SHELL GAS LANKA LTD

v.

ALL CEYLON COMMERCIAL & INDUSTRIAL WORKERS UNION AND OTHERS

COURT OF APPEAL
HECTOR YAPA, J.,
CA 587/97
17TH AUGUST, 1999
23RD SEPTEMBER, 1999
12TH MARCH, 1999

Industrial Disputes Act - S.4(1), S.17(1) - Arbitration - Quashing appointment of Arbitrator - Arbitrator making observations before hearing - Whether it is prejudicial to an impartial determination of dispute - Bias - Likelihood of Bias - Duty to see whether a Settlement is possible - Can the Record be contradicted.

The Minister of Labour acting in terms of S.4(1), referred a dispute for settlement by Arbitration. When the dispute came up for the first time after having heard the parties with regard to the background of the dispute the Arbitrator made certain observations.

The Petitioner contends that the said observations were prejudicial to an impartial determination of the dispute and that the said observation manifested a predetermination of the dispute by the 2nd Respondent. The Petitioner informed the Arbitrator they do not wish the Inquiry to continue before the 2nd Respondent - Arbitrator. The 2nd Respondent refused to accede to the said request.

Held :

(1) It is not open to the Petitioner to file a self serving affidavit for the first time before the Court of Appeal and thereby seek or attempt to contradict a judicial or quasi judicial record.

If he intends to contradict the record he should have filed the necessary papers before the Tribunal and initiated an inquiry and obtained an order from such authority in the first instance.

(2) When a dispute is referred to an arbitrator for settlement by arbitration, it is the recognised practice to explore the possibility of conciliation in the first instance. In this process views are exchanged and

even the Arbitrator himself may express his views with the sole object of reaching a settlement.

(3) It would be a serious error to think that either a Judge or an Arbitrator would shut his mind to the evidence presented once a settlement has failed, as such views are expressed in attempting to bring about a settlement.

(4) A Judicial Officer is a person with a trained legal mind so that he will have to take a decision having regard to the evidence in this case, besides he is required to give reasons for his reasons.

(5) In law what is material is not the subjective belief of the Petitioner in the issue of bias, it is an objective test.

(6) In the present case there must appear to be real likelihood of bias. There must be circumstances from which a reasonable man would think it likely or probable that the 2nd Respondent Arbitrator would favour one unfairly at the expense of the other.

(7) The Petitioner's case regarding bias against the 2nd Respondent is based on surmise and conjecture which is not sufficient.

APPLICATION for a Writ of Certiorari and/or Prohibition.

Cases referred to :

1. *K. v. Jayawardane* 48 NLR 497 at 503
2. *Gunawardena v. Kelaart* 48 NLR 522
3. *Seebert Silva v. Aronona Silva* 60 NLR 272
4. *Ceylon Tea Plantations Co. Ltd., v. Ceylon Estates Staff Union* SC 211/72 SCM 15. 05. 1974
5. *Richard Pieris & Co. Ltd., v. Wijesiriwardena* 62 NLR 233 at 235
6. *Muncipal Council of Colombo v. Munasinghe* 71 NLR 223 at 225
7. *Kumarasena v. Data Management Systems Ltd.,* (1987) 2 SLR 190 at 200
8. *Ceylon Tea Marketing Ltd., v. Prepacked Exports (Pvt) Ltd., and Others* (1998) - 2 SLR 146
9. *The Commonwealth Concilliation & Arbitration Commission and Others - Exparte The Anglosian Group (1969)* 122 CLR 546
10. *Saparamadu v. Joseph* 68 NLR 200

11. *Daya Weththasinghe v. Mala Ranawake* (1989) 1 SLR 86
12. *Perera v. Hasheeb* 1 Sri Kantha LR 133 at 145
13. *Nadarajah Ltd., v. Krishnadasan* 78 NLR 255
14. *Metropolitan Properties Co. (F.G.C.) Ltd., v. Lannon and Others* (1968) All ER 304 at 310
15. *In Re Ratnagopal* 70 NLR 409 at 435

Faiz Musthapha P.C., with *Nigel Hatch* for the Petitioner.

Ms. Chamantha Unamboowe with *Athula Perera* and *Ayanthi Abeysekera* for 1st Respondent.

Cur. adv. vult.

July 25, 2000.

HECTOR YAPA, J.

This is an application for a writ of certiorari and prohibition. A writ of certiorari is sought for the purpose of quashing the appointment of the 2nd respondent as arbitrator and his order dated 23. 06. 1997 contained in P13, where he decided to continue with the arbitration proceedings. A writ of prohibition is sought to restrain the 2nd respondent from inquiring into and determining the dispute referred to him by P5 and P5 A. Briefly the relevant facts relating to this application are as follows. The petitioner employed K. Hemachandra as a bowser driver attached to the Orugodawatta Branch of the petitioner company. On 29. 12. 1996 the said driver while driving a liquid petroleum gas (LPG) tanker owned by the petitioner company, met with an accident inside the Lanka Wall Tile factory premises at Meepe. The accident resulted in the releasing of approximately 500 kgs. of L. P. Gas, leading to the formation of a vapour cloud which was subsequently dispersed. The driver thereafter drove the bowser back to the petitioner's depot at Orugodawatta from Meepe without the prior approval of his superior officers of the petitioner company. Since the driver had driven the said bowser with a potential gas leak which was highly combustible on the public road, risking damage and injury to the public, the said driver was asked to show cause why disciplinary action

should not be taken against him by the petitioner company (vide P1 and P1 A). Consequent to an inquiry where the said driver K. Hemachandra was found guilty of charges relating to gross negligence and gross misconduct, his services were terminated by letter dated 17. 03. 1997. (vide P2). When the said action was taken by the petitioner company, the 1st respondent trade union by writing dated 31. 03. 1997, (vide P3) gave the petitioner company ten days notice of trade union action and commenced a strike from 02. 05. 1997, causing great inconvenience and hardship to the consumer public and heavy loss and damage to the petitioner company.

Therefore, on 08. 05. 1997 a memorandum of settlement was entered into under the Industrial Disputes Act, No. 43 of 1950 as amended between the petitioner company and the 1st respondent union (vide P4 to P4C). However there was no agreement between the parties on the question of reinstatement of the bowser driver K. Hemachandra for the reason that the petitioner company was not prepared to compromise on its undertakings such as the introduction of international safety standards in Sri Lanka. Therefore the then Minister of Labour appointed the 2nd respondent as the arbitrator acting in terms of Section 4(1) of the Industrial Disputes Act and referred the following disputes for settlement by arbitration. The said reference to arbitration is as follows. "Whether the termination of employment of Mr. K. Hemachandra, Bowser Driver, attached to Orugodawatta Branch of Messrs Shell Gas Lanka Ltd. by the said company is justified and if not, to what relief he is entitled." (Vide P5 & P5A). It was submitted on behalf of the petitioner company that on 12. 06. 1997 when this dispute came up for the first time before the 2nd respondent arbitrator, he after having heard the parties with regard to the background of the dispute made the observations as set out in paragraph 21 of the petition. Briefly the 2nd respondent's observations are as follows.

i. That the petitioner had inflicted "capital punishment" on the said driver, whereas some lighter punishment should have been given.

ii. As a result of the termination of the said driver's services, he had now been rendered jobless and could therefore act against the management as he knew everything about the petitioner company.

iii. The 2nd respondent told Mr. Nihal de Silva the Personnel Manager of the petitioner company, that he should be more understanding and cultivate cordial relationships and harmony with the workers, as unlike in the past the management today should be close to their workers.

iv. The act committed by the said driver was not deliberate and that any driver could meet with an accident and that therefore the punishment imposed on him was too harsh.

v. That the 2nd respondent having refixed the said arbitration for 23. 06. 1997, repeated not less than three times to the petitioner's Counsel and to the Personnel Manager Mr. Nihal de Silva that, the 2nd respondent would be pleased if by the next date the petitioner reinstated the said driver.

The petitioner company was therefore of the view that the said observations of the 2nd respondent were prejudicial to an impartial determination of the said dispute and further the said observations manifested a pre determination of the dispute by the 2nd respondent. Thereupon on the next date of the arbitration inquiry namely on 23. 06. 1997, the petitioner's Counsel met the 2nd respondent in the chambers prior to the commencement of the sittings and informed the 2nd respondent that he had disqualified himself from hearing the dispute, so that the petitioner did not wish the inquiry to continue before the 2nd respondent. Since the 2nd respondent refused to accede to the said request of the petitioner's

Counsel, he formally supported a motion alleging that the observations made by the 2nd respondent on 12. 06. 1997, indicated clearly and unequivocally that the 2nd respondent has already decided that the termination of the services of the driver K. Hemachandra was unjustified and that he should be reinstated by the petitioner company. It was further stated that no purpose will be served by proceeding with the inquiry before the 2nd respondent and moved that he (2nd respondent) should not proceed to inquire into the said dispute, so as to enable the parties to have the matter in dispute transferred to such other arbitrator as the Minister of Labour may be pleased to appoint (Vide P12). However the 2nd respondent by this order dated 23. 06. 1997 marked P13, held that he was devoid of any power to transfer the said dispute referred to him. He further stated that when a dispute was referred to an arbitrator for determination, it was his duty to see whether a settlement was possible and therefore he (2nd respondent) was not accepting the matters stated by the Counsel for the respondent company (petitioner company) and decided to proceed with the inquiry. Therefore in the present application the petitioner company is seeking to obtain the relief referred to above by the issue of a writ of Certiorari and a writ of Prohibition.

While this application was pending before the Court of Appeal for notice, the 2nd respondent had commenced the recording of evidence in the arbitration proceedings. When this application was supported in the Court of Appeal on 24. 07. 1999, the Court of Appeal by its order dated 17. 09. 1997 refused notice. Thereafter the petitioner company invoked the jurisdiction of the Supreme Court by way of special leave to appeal. On 25. 08. 1998 the Supreme Court granted the petitioner company relief by setting aside the said order of the Court of Appeal refusing notice and directed the Court of Appeal to issue notice on the respondents and thereafter to proceed to hear and determine the application. The Supreme Court in addition directed the 2nd respondent arbitrator to stay all proceedings until the matter is finally decided by the Court of Appeal.

At the hearing of this application learned Counsel for the 1st respondent union did not contest the correctness or otherwise of the observations attributed to the 2nd respondent as having being made on 12. 06. 1997, contained in P12. However it is to be observed that the proceedings of 12. 06. 1997 marked P9 only contain a reference that the parties had discussions before the arbitrator with a view to arrive at a settlement. The petitioner in paragraph 22 of the petition complains that the proceedings of 12. 06. 1997 as recorded in P9 are defective and do not contain a true and accurate reflection of the matters pleaded therein. Therefore the petitioner has annexed marked P10 an affidavit from Nihal de Silva, Manager Human Resources and a fax message sent by said Nihal de Silva to their lawyer marked P10A to support this position raised by the petitioner. However it is to be noted that the petitioner has not tendered the said affidavit marked P10 and the fax message marked P10A before the 2nd respondent arbitrator and made an application to have the proceedings of 12. 06. 1997 corrected on the lines as referred to in the said documents, if that was the correct position. Besides in view of the reference in the order of the 2nd respondent arbitrator dated 23. 06. 1997 where he has stated that he was not accepting the matters stated by the Counsel for the respondent company, (petitioner company) it became all the more necessary for the petitioner to have taken steps to get the proceedings dated 12. 06. 1997 corrected. In these circumstances it was wrong for the petitioner to have stated that in the order of the 2nd respondent arbitrator dated 23. 06. 1997 he (2nd respondent) did not dispute or deny having made the observations attributed to him in the motion marked P12.

Regard to this matter it is important to state here that, it is not open to the petitioner to file a self-serving affidavit for the first time before the Court of Appeal and thereby seek or attempt to contradict a judicial or quasi judicial record. If a litigant as the petitioner in this case intended to contradict the record, he should have filed the necessary papers before the Court or tribunal as the case may be and initiated an inquiry

before such authority and obtained an order from such authority in the first instance. It is thereafter that he should raise the matter in the appropriate proceedings before the Appeal Court so that such Court would be in a position on the material before it to make a proper determination with the benefit of the order of the deciding authority in the first instance. Therefore it is irregular for the petitioner to file a self serving affidavit in the Court of Appeal with a view to add and to amplify the record or to contradict the record. Vide *King v. Jayawardana*[1] at 503, *Gunawardana v. Kelaart*[2] and *Seebert Silva v. Aronona Silva*[3]. In the light of this position the observations attributed to the 2nd respondent arbitrator is not supported by the record of the proceedings of 12. 06. 1997. It is subject to this limitation that, there is no legal proof of the facts asserted by the petitioner company that this Court could consider the question whether the said observations if it had been made by the 2nd respondent constitutes bias so as to disqualify the 2nd respondent from inquiring into and making a determination on the dispute that had been referred to him.

It was submitted by learned Counsel for the petitioner that the 2nd respondent was appointed by the then Minister of Labour under Section 4(1) of the Industrial Disputes Act to function as an arbitrator. The 2nd respondent's appointment is statutory and he is required to function within the ambit of his powers and should act impartially. In other words he is under a duty to act judicially. Learned Counsel referred to Section 17(1) of the Industrial Disputes Act and submitted that the 2nd respondent as an arbitrator is required to make an award as may appear to him just and equitable. He referred to certain cases where the concept of just and equitable award or order as the case may be has been interpreted. In the case of *Ceylon Tea Plantations Co. Ltd. v. Ceylon Estates Staff Union*[4] Rajaratnam, J. has held that a just and equitable order must be fair by all the parties and never means safeguarding the interest of the workmen alone. In the case of *Richard Pieris & Co. Ltd. v. Wijesiriwardana*[5] at 235 it was observed by T.S. Fernando J. that justice and equity can themselves be

measured not according to the urgings of a kind heart but only within the framework of the law. In the case of *Municipal Council of Colombo v. Munasinghe*[6] at 225 H.N.G. Fernando, J. made the following observation. "An arbitrator holds no licence from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin." It was contended therefore by Counsel for the petitioner that it is settled law that an arbitrator is under a duty to act judicially, fairly and impartially. The 2nd respondent in the circumstances was under a statutory duty to inquire into the said dispute by hearing such evidence as may be tendered by the parties and thereafter make an award as may appear to him just and equitable. However by proceeding to make the observations attributed to the 2nd respondent, he has predetermined the dispute before pleadings being filed and evidence being recorded. Therefore Counsel submitted that the said conduct amounted to bias on the part of the 2nd respondent. Counsel further referred to the fact that under our law two tests have been applied following English law as to what constitutes a disqualification due to bias. One such test being the reasonable suspicion of bias test and the other being the real likelihood of bias test. However it would appear that there is no significant difference in these two tests. Vide the case of *Kumarasena v. Data Management Systems Ltd.*[7] at 200. Counsel also cited the case of the *Ceylon Tea Marketing Ltd. v. Prepacked Exports (Pvt) Ltd. & Others*[8] where the Supreme Court observed that since the High Court Judge who heard this matter appears to have expressed a concluded opinion on the merits of the case, it is desirable that the trial be heard by another Judge and directed the senior High Court Judge presiding in Court No. 1, to hear this case or to nominate another Judge to hear this case. Therefore the contention of learned Counsel for the petitioner was that the 2nd respondent arbitrator has prejudged the issue before him and that no useful purpose would be served in proceeding with the arbitration inquiry before him.

Learned Counsel for the 1st respondent on the other hand argued that, in considering the question of bias, what is important is not whether the petitioner feared that the arbitrator was biased on the basis that he had prejudged the issue before him, but whether the words attributed to the 2nd respondent arbitrator showed a real likelihood of bias or a reasonable suspicion of bias. Counsel contended that the observations made by the 2nd respondent as referred to in P12 were made at a stage prior to even filing of the statement of claim and that the 2nd respondent was infact exploring the possibility of a settlement. The observations of the 2nd respondent as contained in P12, merely indicate a possible basis as to how the dispute could be settled and this fact is evident from what has been stated by the 2nd respondent arbitrator in his order marked P13. It was a preliminary view expressed by him. This in no way suggests that the 2nd respondent will shut his mind to the evidence that would be presented, should a settlement fail. In support of this contention Counsel cited the following cases. In the case of *The Queen v. The Commonwealth Conciliation and Arbitration Commission and others; Exparte The Angliss Group*[9] where the Court held that the expression of an attitude of mind by members of the Commission which tended to favour the adoption of the principle of equal pay and even the fact that a step has been taken in furtherance of such a principle were not sufficient to engender a reasonable suspicion in the minds of those who came before the tribunal, or in the minds of the public, that the tribunal or its members might not bring fair and unprejudiced minds to the resolution of the question arising before the tribunal. Accordingly, the application for prohibition was refused. In the case of *Saparamadu v. Joseph*[10], the Court held that in a prosecution for unlawful gaming, (Section 2 of the Gaming Ordinance) a Magistrate is not disqualified, on the ground of bias, from hearing a case merely because he had earlier issued a search warrant in terms of Section 5(1) of the Gaming Ordinance. The Court was of the view that it was wrong to suggest that merely because the Magistrate had taken a prima facie view, that he will be biased

or incapable of approaching the case with an open mind. In the case of *Daya Weththasinghe v. Mala Ranaweke*[11] it was held that a party seeking to establish bias undertakes a heavy burden of proof. Mere reasonable suspicion is not enough. A Judicial Officer is a person with a legally trained mind and Court will not lightly entertain an allegation of bias. The petitioner had failed to establish bias. Therefore learned Counsel contended that in the present case also the 2nd respondent arbitrator who has a trained judicial mind will be in a position to examine the evidence presented with an open mind.

It should be remembered that when a dispute is referred to an arbitrator for settlement by arbitration, it is the recognised practice to explore the possibility of conciliation in the first instance. In this process views are exchanged by the parties and even the arbitrator himself may express his views with the sole object of reaching a settlement. Perhaps the views expressed by the arbitrator may even indicate the possible lines of settlement. However in the event of the parties failing to reach a settlement in respect of the dispute, then it is taken up for adjudication with the presentation of evidence by the parties. In such situations the views expressed by the parties and even the arbitrator himself should be disregarded and the dispute has to be decided purely on the evidence presented. It would be a serious error to think that either a Judge or an arbitrator would shut his mind to the evidence presented once a settlement has failed purely for reason that certain views have been expressed by the Judge or an arbitrator in attempting to bring about a settlement. After all, such views are expressed by a Judge or an arbitrator before evidence is presented on a cursory examination of the material before him. Under these circumstances it would be wrong to assume that a Judge or an arbitrator will not change the views expressed by him earlier with regard to the dispute, once evidence has been presented. A judicial officer is a person with a trained legal mind so that he will have to take a decision having regard to the evidence in the case. Besides, he is also required to give

reasons for his decision. In the case of *Perera v. Hasheeb 1 Sriskantha*[12] *at 145 G.P.S. De Silva, J.* (as he was then) observed as follows. "It must be remembered, that a judicial officer is one with a trained legal mind. It is a serious matter to allege bias against a judicial officer and that this Court would not lightly entertain such an allegation." In the present case the 2nd respondent arbitrator, a president of the Labour Tribunal with a trained judicial mind without doubt would be conversant with the principle that all negotiations and representations made during the process of conciliation cannot be taken into consideration once the negotiations fail and that the dispute should be decided on the merits of the case based on the evidence presented. Therefore whatever observations that may have been made by the 2nd respondent arbitrator in trying to bring about a settlement would not engage his attention once he proceeds to decide the dispute on the evidence adduced before him. One has to act on this basis, otherwise it would open the flood gates for a multitude of applications seeking that a particular Judge or an arbitrator should be changed on flimsiest grounds and that the judicial system will become unworkable.

One should also take note of the fact that once a reference is made to an arbitrator for the settlement of a dispute in terms of Section 4(1) of the Industrial Disputes Act, the Minister himself has no power to revoke the said order of reference. Vide *Nadaraja Ltd. v. Krishnadasan*[13]. Therefore it would appear that even though the Minister of Labour has no right to revoke the reference once made the petitioner company is seeking indirectly upon this application to change the arbitrator. This should not be permitted, since the available material would not justify such action and further it would lead to unnecessary delay.

Finally it is to be observed that the petitioner company has stated in the petition that he has lost confidence in the 2nd respondent arbitrator and that there would be a denial of justice if the 2nd respondent were to continue with the inquiry

on the ground of bias. In law what is material is not the subjective belief of the petitioner on the issue of bias. It is an objective test. Lord Denning, M.R. in the case of *Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon and Others*[14] at 310 outlined the test to be applied in determining the issue of likelihood of the bias in the following terms. "In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand." It is to be observed that in Sri Lanka our Courts have shown a preference for the real likelihood test. In *Re Ratnagopal*[15] at 435 T.S. Fernando J. formulated the test as follows. "Would a reasonable man in all the circumstances of the case, believe that there was a real likelihood of the Commissioner being biased against him?"

In the case of *Kumarasena v. Data Management System Ltd.(Supra)* a transfer of a case was asked for on the ground that the Judge has prejudged the case when he enhanced the security. The Court of Appeal at page 202 observed that "in doing so it may well have been that he (Judge) misdirected himself as to the relevancy to the question before him of the facts on which he based his order and as to the correct position in law. That by itself to my mind does not demonstrate bias or anything else that suggests that a fair and impartial trial cannot be held before him." The Court further observed, that "I do not think these are circumstances from which a reasonable man (weighing these circumstances) would think it likely or probable that the Judge did on this occasion or would in the future favour one side unfairly at the expense of the other."

Similarly in the present case also there must appear to be a real likelihood of bias. In other words there must be circumstances from which a reasonable man would think it likely or probable that the 2nd respondent arbitrator would favour one side at the expense of the other. As Lord Denning observed in the case of *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon and others(Supra)* at page 310 "The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; the judge was biased." In the present case, one cannot come to such a conclusion. Evidence has not been presented before the 2nd respondent arbitrator. Only an attempt had been made to explore the possibility of a settlement. Further the utterances alleged to have been made by the 2nd respondent arbitrator have not been legally established. Therefore the petitioner's case regarding bias against the 2nd respondent arbitrator is based on surmise and conjecture which is not sufficient.

Taking all these circumstances into consideration I hold that the petitioner company has failed to establish that there was a real likelihood of bias or a reasonable suspicion of bias on the part of the 2nd respondent arbitrator. Therefore the relief sought by the petitioner in this application is refused and accordingly the application is dismissed without costs. The 2nd respondent arbitrator may proceed with the arbitration inquiry.

Application dismissed.