a party in the case. Against order substituted Plaintiff filed an application for leave to appeal to the Supreme Court and the Supreme Court granted leave on the following questions.

1. Has the learned High Court Judge erred in holding that the substitution of the substituted Plaintiff Bank raised a legal bar to the subsequent curing of any defect which may have existed in the proxy filed by the original plaintiff bank;

2. Has the learned High Court Judge erred in failing to realize that the substituted Plaintiff was entitled in law to tender the proxy marked X17 of the original Plaintiff bank for the purpose of regularizing the record if any defect had existed in the original proxy marked X2;

3. Has the learned High Court Judge erred in failing to correctly apply the principle of law that, a defect in a proxy can be cured provided it is evident that the person executing the proxy intended to grant the authority of that proxy to the Attorney-at-law in whose favour the proxy has been executed.

4. Where the party whose proxy is sought to be rectified is not before Court, can a party substituted in his place rectify an error in the original proxy and tender a new proxy for the original party.

Held:

(1) Once substitution had taken place and was affirmed by the Supreme Court on being challenged by the Defendant, the application of the Defendant regarding the validity of the proxy raised after about five years from the time of filing of the action should not have been allowed.

(2) Jurisdictional objections are required to be taken at the first opportunity, the failure of which would constitute acquiescence to jurisdiction of the Court".

per Suresh Chandra, J.—

> "The objections regarding the proxy was raised only after the substitution of the Plaintiff had taken place, and after the said substitution was challenged in the Supreme Court, which objection was taken by the defendant almost five years after entering an appearance in the case. Once the substituted plaintiff was in place the case should have proceeded from that point."

APPEAL from the order dated 8th July 2009 of the Commercial High Court.

Cases referred to:

(1) *Udeshi V. Mather* – (1988) 1 SLR 12

(2) *Paul Coir (Pvt.) Ltd. V.Waas* – (2002)1 SLR 13

(3) *Pinto V. Trelleborg Lanka – (Pvt) Ltd.* (2003) 3 SLR 214

(4) *S.P.Gunathilaka V. Sunil Ekanayake* – S.C. 26/2009 decided on 15.12.2010

Prasanna Jayawardena for substituted – Plaintiff – Appellant

C.J. Fernando for Defendant – Respondent

Cur.adv.vult

June 28th 2011

SURESH CHANDRA J.

This is an appeal from the order dated 8th July 2009 of the Commercial High Court.

The Plaintiff Bank filed action on 19th November 2001 against the defendant praying for the recovery of a sum of Rs. 89.3 Million together with interest due thereon. The Defendant filed answer on 26th February 2004 praying for a dismissal of the plaintiff's action. The case was thereafter fixed for trial.

On 20th January 2005 the substituted Plaintiff made an application to have itself substituted in place of the original plaintiff in terms of section 404 of the Civil Procedure Code on the ground that the business of the original plaintiff in Sri Lanka had been transferred to the Substituted Plaintiff Bank. On 9th May 2005 the Defendant filed its objections to the proposed substitution. By order dated 5th August 2005 Court allowed the application for substitution.

The Defendant made an application against the said order for substitution to this Court and the said application was dismissed. On 30th January 2006 the defendant had made an application in open Court to the effect that the

original proxy filed by the original plaintiff was defective and the defendant stated it would make an application in future. The Original plaintiff filed a fresh proxy dated 28th February 2006 by motion dated 3rd March 2006. The Defendant on 13th March 2006 filed a motion and moved to have the case dismissed on the basis that the original proxy filed by the original plaintiff was defective. The substituted Plaintiff filed its statement of objections to the said application of the Defendant on 15th May 2006.

Thereafter the substituted Plaintiff by motion dated 7th August 2006 tendered a fresh proxy dated 2nd August 2006 on behalf of the original plaintiff setting out the fact that the substituted plaintiff had recently become aware that the aforesaid proxy dated 28th February 2006 had been defective due to inadvertent clerical and/or typographical errors and moving that the said fresh proxy dated 2nd August 2006 be accepted. The defendant filed written submissions objecting to the proxy dated 2nd August 2006. The defendant's then registered Attorneys-at-Law withdrew the proxy filed by them on behalf of the defendant and on 19th March 2007 a new proxy given by the Defendant to another Attorney-at-Law was tendered on behalf of the defendant and the defendant made an application to file a further statement of objections.

The defendant filed its statement of objections objecting to the substituted plaintiff's statement of objections dated 15th May 2006. Thereafter, the Commercial High Court directed the substituted plaintiff to file a petition in this connection and when the case had been called on 21st November 2007 for inquiry the substituted plaintiff withdrew its earlier applications and moved to file a petition praying for the acceptance of a corrected proxy signed by the original plaintiff.

Accordingly the substituted plaintiff filed a petition dated 10th January 2008 along with an annexed affidavit and a fresh proxy dated 9th January 2008 of the original plaintiff signed by the Power of Attorney holder of the original plaintiff bank and prayed that the said fresh proxy dated 9th January 2008 be accepted and that the said fresh proxy be filed of record. The defendant filed its statement of objections dated 19th March 2008 and the parties had agreed to have the matter regarding the acceptance of the proxy dated 9th January 2008 be decided by way of written submissions which they filed. The learned Judge of the Commercial High Court delivered his order on 8th July 2009 refusing to accept the aforesaid proxy dated 9th January 2008 on the basis that the original plaintiff was no longer a party in the case.

The Substituted plaintiff on making an application for leave to appeal to this court, leave was granted on 10th November 2009 on the following question of law-

(i) Has the learned High Court Judge erred in holding that the substitution of the substituted plaintiff Bank raised a legal bar to the subsequent curing of any defect which may have existed in the proxy filed by the original plaintiff bank;

(ii) Has the learned High Court Judge erred in failing to realize that the substituted plaintiff was entitled in law to tender the proxy marked X17 of the original plaintiff bank for the purpose of regularizing the record if any defect had existed in the original proxy marked X2;

(iii) Has the learned High Court Judge erred in failing to correctly apply the principle of law that, a defect

in a proxy can be cured provided it is evident that the person executing the proxy intended to grant the authority of that proxy to the Attorney-at-law in whose favour the proxy has been executed.

(iv) Where the party whose proxy is sought to be rectified is not before Court, can a party substituted in his place rectify an error in the original proxy and tender a new proxy for the original party.

This case which was instituted in November 2001 has been proceeded with only up to the stage of the filing of answer by the defendant so far and throughout the intervening period much time has been spent on technical objections regarding the filing of proxies, rectifications and objections regarding substitution. This is the second time that it has come up to the Supreme Court as it had come up earlier regarding the question of substitution which was rejected by this Court in 2006.

It is rather disheartening to note that the objection regarding the defect in the proxy had been raised by the defendant for the first time in January 2006 which was after about five years from the filing of the original action and that too after the substitution referred to above had taken place. From then onwards it had been a case of raising objections to the filing of proxies which was done by the plaintiff apparently to cure defects in the original proxy if any as stated by them.

The plaintiff has filed three proxies thereafter seeking to cure defects in the proxies. It is the last proxy dated 9th January 2008 which is the subject matter of the present

application before Court. It is to be noted it is only against the last proxy that was filed by the plaintiff that the Court has made an order.

This begs the question as to the validity of the other three proxies filed on behalf of the plaintiff and the substituted plaintiff which remain in the record. There is of course one thread running through all these proxies, it is the same Attorneys-at-law who have been authorized by the plaintiff and the substituted plaintiff which makes it clear that the intention of the plaintiff and the substituted plaintiff to authorise the same Attorneys-at-law regarding their action against the defendant, which basis has been accepted in a series of cases. Vide *Udeshi v Mather*(1) , *Paul Coir (Pvt) Ltd v Waas*(2); *Pinto v Trelleborg Lanka (Pvt) Ltd*(3).

The learned High Court Judge has refused to accept the proxy dated 9th January 2008 on the basis that a defective proxy can be cured only if there was no positive rule of law against such curing. Having considered the cases regarding the curing of defective proxies the learned High Court Judge has arrived at this conclusion.

The Defendant in their written submission have stated that once the substitution has been effected (which was challenged by them and which failed) the original party has no part to play in the action and the subsequent filing of the proxy in 2008 has no validity. Although the substituted party steps into the shoes of the plaintiff, it does not debar the plaintiff to cure a technical defect such as the curing of a proxy which is defective. The substituted plaintiff has taken it upon itself after the defendant had raised a query regarding the original proxy after the substitution had taken place,

to have taken steps to cure what it considered as defective proxies if any while stating that the original proxy was valid and went to the extent of stating that those steps were being taken out of an abundance of caution without prejudice to the validity of the original proxy. This would mean that the original proxy was still considered valid by the plaintiff and the substituted plaintiff.

It is my view that once substitution had taken place and was affirmed by this Court on being challenged by the defendant, the application of the defendant regarding the validity of the proxy raised after about five years from the time of filing of the action should not have been allowed. In the recent decision of the Supreme Court, *S.P.Gunathilake vs Sunil Ekanayake* [(4)], Chief Justice J.A.N. de Silva has exhaustively dealt with the effect of section 27 of the Civil Procedure Code, taking into consideration all the relevant cases and in respect of the objection taken belatedly regarding the defect or absence of a proxy observed thus "if jurisdictional objections are permitted at the very end of proceedings and upheld, all proceedings would have to be held void thus wasting precious judicial time and resources and causing grave injustices. Therefore jurisdictional objections are required to be taken at the first opportunity, the failure of which would constitute acquiescence to jurisdiction of the court." In the present case the objection regarding the proxy was raised only after the substitution of the plaintiff had taken place, and after the said substitution was challenged in the Supreme Court, which objection was taken by the defendant almost five years after entering an appearance in the case. Once the substituted plaintiff was in place the case should have proceeded from that point.

In the above circumstances I am of the view that the order of the learned High Court Judge cannot stand and the questions of law on which leave was granted by this Court are answered in favour of the plaintiff. The appeal of the plaintiff is allowed and the order of the learned High Court Judge is set aside and the High Court is directed to proceed with the trial in the case expeditiously. As both parties have contributed to the delay in proceeding with the case on technicalities, each party will bear its own cost.

AMARATUNGA J. - I agree.

IMAM J.-I agree.

Appeal allowed. The order of the High Court Judge is set aside and the High Court is directed to proceed with the trial.