LANKA LOHA HOLDING (PVT) LTD
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
CALA NO. 299/99
MARCH 21 AND 22, 2002

Rahabilitation of Public Enterprises Act, No. 29 of 1991, sections 2, 5 (1) and 9 – Compulsory vesting of shares – Conversion of Government-Owned Business Undertakings – Public Companies Act, No. 23 of 1987 – Companies Act, No. 17 of 1982 – Determination of question of compensation by Compensation Tribunal – Is the Tribunal bound by the principles of natural justice? – Could it devise its own rules and procedure? – Judicial review and appeals – Can the appellant raise questions on legality such as violations of natural justice? – Compensation Tribunal functus – Can there be de novo proceedings? – Interpretation Ordinance, section 6 (3).

Held:

(1) The denial of a hearing was contrary to all the basic principles of natural justice.

(2) Even in situations where express provisions have not been made for the observance of natural justice by a tribunal there is an obligation on the part of the Statutory Tribunal to follow the rules of natural justice when making determinations which affects the rights of individuals.

(3) Although a tribunal is free to devise its own procedure, it does not mean it can act in a manner which violates the basic principles of natural justice.

Per Nanayakkara, J.

"Although judicial review and appeals are two distinct procedures, a party is not precluded from raising issues relating to principles of natural justice both by way of appeal as well as by way of judicial review."

(4) Even though the Tribunal is functus, once a vesting order is made in terms of the provisions of the Act proceedings already commenced can be continued until the conclusion.

APPLICATION for Leave to Appeal from an Order of the Compensation Tribunal established in terms of s. 5 (1) of Act, No. 29 of 1996.

Cases referred to :

1. *The Kahatagaha Mines Ltd. v. Fernando* – 78 NLR 273.
2. *Sandesa Ltd. et al v. Sirimavo Bandaranaike* – (1980) 2 Sri LR 156.
3. *Sri Lanka Broadcasting Corporation v. De Silva* – (1981) 2 Sri LR 220.
4. *Elarka v. Oil Bourne Shipping Co.* – (1978/79/80) SLR 55.

K. N. Choksy, PC with *Lalanath de Silva* for petitioner.
F. Jameel, Senior State Counsel for respondents.

Cur. adv. vult.

October 18, 2001

NANAYAKKARA, J.

The petitioner was a Company duly incorporated under the laws of Sri Lanka, the shares of which were subsequently compulsorily vested in the Government of Sri Lanka under the provisions of the Rehabilitation of Public Enterprises Act, No. 29 of 1996.

The precursor of the petitioner Company was the State Hardware Corporation which was a State-owned Corporation before privatization. On the 5th of November, 1990, in pursuance of the Government privatization policy the State Hardware Corporation was privatized and the petitioner-company was incorporated under the provisions of the Companies Act, No. 17 of 1982 read with the Conversion of the Government-Owned Business Undertakings into Public Companies Act, No. 23 of 1987.

In terms of a memorandum of understanding (MoU) entered into between the Government and the petitioner-company on the 24th of October, 1991, the petitioner-company acquired 90% of the shares of the Company for the purchase price of Rs. 30,000,000 of which 15% of the said shares were later transferred to the Merchant Bank of Sri Lanka for a consideration of Rs. 5,000,000. Thereupon, the petitioner-company took over the management and control of the privatized venture and the company gifted the remaining 10% of the shares to the employees. Subsequently, by virtue of a vesting order published in the *Gazette Extraordinary* No. 960/11 dated 28. 01. 1997, under the provisions of section 2 of the Rehabilitation of Public Enterprises Act, No. 29 of 1996, the President of Sri Lanka vested the administration and management of the petitioner-company with the Government. Accordingly, its shares were vested with the Secretary to the Treasury for and on behalf of the Government.

The 2nd, 3rd and the 4th respondents who were appointed by the President of Sri Lanka to constitute the Compensation Tribunal in terms of section 5 (1) of the Rehabilitation of Public Enterprises Act, No. 29 of 1996, were entrusted with the task of determining the quantum of compensation, if any payable to the shareholders of the petitioner-company, consequent to the compulsory vesting of its shares in the Government.

This application for leave to appeal is a sequel to an award made by the 2nd, 3rd and the 4th respondents who constituted the Compensation Tribunal in respect of a claim for compensation made by the petitioner-company. The 1st respondent who is the Attorney-General has been made a party by the petitioner-company as the claim is made against the State.

The petitioner-company lodged a claim of compensation in a sum of Rs. 90,558,000 for the 5,625,000 shares of Rs. 10 each owned by it for the compulsory acquisition of its shares by the Government.

The Compensation Tribunal which went into the question of compensation payable to the petitioner-company, after several dates of hearing by an award dated 11th November, 1996, determined that no compensation whatsoever was due to the petitioner-company.

Being dissatisfied and aggrieved by the said award the petitioner-company has presented this application for leave to appeal claiming, *inter alia*, setting aside the award made on 11. 11. 1999 an award of a sum of Rs. 90,558,000 as compensation.

The basic complaint of the petitioner-company is that, although the Compensation Tribunal held several sittings on different dates, the petitioner-company was not notified of the sittings held on certain dates, and proceedings on these days were conducted in the absence of the petitioner-company, thereby violating the basic principles of natural justice of *audi alteram partem*. The day on which the evidence of the important matters pertaining to a loan of Rupees 25 million obtained by the petitioner-company from the Merchant Bank, and on the days on which evidence of the People's Bank and the National Development Bank were tendered, the petitioner-company was prevented from presenting itself before the Tribunal as no notice of the sittings were given to it and thereby the petitioner was deprived of the opportunity of testing the veracity of the evidence of important witnesses given at the Tribunal.

The petitioner has also drawn the attention of this Court to another important occasion when the evidence of the Public Enterprises Reform Commission (PERC) officials had been led in regard to the valuation of the shares, assets and liabilities in the absence of the petitioner.

The petitioner-company has also averred that the Tribunal, not only has taken into account certain documents which were prejudicial to

the interests of the petitioner-company without its knowledge, but it has also failed to take into account some documents which were of vital importance to the petitioner-company.

The petitioner-company has also contended in their submission, every shareholder of a vested privatized public venture or enterprise is entitled to reasonable compensation in compliance with section 5 (2) of the Rehabilitation of Public Enterprises Act, No. 29 of 1996 and the Compensation Tribunal set up under the Act is entrusted with the task of determining a question affecting the rights of the subjects. When a Tribunal is called upon to determine a question affecting the rights of subjects, it is expected to observe the principles of natural justice of *audi alteram partem*, when making a determination.

The learned State Counsel representing the respondents, responding to the submissions made on behalf of the petitioner-company has argued that, in terms of the provisions of the Rehabilitation Act, No. 29 of 1996, the Compensation Tribunal was only required to determine reasonable compensation to be paid in respect of the compulsory acquisition of the shares, and the Tribunal which was set up for this purpose was composed of experts in the field of valuation, therefore the Tribunal was entitled to set for itself its own procedure in arriving at a determination. She also contented that the Compensation Tribunal was not obliged to follow or observe inflexibly set procedures.

It was also the position of the State Counsel that the petitioner-company which had obtained a loan of Rs. 500,000 from the Merchant Bank of Sri Lanka, towards the payment of the part of purchase consideration of the privatized venture, for which loan the petitioner-company had mortgaged a property belonging to it as security, cannot now contend that the said mortgage was invalid and the said mortgage bond should not have been taken into account as a liability of the

petitioner-company in determining the question of quantum of compensation.

Learned State Counsel has also argued that the petitioner-company has not made any attempt to have the vesting order set aside, instead the petitioner-company has only disputed the determination of the Compensation Tribunal.

Counsel for the respondent has further contended that the mere fact that the 2nd to 4th respondents have not observed the principles of natural justice in arriving at a determination does not *per se* render the procedure adopted by the Tribunal unfair and irregular.

Learned State Counsel adverting to the relief sought by the petitioner-company has also submitted that the grounds urged by the petitioner-company can only form the basis of an application for judicial review in the nature of prerogative writs and in any event they cannot be the basis of an application for leave to appeal.

With this brief reference to the salient submissions made by respective counsel on the question of law and facts, I shall proceed to examine the validity of the determination and the procedure adopted by the 2nd to 4th respondents who constituted the Compensation Tribunal.

It is an admitted fact in this case although several sittings were held by the 2nd to 4th respondents who constituted the Compensation Tribunal to determine the question of compensation payable to the petitioner-company, in respect of its compulsorily acquired shares, the petitioner-company had no notice of certain days on which the sittings were held and thereby the petitioner-company was deprived of the opportunity of participating in the proceedings of the Tribunal on those

days. It is also an accepted fact that some days on which the sittings were held in the absence of the petitioner-company, important matters pertaining to the liability of the petitioner-company in respect of the mortgage bond executed in favour of the Merchant Bank had been taken up and discussed by the Tribunal. The Tribunal has also gone to the extent of admitting valuation reports from an important institution called the Public Enterprises Reform Commission (PERC) without the knowledge of the petitioner-company and in its absence. It is also an incontrovertible fact that the petitioner-company has not been afforded an opportunity of producing important documents which they think relevant and material to their case. In short the petitioner-company had not been given an opportunity of testing the veracity of the witnesses and the authenticity of the documents produced against it at the inquiry before the Tribunal, nor have they been given an opportunity of producing documents material to them.

It is also evident that the Compensation Trubunal was vested with an authority of determining a matter which affects the rights of individuals, therefore there was a duty cast on that Tribunal to exercise its authority fairly and reasonably. It is also undisputed that the petitioner-company was denied a hearing at the inquiry before the Compensation Tribunal. The denial of a hearing was contrary to all the basic principles of natural justice. Observance of principles of natural justice is something basic and fundamental to our system of justice when making decisions which are prejudicial to the interests of all individuals, whether those decisions were of judicial or quasi judicial nature or made by an administrative tribunal. In this connection, observations made by his Lordship the Chief Justice Tennekoon in the case of *The Kahatagaha Mines Ltd. v. Fernando*,[1] would be pertinent in putting the issue in its correct perspective :

"His function, therefore, immediately becomes a judicial or at least a quasi judicial function. This must necessarily be so, because the determination of the Chief Valuer is binding on the person from whom the property was acquired and on the State Graphite Corporation, and also on any other person who had lesser interests in that property. If there was any doubt in regard to the matter, the Legislature made provision in subsection 2 of section 64 . . ."

Even in situations, where express provisions have not been made for the observance of natural justice by a tribunal, there is an obligation on the part of the Statutory Tribunal to follow the rules of natural justice where making a determination which affects the rights of individuals.

The learned Counsel for the State contends that the Tribunal is not bound by the principles of natural justice and it may devise its own rules and procedure in making a determination in terms of the provisions. I find myself unable to subscribe to this contention of the learned State Counsel. Although a Tribunal is free to devise its own procedure, it does not mean it can act in a manner which violates the basic principles of natural justice.

Learned State Counsel has also submitted that the grounds urged by the petitioner-company can only form the basis of an application for judicial review in the nature of prerogative writs. But, it should be observed, that this contention of the learned State Counsel is not without any merit as the examination of the relevant authorities and Treaties on the subject of judicial review will make it evident that although judicial review and appeals are two distinct procedures, a party is not precluded from raising issues relating to principles of natural justice both by way of appeal as well as by way of judicial review. In this regard, reference to a passage from *Administrative Law*, 7th edn. by H. W. R. Wade, cited by the learned Counsel for the petitioner would be appropriate :

"Appeal and review are in principle two distinct procedures, appeal being concerned with merits and review being concerned with legality. But, in practice an appellant will often wish to raise questions which strictly are questions of legality, such as violations of natural justice or some objection to the tribunal's jurisdiction. It is important that this should be freely allowed, since otherwise many cases could not be fully disposed of on appeal."

State Counsel also states that the Compensation Tribunal is functus and is not in existence now and even if the Court holds that the procedure adopted in making the determination by the tribunal is irregular and flawed as the provisions of the Rehabilitation of Public Enterprises Act, No. 29 of 1996 in terms of section 9 have ceased to be operative the Court cannot remit the case back to the tribunal for proceedings *de novo*. It is pertinent at this stage to refer to section 9 of the Act. The section states that the provisions of the Act shall be operative for a period of six months from the date of commencement of the Act, if the provisions of the Act cease to be operative after a period of six months from the date of the commencement of the Act, as learned State Counsel pointed out, the operation of or acting under the allied sections consequent to a vesting order made under section 2 of the Act would be rendered impracticable. For instance, if a vesting order is published in the last month of the validity of the Act, a tribunal which is expected to make its determination within 6 months, would not be able to act as stipulated in the Act. If we were to go by such interpretation the objective and the purpose for which the Act was enacted, would be reduced to an absurdity and acting within the parameters of the Act would be a practical difficulty.

The decision reached in the case of *Sandesa Ltd. et al v. Sirimavo Bandaranaike*,[2] puts this beyond any manner of doubt when the Court of Appeal exercising its appellate jurisdiction having set aside the judgment remitted the case back for a fresh hearing to the original Court on the ground of violation of the principles of natural justice.

It should also be observed when an Act provides a remedy by way of appeal as provided by section 5 (*b*) an aggrieved party is expected to follow that procedure. The reasoning adopted in the cases of *Sri Lanka Broadcasting Corporation v. de Silva*[3] and *Elarka v. Oil Bourne Shipping Co*,[4] put the issue beyond manner of doubt.

Therefore, I am of the view that section 9 of the Act by necessary implication, refers only to the period during which the President of the Republic of Sri Lanka can make a vesting order under section 2 of the Act, as suggested by the learned Counsel for the petitioner-company. Once a vesting order is made in terms of the provisions of the Act, proceedings already commenced can be continued until the conclusion. This interpretation of the section will also be in consonance with section 6 (3) of the Interpretation Ordinance which makes provision for the continuance of pending or incomplete actions in the event of repeal of any written law, as contended by the Counsel for the petitioner.

Therefore, having regard to all the circumstances of the case, and for the reasons set out herein, I set aside the award made by the Compensation Tribunal on 11. 11. 1999 and remit the case back to the Tribunal for a fresh determination of an award with proper notice to the petitioner in compliance with the rules of natural justice.

I make no order for costs.

UDALAGAMA, J. – I agree.

Application allowed.