UPALI NEWSPAPERS LTD.
v.
EKSATH KAMKARU SAMITHIYA AND OTHERS

COURT OF APPEAL.
JAYASURIYA, J.,
KULATILAKE, J.
C.A. NO. 615/96.
LT2/A/1/89.
DECEMBER 5, 1997.
FEBRUARY 18, 1998.
MAY 5, 1998.

Industrial Disputes Act – Sections 31 (B), 31 (B) (2) (b) – Matter pending before Labour Tribunal – Jurisdiction of the Minister to refer matter for Arbitration for settlement – Is the Award valid?

Presidents of Labour Tribunal – Are they Judicial Officers – Constitution, Articles 114, 116, 170 – Interpretation – Writ of Certiorari – Labour Tribunal Presidents appointed as Magistrates.

The workmen made separate applications to the Labour Tribunal for relief under s. 31B Industrial Disputes Act. While the applications were still pending before the Labour Tribunal the Minister referred the matter in terms of s. 4 (1) for settlement by Arbitration. At the inquiry before the Arbitrator the preliminary objection taken to the jurisdiction was overruled and an award was made.

Held:

1. Article 170 of the Constitution read with Article 114 shows that the President of a Labour Tribunal is included in the definition of "Judicial Officer".

Per Kulatilake, J.

> "It is interesting to note that the J S C had published in the *Gazette* No. 1,052 dated 30.10.98 a notification in which eighteen Labour Tribunal Presidents have been appointed as Magistrates for the limited purpose of performing duties relating to the endorsement of their Orders."

2. The combined effect of the provisions of Articles 170, 114, 116 is that the proposition that the Minister has unlimited powers under s. 4 (1) which

would enable him to refer a dispute which is pending before Labour Tribunal to an Arbitrator for settlement, is incorrect. A contrary interpretation would necessarily infringe and violate the principle of independence of the judiciary enshrined in Article 116 of the Constitution which is the paramount law.

3. S. 31 (B) (2) would apply only to an application made to a Labour Tribunal *subsequent* to a reference made by the Minister to an Arbitrator or to an Industrial Court for settlement.

APPLICATION for a *Writ of Certiorari.*

Cases referred to:

1. *Wimalasena* **v.** *Navaratne and two Others* – [1978-79] Sri L.R. vol. 2 10 (Court of Appeal) – distinguished.
2. *Ceylon Tyre Rebuilding Co., Ltd. v. Perera and Others* – [1980] 2 SLR 36 (Court of Appeal) – Distinguished.
3. *Walker Sons & Co., Ltd. v. F. C. W. Fry* – 68 NLR 73.
4. *Liyanage v. The Queen* – 68 NLR 265.
5. *Ratnasiri Perera v. Dissanayake, Assistant Commissioner of Co-operative Development & Others* – [1992] 1 Sri L.R. 288.

Gamini Marapana, PC with *Anil Tittawella* and *Samantha Vithana* for petitioner.

C. Hewamanage for 1st respondent.

2nd, 3rd and 4th respondents absent and unrepresented.

Cur. adv. vult.

March 19, 1999.

KULATILAKE, J.

Pursuant to a reference made by the Minister of Labour in terms of section 4 (1) of the Industrial Disputes Act relating to an industrial dispute which had arisen between the petitioner-company and the first respondent Trade Union representing workmen J. K. Vipula, I. G. P. Manjula, H. M. Vipula, N. L. P. W. Jayawardena, P. D. Pemananda, W. M. H. D. Bandara and G. P. D. R. Janaka. Arbitrator M. Sridharan, who is the fourth respondent to this application, had come to a finding

that the termination of the services of workmen by the petitioner-company was unjustifiable and wrongful and accordingly he has made his award dated 22nd March, 1996.

By this application the petitioner prays for a *writ of certiorari* to quash the award made by the fourth respondent. The facts in brief are as follows:

Workman J. K. Vipula who was a casual worker during the period January, 1987 to 15th April, 1988, on a daily rate of payment was not offered any work on 16.4.1988 as there was no work to be offered to him.

Workman I. G. P. Manjula's services were terminated, with effect from 16.4.88, after a domestic inquiry into a charge of unauthorised absence on the 12th, 14th and 15th of April, 1988.

H. M. Vipula's services were terminated after a domestic inquiry into charges of taking unauthorised leave and of unsatisfactory attendance.

K. L. P. W. Jayawardena's services were terminated after a domestic inquiry into a charge of deliberately giving false information at the time of recruitment in order to obtain unfair advantages.

P. D. Pemananda's and M. H. D. Bandara's services were terminated after a domestic inquiry for having intimidated and threatened a staff officer U. K. Chandrasena.

G. P. D. R. Janaka's services were terminated after a domestic inquiry into a charge of improper conduct.

The workmen have made separate applications to the Labour Tribunal for relief and redress in terms of section 31B of the Industrial Disputes Act. While the applications were still pending before the Labour Tribunal (vide paragraph 13 VIIA of the petition and paragraph 14 VIIA of the affidavit of the Personnel Manager of the petitioner-company and at page 3 of the award) the Minister on 21.9.89 referred

the matter in terms of section 4 (1) of the Industrial Disputes Act for settlement by arbitration. At the inquiry before the arbitrator a preliminary objection to the jurisdiction had been taken up but was overruled. When this matter came up for argument before us both parties conceded to the correctness of the above facts and also the fact that the Minister had referred the dispute for arbitration while the inquiry was pending in the Labour Tribunal. We have heard the oral submissions made by the learned President's Counsel for the petitioner and the learned counsel for the first respondent. We have also perused and considered the written submissions tendered as well as the cases cited by them in support of their respective cases.

The only point raised and urged by the learned President Counsel who appeared for the petitioner was whether the Minister has the power to refer an industrial dispute for arbitration for settlement in terms of section 4 (1) of the Industrial Disputes Act when there were applications filed by the respective workmen still pending in the Labour Tribunal. The learned President Counsel urged that this Court should consider whether the *ratio decidendi* in *Wimalasena* v. *Navaratne and two Others*[1] (*per* Ratwatte, J.) reiterated with approval in *Ceylon Tyre Rebuilding Co., Ltd. v. Perera and Others*[2] should continue to be followed as these judgments failed to consider that at the time the Industrial Disputes Act was enacted the Presidents of Labour Tribunals were neither judicial officers nor were considered to be performing judicial functions.

In interpreting the status of a President of a Labour Tribunal under the Constitution of 1948 it was assumed that they were "public officers" and as such were appointed by the Public Service Commission. The question as to whether the Labour Tribunals exercise judicial functions or administrative functions was considered by a Divisional Bench in *Walker Sons & Co., Ltd. v. F. C. W. Fry*[3] where Sansoni, CJ., H. N. G. Fernando, SPJ. and T. S. Fernando, J. (Tambiah, J. and Sri Skandarajah, J. dissenting) after cataloging its powers under part IVA and particularly under section 31B of the Industrial Disputes Act, held that a Labour Tribunal exercises judicial powers. Further, they held that a Labour Tribunal had no jurisdiction to exercise its judicial powers unless the Presidents are appointed by the Judicial Service

Commission. The decision in this case taken in conjunction with the Privy Council's decision in *Liyanage v. The Queen*[4] which categorically held that there is vested in the judiciary independent power which under the Constitution of 1948 cannot be usurped or infringed by the Executive or the Legislature, induced the Supreme Court to set aside a number of orders made by Labour Tribunals on the ground that those orders were made without jurisdiction. **The end result was that the legislature took remedial steps to rectify this position and the present position as laid down in the Constitution of the Democratic Socialist Republic of Sri Lanka is that the appointment, transfer, dismissal and disciplinary control of Presidents of Labour Tribunals are vested in the Judicial Service Commission in terms of the provisions of Article 115.**

The learned President Counsel further submitted that even though the learned President's Counsel who had appeared for the petitioner in *Wimalasena v. Navaratne and Others (supra)* argued that the Executive cannot be permitted to interfere in pending proceedings of a judicial nature, Ratwatte, J. (Atukorale, J. agreeing) interpreted the particular provisions and expressed the view that the Minister's powers under section 4 (1) of the Industrial Disputes Act are "very wide" and held that the Minister had the power to refer the dispute in that case for settlement by arbitration in spite of the fact that there was an inquiry pending in the Labour Tribunal regarding the same dispute. This decision was followed with approval in *Ceylon Tyre Rebuilding Co., Ltd. v. Perera* (*supra*).

There are two important aspects that the above judgments have failed to consider.

In 1957 when the present Industrial Disputes Act (including the statutory provisions as found in section 4 of the Act) was enacted the draftsman proceeded on the assumption that a President of a Labour Tribunal is a "public officer" performing public functions.

The Constitution of 1948 founded on the doctrine of strict separation of powers (vide *Liyanage v. The Queen (supra)* at 282) could never

have anticipated the executive to be given such wide powers so as to interfere with proceedings which are of a judicial nature.

The learned President's Counsel contended that had their Lordships in *Wimalasena v. Navaratne & Others (supra)* and *Ceylon Tyre Rebuilding Co., Ltd. v. Perera (supra)* the opportunity to consider these aspects, they would have desisted in interpreting that particular section as giving such wide powers to the Minister so as to violate the provisions of the Constitution.

The learned counsel for the first respondent referred us to *Ratnasiri Perera v. Dissanayake, Assistant Commissioner of Co-operative Development and Others*[5]. In that decision the main issue for consideration was whether an arbitrator appointed by the Registrar of Co-operative Societies in terms of the Co-operative Societies Law, No. 5 of 1972 fell into the category of a Court, tribunal or other institution exercising judicial powers under Article 4 (*c*) of the Constitution. In fact, the learned President Counsel has correctly contended that, that decision, has no bearing on the point at issue in the instant case.

In terms of Article 170 which is the Interpretation Article in the Constitution, the term "judicial officer" is interpreted so as to include the President of a Labour Tribunal as well.

The relevant provision reads thus:

> "Judicial officer means any person who holds office as – any Judge of the High Court or any Judge, presiding officer or member of any other Court of first instance, tribunal or institution created and established for the administration of justice or for the adjudication of any labour or other dispute but does not include a person who performs arbitral functions or a public officer whose principal duty or duties is or are not the performance of functions of a judicial nature."

In terms of Article 114 of the Constitution the President of a Labour Tribunal is appointed by the Judicial Service Commission. Thus, the

status of a Labour Tribunal as it stands today is entirely different from what it was in 1957 when the Industrial Disputes Act was enacted. Interpretation Article 170 read with Article 114 of the Constitution gave effect to the exhortations of Their Lordships in *Walker Sons & Co., Ltd.* v. *F. C. W. Fry (supra)* and went one step further by including the President of a Labour Tribunal within the definition of "judicial officer". It is interesting to note that the Judicial Service Commission had published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka No: 1,052 dated 30.10.98 a notification in which eighteen Labour Tribunal Presidents have been appointed as Magistrates for the limited purpose of performing duties relating to the enforcement of their orders.

Hence, we are of the considered view that the Minister's powers in terms of section 4 of the Industrial Disputes Act has to be reviewed afresh in view of the aforesaid circumstances.

It is enshrined in Article 116 of the Constitution of the Democratic Socialist Republic of Sri Lanka which recognises the independence of the judiciary, certain safeguards, which enable judicial officers to perform their powers and functions without any interference. Article 116 (1) reads thus:

> "Every judge, presiding officer, public officer or other person entrusted by law with judicial powers or functions or with functions under this chapter or with similar functions under any law enacted by Parliament shall exercise and perform such powers and functions without being subject to any direction or other interference proceeding from any other person except a superior Court, tribunal, institution or other person entitled under law to direct or supervise such judge, presiding officer, public officer or such other person in the exercise or performance of such powers or functions."

The combined effect of the provisions of Interpretation Article 170, Articles 114 and 116 is that the decision in *Wimalasena v. Navaratne and Others (supra)* can no longer be considered as valid authority for the proposition that the Minister has unlimited powers under section

4 (1) of the Industrial Disputes Act which would enable him to refer a dispute, which is pending before a Labour Tribunal to an Arbitrator for settlement. Such an interpretation would necessarily infringe and violate the principle of independence of the judiciary enshrined in Article 116 of the Constitution which is paramount law.

If section 4 (1) of the Industrial Disputes Act is construed to mean that the Minister under this provision has no power to refer a dispute which is pending before the Labour Tribunal for arbitration to an Arbitrator, it is necessary for this Court to consider the effect of section 31B (2) (*b*) of the Industrial Disputes Act which reads thus:

> "Where it is so satisfied that such matter constitutes or forms part of an industrial dispute referred by the Minister under section 4 for settlement by arbitration to an arbitrator or for settlement to an industrial court make order dismissing the application without prejudice to the rights of the parties in the Industrial Disputes."

We are of the view that this provision would apply only to an application made to a Labour Tribunal subsequent to a reference made by the Minister to an arbitrator or to an industrial court for settlement.

For the aforesaid reasons we hold that the reference dated 21.9.1989 made by the Minister in terms of section 4 (1) of the Industrial Disputes Act is bad in law and as such the award of the Arbitrator dated 22.3.1996 is an order made without jurisdiction. In the result, we proceed to quash the award made by N. Sridharan the Arbitrator dated 22.3.1996. The application is allowed. We make no order as to costs.

JAYASURIYA, J. – I agree.

Application allowed.