CHAS P. HAYLEY AND CO., LTD.
v.
COMMERCIAL AND INDUSTRIAL WORKERS AND OTHERS

COURT OF APPEAL.
SENANAYAKE, J.
C.A. APPLICATION NO. 414/94
JANUARY 30, 1995 AND FEBRUARY 07, 1995.

Industrial Law – Industrial Disputes Act – Dispute – Settlement by Arbitration – Reference under Sec. 4(1) of the Industrial Disputes Act – Collective Agreement – No notice of Repudiation – Is the reference ultra vires – Is the Minister of Labour exercising Judicial functions when he makes a reference under S. 4(1) – Order a nullity – Laches excused – Error of law on the face of the Record – Writ lies.

The Minister of Labour acting under Sec. 4(1) of the Industrial Disputes Act, referred an industrial dispute for settlement by arbitration. It was contended that as there was a collective agreement which was in force and binding on the parties, there could not have been an industrial dispute within the meaning of Section 48; further, under Sec. 8, an industrial dispute does not arise unless a party to the collective agreement gives a valid notice of repudiation under Sec. 9(1) (2). This objection was not raised before the Arbitrator. It was further contended that the award, in any event, is bad in law as the Arbitrator has not considered the relevant facts and had misconstrued documents.

Held:

(1) The powers conferred on the Minister of Labour in terms of Sec. 4(1) are wide. The Minister acts solely in an administrative capacity, and not judicially or Quasi-judicially. The concluding words in Sec. 4(1) highlight the amplitude of the power vested under Sec. 4. Even if the two parties to the collective Agreement do not want the matter referred to arbitration, the Minister is vested with the power under Sec. 4(1) to refer the matter for arbitration.

Per Senanayake, J.: "To my mind the Legislature has prudently and advisedly entrusted an amplitude of power in the Minister, in the larger interest of Industrial Peace".

(2) A finding of fact may be impugned on the grounds of error of law on the face of the Record; the misconstruction of documents become error on the face of the record.

(3) Although the Petitioner has disentitled himself to the discretionary relief by his own conduct of submitting to jurisdiction and undue delay, as the proceedings were a nullity, a Writ of Certiorari in the circumstances, would not be denied.

Cases referred to:

(1) *Anisminic Ltd., v. Foreign Compensation Ltd.* 1969 2 A.C. 147.

(2) *R. v. Fulham, Hammersmith and Kensington Rent Tribunal – ex parte – Zerek* – 1952 2KB 1.

(3) *Reg. v. Income Tax Special Commissioners* 21 QBD 313.

(4) *Rex v. Lincolnshire Justices – Ex parte* – Brett; 1926 2 KB 193.

(5) *Aislably Estates, Ltd., v. Weerasekare* – 77 NLR 241.

(6) *Nadarajah, Ltd., v. Krishnadasan* – 78 NLR 258.

APPLICATION for Writ of Certiorari.

Faisz Mustapha P.C. with *Sanjeewa Jayawardene* for Petitioner
J. C. Weliamuna for 1st Respondent.

Cur. adv. vult.

April 28,, 1995.

SENANAYAKE, J.

This is an application filed by the Petitioner invoking the jurisdiction of this Court to issue a Writ of Certiorari quashing the reference marked P1 made by the 3rd Respondent and also to quash the award made by the 2nd Respondent marked Y2.

The facts briefly are as follows: the Petitioner is an Incorporated Company engaged in the business of manufacture and export of coir twine and mats and the export of coir yarn. In or about August 1992 the 3rd Respondent acting in terms of Section 4 (1) of the Industrial Disputes Act referred to the 2nd Respondent an Industrial Dispute alleged to be in existence between the Petitioner Company and the 1st Respondent Union for settlement by Arbitration. The matter that was referred was whether the demand of the 1st Respondent for the increase of minimum monthly wage to Rs. 3000/- and corresponding increase in the wage scales of all categories of employees of Chas P. Hayley and Co. Ltd., is justified, if not to what reliefs the said employees are entitled. The said Arbitration was allotted No. A2242. The Petitioner's position was that it was bound by the Collective Agreement dated 12.02.90, that the current wages were paid according to the terms of the Collective Agreement and they were also paying the N.R.C.O.L.G. to the employees at the end of October each year. The concessionary bank credit and the benefit of a tax

free outright Grant were withdrawn resulting in the Company's profitability. That the Petitioner suffered further financial losses due to the actions of the employees during the several months preceding the reference of the alleged dispute to Arbitration, that the financial and trading position of the Petitioner did not warrant any increase of wages.

At the inquiry held by the 2nd Respondent an industrial dispute said to be in existence between Haymat Ltd., and its employees which had also been referred to the 2nd Respondent was referred for Arbitration to the 2nd Respondent and allotted No. A. 2259 and was consolidated with the said Arbitration A. 2242 and the parties agreed to abide by the award made in A. 2242 as the matters alleged to be in dispute in both were identical.

The petitioner's position was as the Collective Agreement was and is in force and binding on the parties and there could not have been an Industrial Dispute within the meaning of Section 48 of the Industrial Disputes Act and as such the 3rd respondent had no jurisdiction to make a reference under Section 4(1) of the Industrial Disputes Act and as such the reference is *ultra vires* the Powers of the Minister and as such the award is void.

That the 2nd Respondent had failed to disclose the criteria on which a thirty percent increase in the wages has been computed and as such the award is vitiated by error of law on the face of the record. That the award was grossly unreasonable; due to acts of hooliganism the factory was closed for 45 days and the reduction was in the region of 33% to 22% during this period; due to the aforesaid reasons the Petitioner lost an important buyer who had been buying 25% of the production and the annual report showed for 1992/93 a loss of Rs. 9.3 million. The volume of export dropped from 1366 metric tons in 1990 to 1117 metric tons in 1992 due to the loss of markets and during the last preceding years four companies have entered the market and the wages paid by them were less than what was paid by the Petitioner and due to competition from the local and foreign companies the prices in the international market have fallen, that the said award was unsupported by evidence and as such the award was vitiated by error of law on the face of the record. The Petitioner has repudiated the award and has duly given notice of repudiation.

The 1st Respondent in the statement of objections in answering paragraphs 4 and 5 of the Petition stated that the Petitioner did not take any objections with regard to the validity of the reference by the 3rd respondent. They further stated as the Petitioner had taken steps to repudiate or repudiated the award the Petitioner is not entitled to have and maintain this application. Further as the Petitioner has not objected to the reference to the Arbitration at the earliest, relief cannot be obtained as the Petitioner is guilty of laches and or delay in filing this application.

The submission of the Learned Counsel for the Petitioner was that there was a Collective Agreement with the Petitioner and the Union. Y4 which was extended to the 1st Respondent and the Petitioner in terms of clause 4 of Y4, the Collective Agreement came into force on 01.11.88 and the 1st Respondent became the recipient of the benefits of Y4 and was bound by the terms and conditions of Y4, this fact was not in dispute. According to clause 19 of Y4 the employees covered by the Collective Agreement will be entitled to Non-Recurring Cost of Living Gratuity (hereinafter referred as NRCOLG).Clause 32 and clause 33 of Y4, the Union and its members and the employees covered and bound by the Agreement agree with the Employer that during the continuance in force of the Agreement that they shall not engage in any strike or other forms of trade Union action against the Employer. In respect of any dispute covered and bound by the Agreement on the other hand whether or not such dispute is related to this Agreement except where such dispute has been caused by an act of the Employer.

Clause 33 reads as follows: 'The Union and its members and the employees agree with the Employer that during the continuance in force of the said Agreement they will not seek to vary, alter or add to all or any of the terms and conditions of employment presently applicable to any of the employees covered and bound by the Agreement'.

Clause 33 (2) reads as follow: 'The Employer agrees with the Union and its members and the employees covered and bound by the Agreement that he shall not seek to vary alter and withdraw all or any of the benefits presently enjoyed by the employees covered and bound by the Agreement other than by Mutual Agreement'.

Clause 33(3) reads as follows: 'any dispute or difference arising from negotiation under the provisions of sub-clause (1) or (2) may be resolved by voluntary arbitration but only if all the parties concerned agree to submit "such dispute or difference for settlement by voluntary arbitration".'

The terms of Y4 was extended by Y5 on 12.02.1990 to the parties to Y5. The submission of the Learned Counsel for the Petitioner was that under Section 8(1) of the Industrial Disputes Act the Collective Agreement which was for the time being in force shall be binding on the parties, trade unions, employers and workmen referred to in that Agreement in accordance with the provisions of Section 5(2) and the terms of the Agreement shall be implied terms in the contract of employment between the employers and workmen bound by the Agreement. The 1st Respondent by R2 dated 12.01.91 demanded an increase of salary from the Petitioner. The first submission of the Learned Counsel was that the reference by the 3rd Respondent was bad as he had no jurisdiction to act in terms 4(1) of the Industrial Disputes Act as there was no Industrial Dispute. Section 48 of the Act defines "Industrial Disputes". According to the Petitioner's own document P1 the said reference was made on 08.08.1992. The Petitioner had waited till 21st June 1994 to take this jurisdictional objections. The petitioner did not take this objection before the Arbitrator. The petitioner in his statement did not take the said objection though they were aware of the existence of the Collective Agreement Y4 and Y5. The delay in failing to take the objection is not explained. A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. The Petitioner has disentitled himself to the discretionary relief by his own conduct submitting to jurisdiction waiver and undue delay and laches.

> "Ferris-Extraordinary Legal Remedies para 176 "Laches is such negligence or omission to assert a right and taken in conjunction with the lapse of time, nor less great and other circumstances causing prejudice to an adverse party operate as a bar in a Court of equity".

"Practice clearly indicates that where the proceedings were a nullity an award of Certiorari will not be readily denied" de Smith Judicial Review.

In the case of *Anisminic Ltd. v. Foreign Compensation Ltd.*[1] Lord Pearce observed " ... Lack of Jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions, or it may not take into account matters which it was directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause the purported decision to be a nullity".

In the case of *R. v. Fulham, Hammersmith and Kensington Rent Tribunal ex parte Zerek* [2] Lord Goddard C.J. observed "The law to be gathered especially from *Reg. v. Income Tax Special Commissioners* [3] and *Rex v. Lincolnshire Justices; Ex parte Brett* [4] is that if a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction but cannot give themselves jurisdiction by a wrong decision upon them, and this Court by means of proceedings for Certiorari, inquire into the correctness of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the tribunal has to decide".

The submission of Learned Counsel was on the basis as the Collective Agreement was in force in terms of the Industrial Disputes Act Section 8, an Industrial Dispute does not arise unless any party to the Collective Agreement in terms of Section 9(1) and (2) had given valid notice of repudiation and the agreement to which such notice relates shall terminate and cease to have effect upon the expiration of the month immediately succeeding the month in which the notice is so received by the Commissioner and the Commissioner shall cause the notice of repudiation to be published in the Gazette.

In the instant case there was no repudiation in terms of Y4 clause 33 the Union or the employees moves to vary the terms or conditions of the Collective Agreement, this could be done only by mutual agreement and any dispute or differences arising from negotiation under sub clause (1) and (2) of clause of 33 and if all the parties agree submit such dispute for settlement by voluntary arbitration.

The submission was that the reference made by the 3rd respondent was *ultra vires*, in view of the existence in force at the time of the reference the Collective Agreement which also provided the machinery to settle any variation of the terms of the collective agreement. The powers conferred on the Minister of Labour in terms of Section 4(1) to refer an industrial dispute for compulsory arbitration are wide. In *Aislaby Estates Ltd. v. Weerasekera* [5] Pathirana, J. observed at page 253 ..."The Minister is acting solely in an administrative capacity and not judicially or quasi judicially. The concluding words in Section 4(1) notwithstanding that the parties to the dispute or their representative do not consent to such a reference", in fact highlight the amplitude of power vested by Section 4 in the Minister to refer a dispute to a labour tribunal for adjudication. Even if the two parties to the Collective Agreement do not want the matter referred to arbitration the Minister, nevertheless under Section 4(1) is vested with the power to refer the matter for arbitration. To my mind the legislature has prudently and advisedly entrusted an amplitude of power in the Minister in the larger interest of industrial peace."

In my view the Minister of Labour is not called upon to exercise any Judicial function in regard to the actual Industrial dispute. The power he exercises is of purely administrative nature and it is his duty to see to the industrial peace in the country.

In the case of *Nadaraja Ltd. v. Krishnadasan* [6] the Supreme Court held "The order of reference is an administrative act of the Minister who has to form an opinion as to the factual existence or apprehension of an Industrial dispute."

I am of the view, that a line of decided cases confirm the principle that the reference made by the Minister in terms of Section 4(1) of the

Act is ministerial and not reviewable by Courts. Further no such objection was taken by the Petitioner before the 2nd Respondent. In my view I am of the view the submission of the Learned Counsel must fail and the reference made by the Minister was *intra vires* and within his powers and jurisdiction.

The second submission of the Learned Counsel was that the financial constraints and the heavy loss for the financial year 91/92 and the loss of markets and competition from other competitors and loss of the foreign buyer due to the activities of the Union, caused the fall of production, and the go-slow practice adopted by the workers have placed them in a desparate position and that they were unable to pay the demands made by the Union – a minimum wage of Rs. 100/- per day resulting in a monthly wage of Rs. 3000/-. His submission was that the award in any event vitiated in failing to take relevant circumstances like that the petitioner was prepared to give 10% salary increase to a 10% productivity increase; damage caused to the property of the factory as depicted by R12, the Union adopting a go-slow movement and a considerable drop in production. The acts of the workers compelling the management to close the Factory the failure to take into account document R16b where there was a loss of nearly 10 Million, the downward trend in production which was 43 metric tons less than the output of previous years. failure to consider the new competitors to the trade who paid lower wages; failure to consider that the demand for the product had fallen in the foreign markets and the competition from synthetic products.

The Arbitrator had taken into consideration irrelevant facts. The Arbitrator equating and commenting adversely on the Management about the salaries paid to the executive grade. His failure to understand that the salary paid to the Executives depend on market factors of supply and demand. His comment and considering factors irrelevant to the issue – the cost of replacing the Air Conditioners which was negligible has clouded the mind of the 2nd Respondent.

It is well settled that the order of an inferior tribunal having a duty to act reasonably in determining the rights of the parties is liable to be quashed by Writ of Certiorari for an error of law appearing on the face of the record. A finding of fact may be impugned on the ground

of error of law on the face of the record (a) erroneously refusing to admit admissible material evidence (b) erroneously admitting inadmissible evidence which influence the finding and (c) finding of fact based on no evidence. (d) where the tribunal had acted with manifest or clear unreasonableness or unfairness. The misconstruction of the document becomes an error on the face of the record.

I am of the view that the Arbitrator had misconstrued the document R16b when he failed to consider that the loss depicted in the Report and speculated on the fact that it was temporary without any evidence. There was no evidence for such a finding. This was unreasonable and unfair. The evidence revealed that the employees were getting a higher wage than prescribed by the Wages Board Ordinance. They were paid more than the other competitors in the Trade. The Arbitrator failed to consider the heavy financial loss and had acted unreasonably and unfairly in granting 30 percent increase in wages with a 10% increase in productivity was an error of law on the face of the record. In the circumstances, I quash the award of the 2nd Respondent by granting a writ of Certiorari.

In the circumstances, I allow paragraph 'b' of the prayer of the Petition. I refrain from making an order for costs.

Application allowed.
Award quashed.