E. S. FERNANDO
v.
UNITED WORKERS UNION AND ANOTHER

SUPREME COURT
RANASINGHE, C.J.,
G. P. S. DE SILVA, J., AND JAMEEL, J.
S.C. APPEAL NO. 38/86 - Ref. A 1757
C.A. APPLICATION NO. 444/80
CA/LA (S.C.) NO. 10/86
OCTOBER 31, 1989

Industrial Disputes Act, section 4(1) and 20 – Writ of certiorari – Termination for disobedience of lawful order – Strike in support of such termination – Repudiation of Award – Is repudiation an alternative remedy so as to disentitle a party to move for a writ of certiorari?

A workman G who was the branch Secretary of the United Workers Union was dismissed for unauthorised absence and refusal to obey a lawful order given by the manager. Ten other workers struck work on the issue of the refusal to keep G in employment. The employer refused to take back G but offered to take back the ten others but they refused. The arbitrator held that the refusal to take back G was justified but the employees had a just cause for the strike as their branch Union Secretary was refused work. The Appeal Court upheld the arbitrator's award.

Held:-

1. The arbitrator's order to re-instate the ten workers is contradictory of and inconsistent with his own finding that the dismissal of G was justified.
2. Re the availability of an alternative remedy by repudiation of the award under S. 20 of the Industrial Disputes Act, it is wrong to regard Section 20(1) as an alternative remedy in relation to proceedings for a writ of certiorari. Assuming that repudiation of an awaro in terms of section 20 is a remedy yet it is an adequate and effectual remedy so as to disentitle an aggrieved party to the remedy by way of certiorari.
3. *Obeysekera* v. *Albert and Others* (2) has been wrongly decided.

Cases referred to:

1. *Manager Nakiadeniya Group* v. *The Lanka Estate Workers Union* 77 CLW 52, 54
2. *Obeysekera* v. *Albert and others* 1978-79 2 Sri LR. 220
3. *Thirunavukarasu* v. *Siriwardena and others* S.C. 33/80 S.C. Minutes of 12.3.1981.

APPEAL from judgment of Court of Appeal.

H. L. de Silva, P.C. with *Gomin Dayasiri* and *Miss L. A. N. de Silva* for petitioner-appellant.

Respondents absent and unrepresented.

Cur. adv. vult.

November 22, 1989.

G. P. S. DE SILVA, J.

The petitioner-appellant, who was the employer, filed an application for a writ of certiorari to quash an award made by the 2nd respondent-respondent in his capacity as an arbitrator in respect of two industrial disputes referred to him under section 4(1) of the Industrial Disputes Act for settlement by arbitration. The application was dismissed by the Court of Appeal, and hence this appeal.

The Minister referred two industrial disputes to the 2nd respondent-respondent. The only parties to the industrial disputes were the petitioner-appellant, the proprietor of Island Printers, and the United Workers Union, the 1st respondent-respondent. The first dispute was referred on 3.7.78 and was assigned reference No. A 1744. The second dispute was referred on 6.9.78 and was assigned reference No. A 1757. The first dispute was:- (a) whether the non-employment of J. M. Gnanadasa, who was a member of the United Workers Union, by the management of Island Printers was justified and to what relief he was entitled; (b) whether certain demands made by the United Workers Union on behalf of its members in relation to annual increments, festival advances, distress loans, leave, and bonus are justified. The second dispute that was referred to the arbitrator was whether the non-employment of the ten workmen whose names were set out in the reference was justified and to what relief each of them was entitled. When these two disputes were taken up for inquiry, it was agreed between the parties that the non-employment of the workman named J. M. Gnanadasa in reference No. A 1744 and the non-employment of the ten workmen in reference No. A 1757 be consolidated and proceeded with together under reference No. A 1757.

The case for the United Workers Union was: (i) that Gnanadasa had been on leave for 4 working days between 31st May and 5th June 1978 and that when he reported for work on 6th June 1978 he was wrongfully refused work by the manager of Island Printers who was an agent of the petitioner-appellant; (ii) that the other ten workmen had lawfully been on strike from noon on 6th June 1978 on a lawful demand, viz. that Gnanadasa be taken back for work. On the other hand, the case for the petitioner-appellant was (a) that Gnanadasa's absence from work was unauthorised; (b) that the

manager had requested Gnanadasa to meet the petitioner-appellant before he could be given work and that Gnanadasa refused to meet the petitioner-appellant; (c) accordingly he was guilty of failing to obey a lawful order given by the manager. It was also the case of the petitioner-appellant that the demand upon which the other ten workmen struck work, namely, that Gnanadasa be taken back for work, was unjustified.

After inquiry, the 2nd respondent-respondent made his award dated 18.02.80. He held : (1) that the non-employment of J. M. Gnanadasa was justified and that he is not entitled to any relief; (2) that the non-employment of the other ten workmen was not justified and ordered that they be re-instated with 3 months' back wages.

The finding at (1) above has not been challenged by the United Workers Union. Mr. H.L.de Silva, for petitioner-appellant, contended before us that the finding at (2) above must be quashed on the ground that the award made by the arbitrator reveals an error of law on its face. It seems to me that on a reading of the award as a whole, Counsel's contention is well-founded. The error of law demonstrable on the face of the award is that the arbitrator ordered the re-instatement with 3 month's back wages of the ten workmen concerned, notwithstanding the following clear findings in favour of the petitioner-appellant:- (i) that the non-employment of the workman, J.M. Gnanadasa, which was the reason for the strike by the other 10 workmen, was justified and that Gnanadasa as the branch Secretary of the United Workers Union had misled the workmen to go on strike; (ii) that the parent Union was to blame "for the irresponsible and callous manner they have handled this case"; (iii) the workers were to blame "for allowing themselves to be nose led by Gnanadasa and for not allowing the officials of the branch Union to take correct action, and for following the wrong advice and being hasty in their decision". (iv) "The conference of 3.7.78 was important. In spite of all that went before, the proprietor was prepared to take in all the workers except Gnanadasa. This, I consider, was a very generous gesture. But the workers refused to return for work if Gnanadasa was not also called. If the proprietor refused to give them work on a later date, it is the parent Union they have to blame for not giving them the correct advice, and themselves for not accepting work when it was offered to them".

Despite these cogent and express findings in favour of the

employer, the arbitrator concluded that ".... the employees had a just cause for the strike as their branch Union Secretary was refused work. Their ignorance of the real cause should not be held against them. I therefore declare that the strike was justified".

Section 17(1) of the Industrial Disputes Act requires the arbitrator to make "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".

The order to re-instate the 10 workmen is contradictory of, and inconsistent with, the arbitrator's own findings set out above. There is here a clear mis-direction in regard to what is meant by a "just and equitable" award. As observed by de Kretser J. in the case of *Manager, Nakiyadeniya Group v. The Lanka Estate Workers' Union* (1) "In the making of a just and equitable order one must consider not only the interest of the employees but also the interest of the employers". Needless to say, the making of a "just and equitable" award involves the exercise of a judicial discretion, a discretion that must be exercised reasonably and fairly, having regard to the findings reached upon the material placed before the arbitrator. This the arbitrator has failed to do in the present case. I therefore find myself unable to agree with the view of the Court of Appeal that there is no error of law on the face of the award.

Apart from the absence of an error of law on the face of the award, the availability of an alternative remedy by way of "repudiation" of the award in terms of section 20 of the Industrial Dispute Act, was the other matter which the Court of Appeal took into consideration in dismissing the application for the writ of certiorari. The Court of Appeal relied on the decision in *Obeysekera vs. Albert and others.* (2) That was a case where the Court of Appeal held that section 20(1) of the Industrial Disputes Act conferred the right on an aggrieved party to repudiate the award, and that, certiorari being a discretionary remedy, the petitioner was not entitled to relief. In fairness to the Court of Appeal, it is proper to state that *Obeysekera vs. Albert* (supra) was directly in point on the question of the availability of an alternative remedy in the present case.

Mr. H.L.de Silva, however, submitted that *Obeysekera vs. Albert* (supra) was wrongly decided inasmuch as the Court of Appeal took the view that section 20(1) of the Industrial Disputes Act was an "alternative remedy" in relation to proceedings for a writ of certiorari

to quash an award made by an arbitrator. Section 20, in so far as is material for present purposes, reads thus:-

Sub-section (1) "Any party, trade union, employer or workman, bound by an award made by an arbitrator under this Act, may repudiate the award by a written notice in the prescribed form sent to the Commissioner and to every other party, trade union, employer and workman bound by the award:

Provided that .....".

Sub-section (2) "Where a valid notice of repudiation of an award is received by the Commissioner then subject as hereinafter provided-

(a) the award to which such notice relates shall cease to have effect upon the expiration of 3 months immediately succeeding the month in which the notice is so received by the Commissioner or upon the expiration of 12 months from the date on which the award came into force as provided in section 18(2), whichever is the later; and

(b) the Commissioner shall cause such notice to be publisned in the gazette, together with a declaration as to the time at which the award shall cease to have effect as provided in paragraph (a) .....".

In support of his submission that the repudiation of an award in terms of section 20 of the Industrial Disputes Act is not an "alternative remedy", Mr. H.L. de Silva relied strongly on the judgment of Wanasundera J. in *Thirunavukarasu vs. Siriwardena and others*, (3). In that case Wanasundera J. considered the effect of the repudiation of an award in terms of section 20 of the Industrial Disputes Act. Said the learned Judge: "The question that has been posed is whether or not an award once it is repudiated has the effect, as it were, of wiping the slate clean so that the award and its effects will disappear altogether as if they had never existed from the inception. I must confess that I find it difficult to accept this argument both on principle and practice ..... the award will be binding on the parties and is made operative in its character of an award for a minimum period of 12 months ..... During that period and in respect of that period when the award will subsist, all rights and liabilities pertaining to the award in its character as an award can be enforced as an award. The law no doubt allows a repudiation of the award at

any time after the required minimum period. What then is the effect of such a repudiation? In my view, such a repudiation can have only prospective application and cannot affect any rights and obligations that have already accrued to the parties and have become terms and conditions of service ....".

It seems to me that the view that the award is operative for a minimum period of 12 months is supported on a plain reading of the section. On the other hand, if the petitioner succeeds in his application for a writ of certiorari, the award is rendered null and void ab initio. It would therefore appear that, assuming that the repudiation of an award in terms of section 20 is a "remedy", yet it is not an adequate and an effectual remedy. To disentitle the petitioner-appellant to the remedy by way of certiorari, the "alternative remedy" must be an adequate and an effectual remedy. In *Obeysekera vs. Albert and others* (supra) the Court of Appeal does not seem to have sufficiently addressed its mind to the question of the adequacy and efficacy of the "remedy" provided in section 20 of the Industrial Disputes Act. In this view of the matter, as at present advised, I am of the view that the case of *Obeysekera vs. Albert and others* (supra) has been wrongly decided.

For the above reasons, I set aside the judgment of the Court of Appeal and quash that part of the award dated 18th February 1980 relating to the reinstatement of the ten workmen whose names are set out in the award and the payment to each of them of 3 months salary as back wages as specified in the award. In all the circumstances, I make no order for costs of appeal.

RANASINGHE, C.J. – I agree.
JAMEEL, J. – I agree.

Appeal allowed.