MOHAMED
v.
CEYLON KNITWEAR INDUSTRIES LTD.

COURT OF APPEAL
ISMAIL, J. (P/CA),
TILAKAWARDANE, J.
C.A. NO. 759/96
D.C. COLOMBO NO. 13616/L
AUGUST 31, 1998
SEPTEMBER 22, 1998
JANUARY 29, 1999

Civil Procedure Code – Amendment No. 53 of 1980 – S. 337 (1), (2), (3) – Writ of Execution – Application within a period of 10 years – Renewal after 10-year period.

The Court of Appeal set aside the judgment of the District Court and entered judgment in favour of the plaintiff-respondent, on 5. 4. 1984. The plaintiff-respondent made an Application for the execution of the Decree for the first time on 7. 2. 85, the Writ was not executed. The Court issued a Writ of Execution for the second time when an application was made stating that a period of 10 years had not lapsed from the date of judgment. The plaintiff-respondent thereafter on 2. 3. 95 made an Application for the renewal of the said Writ of Execution. The objections of the defendant-petitioner were rejected, and Court made order granting the Writ of Execution, on the basis that the judgment-creditor had lawfully applied for the issue of the Writ within the specified ten-year period and that it had thereafter renewed it, from time to time, before its expiration in terms of s. 337 (3) CPC.

Held:

1. The Application for the first renewal was made on 2.3.95, after the expiration of a period of ten years from date of decree following the judgment of the Court of Appeal on 5.4.84. The District Court had erred in granting the Application for the renewal of the Writ after ten years contrary to the provisions of s. 337 (1) read with s. 337 (3) CPC.

APPLICATION in Revision from the Order of the District Court of Colombo.

Cases referred to:

1. *Peries v. Cooray – (1909)* 12 NLR 362.
2. *Haji Omar v. Bodhidasa* – (1994) 2 SLR 197.

R. C. Gunaratne for defendant-petitioner.

K. N. Choksy, PC with *V. K. Choksy* for plaintiff-respondent.

Cur. adv. vult.

February 03, 1999.

ISMAIL, J. (P/CA)

The plaintiff-respondent company instituted an action against the 2nd defendant-petitioner and the three defendant-respondents above-named seeking a declaration of title to the premises described in the 2nd schedule to the plaint and praying for the ejectment of the defendants therefrom.

The District Judge held that the plaintiff company was entitled to a declaration of title to the premises but refused its prayer for the ejectment of the contesting 1st defendant and the 2nd defendant-petitioner from the premises. The finding of the District Judge was that the 1st defendant was entitled to remain in occupation as a tenant of one portion of the premises and that the 2nd defendant's wife was the tenant of the other portion and as such that no order for ejectment could be made against the 2nd defendant. Judgment was entered *ex parte* against the 3rd and 4th defendant-respondents.

The Court of Appeal considered this judgment in appeal bearing No. CA 822/75 (F). By its judgment dated 5.4.84, the Court of Appeal found that the 1st and 2nd defendants had failed to discharge the burden of proving that their occupation of the premises was lawful. The judgment of the District Court was, therefore, set aside and judgment was entered in favour of the plaintiff-respondent company, as prayed for in paragraphs (*a*) and (*b*) of the plaint, as against all

the defendants. Decree *Nisi* was ordered to be entered and issued on the 3rd and 4th defendants.

The 2nd defendant-petitioner's application for special leave to appeal to the Supreme Court bearing No. SC Special LA 52/84 against the judgment of the Court of Appeal dated 5.4.84 was refused with costs by an order made on 4.7.84.

The plaintiff-respondent company made an application for the execution of the decree for the first time on 7.2.85 (JE37). The writ was not executed. The Court issued a writ of execution for the second time when an application was made on behalf of the plaintiff-respondent company on 11.3.94 (JE72), stating that a period of ten years had not elapsed from the date of the judgment in appeal in its favour.

The plaintiff-respondent company made an application on 2.3.95 for the renewal of the said Writ of Execution for a period of one year. It has been pointed out that a motion filed for this purpose has been minuted only on 4.5.95 as journal entry No. 73. The next journal entry (No. 74) dated 26.4.96 indicates that notice was ordered to be issued on the 2nd defendant-petitioner granting him an opportunity to file objections against allowing a further renewal of the writ.

The Additional District Judge held an inquiry and has made order rejecting the objections of the 2nd defendant-petitioner to the grant of a renewal of the writ. The order dated 23.10.96 has been made on the basis that the judgment-creditor had lawfully applied for the issue of the Writ of Execution within the specified ten year period and that it had thereafter renewed it, from time to time before its expiration in terms of section 337 (3) of the Civil Procedure Code.

The 2nd defendant-petitioner by this application in revision filed dated 07.11.96 has sought to have the aforesaid order set aside.

Learned counsel for the 2nd defendant-petitioner submitted that in terms of the section 337 of the Civil Procedure Code, as amended by Act No. 53 of 1980, an application for the execution of writ or an application for the renewal of the unexecuted writ cannot be made

after the expiration of a period of the ten years from the date of the decree sought to be executed.

The relevant provisions of section 337 of the Civil Procedure Code, as amended by Act No. 53 of 1980, are as follows:

337. (1) No application (whether it be the first or the subsequent application) to execute a decree, not being a decree granting an injunction, shall be granted after the expiration of ten years from –

(*a*) the date of the decree sought to be executed or of the decree, if any, on appeal affirming the same; or

(*b*) . . .

(2) Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application.

(3) Subject to the provisions contained in subsection (2), a Writ of Execution, if unexecuted, shall remain in force for one year only from its issue, but –

(*a*) such writ may, at anytime before its expiration, be renewed by the judgment-creditor for one year from the date of such renewal, and so on from time to time; or

(*b*) a fresh writ may at any time after the expiration of an earlier writ be issued, till satisfaction of the decree is obtained.

The Court of Appeal set aside the judgment of the District Court and entered judgment in favour of the plaintiff-respondent company

on 5.4.84. The applications for the execution of the decree were made firstly on 7.2.85 and again on 11.3.94, both within a period of ten years from the date of the judgment in appeal in terms of which the decree should have been entered. The date of the refusal of the application for leave to appeal to the Supreme Court is not material. The contention on behalf of the petitioner is that the judgment-creditor could not have made an application for the renewal of the writ on 2.3.95 (JE73), as a period of ten years had elapsed from 5.4.84, the date on which the judgment on appeal was delivered.

The position taken up by counsel for the plaintiff-respondent is that the ten-year period does not apply to the renewal of the writ. It was contended that the only time constraint applicable to renewal is that the application for renewal must be made before the expiration of a period of one year from the date of the issue of the writ. The renewal having been applied for on 2.3.95 within one year of the order issuing the writ for the second time on 11.3.94, it was contended that it was a lawful application within the meaning of section 337 (3) (*a*) of the Code. It was emphasized that this was not an application for a 'fresh writ' under 337 (3) (*b*) in which event the ten-year period would have applied.

The amendment to section 337 of the Code has introduced a time limit of a period of ten years within which a first or a subsequent application to execute a writ shall be granted. It was held in *Peries v. Cooray*[1] that in terms of section 337 of the Code before its amendment, there was no time limit within which a first application for execution could be granted. It appears also that originally, before the repeal of section 5 of the Ordinance No. 22 of 1871, the right of a judgment-creditor to a writ of execution was limited to cases where the decree was not more than ten years old.

I am unable to accept the submission on behalf of the respondent that the ten-year period applies only to an application for a writ and that it does not apply to a renewal of a writ. I do not also accept the submission that once an application for the execution of a writ has been applied for within the ten-year period and has been issued by Court, the renewal of such a writ need not be applied for within the period of ten years since the date of the decree.

I am of the view that the provisions of section 337 (3) are subject to the time period specified in subsection (1).

It is quite clear that the judgment-creditor did not apply for the execution of the decree or seek a renewal on the basis that the judgment-debtor has by fraud or force prevented the execution of the decree within ten years immediately preceding the date of the application. The provisions of subsection (2) would therefore not be applicable.

In *Haji Omar v. Bodhidasa*[2] it was contended that in terms of section 337 (3) of the Code, a Writ of Execution may be issued at any time until satisfaction of decree is obtained and that therefore there is no time constraint for such application. Dheeraratne, J. observed as follows at page 193: "I am unable to justify such an interpretation because the amended section 337 (1) states that no application to execute a decree shall be granted after the expiration of ten years from the date of the decree, and it is clear that what is stated in subsection (3) must be read subject to that general provision contained in subsection (1) as regards the time frame. Besides, the opening words of subsection (3) 'subject to the provisions contained in subsection (2)' would itself attract the limitation of ten years specified in that subsection".

The application for the first renewal was made on 2.3.95 (JE 73) after the expiration of a period of ten years from date of the decree following the judgment of the Court of Appeal on 5.4.84. The Additional District Judge has erred in granting the application for the renewal of the writ made after ten years contrary to the provisions of section 337 (1) read with section 337 (3) of the Civil Procedure Code. The order of the Additional District Judge dated 23.10.96 is therefore set aside.

The application is allowed with costs fixed at Rs. 1,050 payable by the plaintiff-respondent to the defendant-petitioner.

TILAKAWARDANE, J. – I agree.

Application allowed.

ALL CEYLON COMMERCIAL AND INDUSTRIAL WORKERS' UNION
v.
NESTLE LANKA LTD.

COURT OF APPEAL
JAYASURIYA, J.
C.A. NO. 752/96
ARBITRATION PROCEEDINGS
NO. 8/A/1/92, and 1/364/93
FEBRUARY 18, 1997
JULY 25, 1997
JANUARY 11, 1999

Industrial Disputes Act s. 4 (1) – Arbitration – Termination justifiable – Duty to act judicially – No evidence Rule – Error on the face of the record – Writ of Certiorari.

The petitioner seeks to quash the award made by the Arbitrator wherein he has held that the termination was justifiable.

Held:

1. Although Arbitrator does not exercise judicial power in the strict sense, it is his duty to act judicially, though ultimately he makes an award as may appear to him to be just and equitable.

2. There is no evidence or material which could support the findings reached by the Arbitrator, findings and decisions unsupported by evidence are capricious, unreasonable or arbitrary.

3. A deciding authority which has made a finding of primary fact wholly unsupported by evidence or which has drawn an inference wholly unsupported by any of the primary facts found by it will be held to have erred in point of law.

   "No evidence rule" does not contemplate a total lack of evidence it is equally applicable where the evidence taken as a whole, is not reasonably capable of supporting the finding or decision.

Writ of Certiorari to quash the award of the Arbitrator.

Cases referred to:

1. *Attorney-General of Australia v. Regina* – 1957 2 All ER 49.
2. *South Ceylon Democratic Workers' Union v. Selvadurai* – 71 NLR 244.
3. *Stratheden Tea Co., Ltd. v. Selvadurai* – 66 NLR 6.
4. *Heath & Co. v. Kariyawasam and two others* – 71 NLR 382.
5. *Nadaraja Ltd. v. Krishnadasan* – 78 NLR 255.
6. *Minister of National Revenue v. Wrights Canadian Ropes Ltd.* – 1947 A1 109.
7. *Argosy Company Ltd. v. I. R. C.* – 1971 – 1 WLR 514.
8. *Osgood v. Nelson* – 1872 LR 5 HL 636.
9. *Maradana Mosque Trustees v. Mohamed* – 1967 1 AC 13.
10. *Allinson v. General Medical Council 1894* – 1 QB 750 at 760.
11. *R. v. Roberts* – 1908 1 KB 407 at 423.
12. *Folkestone Corporation v. Brockman* – 1914 AC 338 at 367.
13. *R. v. Nat Bell Liquors Ltd.* – 1922 AC 128 at 151.
14. *R. v. Ludlow* – 1947 KB 634.
15. *O'reilly v. Mackman* – 1983 2 AC 237.
16. *R. v. Northumberland Compensation Appeal Tribunal ex parte shaw* – 1951 1 KB 711. (Affirmed in 1952 1 KB 338).
17. *Shell Gas Company v. All Ceylon Commercial and Industrial Workers' Union* 1998 – 1 SLR 118 at 124.

Ms. Chamantha Weerakoon-Unamboowa with *Ms. Dilhani Perera* for petitioner.

A. J. I. Tillakawardena with *Upul Fernando* and *Nihal Samarasinghe* for 1st respondent.

No appearance for 2nd, 3rd and 4th respondents.

Cur. adv. vult.

May 03, 1999.

JAYASURIYA, J.

The petitioner in its amended application has prayed for the issue of a mandate in the nature of a writ of certiorari quashing the award made by the fourth respondent dated 9th of July, 1996, which had been produced marked P7. The second respondent in his capacity as Minister of Labour has made a reference in terms of section 4 (1) of the Industrial Disputes Act to the fourth respondent and

appointed the fourth respondent as arbitrator to conciliate, arrive at a settlement and to determine the dispute which had arisen between the petitioner-trade union and the first respondent. The third respondent in his capacity as Commissioner of Labour has stated the issue arising on the dispute between the aforesaid parties as follows :

> "Is the termination of the services of the employee named T. A. M. Hemasiri with effect from 10th of April, 1992, by the first respondent-employer justifiable? if the said termination is unjustifiable what are the reliefs the employee is entitled to from the first respondent company as his employer?"

The aforesaid employee had been employed in the service of the employer from 15th November, 1983, in the post of a shift mechanic and he had been asked to show cause why disciplinary action ought not to be taken against him on the following grounds:

(1) For preferring false allegations against the Personnel Manager of the employer-company.

(2) For refusing to accept the letter dated 31st March, 1992, issued by the employer-company to the said employee. The said letter has been marked in the arbitration proceedings as R2.

(3) For wrongfully inducing fellow-workers to refuse to accept certain circulars issued by the employer-company and for wrongfully taking steps to refuse to issue such circulars to fellow employees.

(4) For compelling fellow-workers to affix their signature to the letter dated 19. 03. 92.

(5) By the aforesaid acts for creating displeasure ill feeling and disaffection between the management of the company and the employees of the company.

(6) By doing any one or more of the said acts that he had committed grave misconduct.

At the conclusion of the arbitration proceedings the fourth respondent-arbitrator came to the conclusion that the aforesaid grounds 3 and 4 had not been established by the employer-company against the employee named Hemasiri; but that grounds 1, 2 and 5 had been established and in the circumstances he concluded that the termination of the services of employee Hemasiri by the employer-company was justified.

The employer had adduced the evidence before the arbitrator of witnesses S. N. Jayasinghe, Tennekoon Piyasena, Huralin Esk and the employee T. A. M. Hemasiri has also given evidence on behalf of the trade Union, petitioner. In the course of the evidence led on behalf of the company a letter dated 19th of March, 1992, signed by the aforesaid employee Hemasiri and eight other fellow-workers was produced marked R1. In this letter marked R1 which was sent to the management of the employer-company, it has been asserted that the Personnel Officer of the employer had arbitrarily appointed certain members to the canteen committee in the following terms :

> "එය එසේ වනුයේ මෙම කොමිටුව සදහා නම් කර ඇති බොහෝ දෙනෙකුව සේවකයන් විසින් නම් නොකළ අය වන අතරම අපද නොදැනුවත්ව පිරිස් කළමණාකාර මහතා "හිතුවට" නම් කරන ලද අය වීමය."

As the allegations stated in the said letter were false the employer-company had issued a letter of warning and it was alleged that the aforesaid employee Hemasiri had wrongfully and in defiance refused to accept the aforesaid letter of warning. It is this refusal which has led to the dispute in respect of which a reference had been made to the arbitrator for settlement. At the time that this letter R1 was issued the said employee Hemasiri had been holding the post of secretary of the trade union which represented the workers who were employed by the employer-company.

Witness Tennekoon Piyasena has testified before the arbitrator clearly that the employee Hemasiri refused to accept the letter of warning marked R2 which was issued by the management of the employer-company. The aforesaid evidence is corroborated and advanced in strength by the evidence of witness Huralin Esk. The

evidence establishes further that the employee Hemasiri had refused to accept the warning letter R2 and also to show cause letter which was marked as R3.

The employee Hemasiri in his evidence has attempted to state that he did not refuse to accept the letter of warning marked R2 but that he had merely requested that the acceptance of the letter be temporarily delayed and that he believed that it was not wrongful on his part to delay accepting the said letter. Further, the employee Hemasiri had attempted falsely to state that he was not the author of the letter dated 19th of March, 1992, which was produced marked R1. The arbitraror has held having regard to the provisions of the Collective Agreement entered into between the employer and the employee that employee Hemasiri had no right either to refuse to accept the letter or to temporarily delay the acceptance of the said letter. Despite the evasive answer given by the employee Hemasiri it is manifestly established having regard to the attendant circumstances proved and on the application of the principle of probability that employee Hemasiri had refused to accept the letter of warning marked R2. In these circumstances it is incumbent on the arbitraror to determine whether such wilful refusal to accept the letter issued by the employer-company addressed to an employee, amounts to an act of wilful disobedience to a legitimate request by the employer and also whether it amounts to a wrongful act of defiance of the authority of an employer by an employee. Thereafter, to determine whether these acts amount to grave misconduct. The arbitrator has concluded especially as the employee held the responsible post of secretary of the trade union that it was entirely a wrongful act on his part to have defiantly refused to accept the aforesaid letter. The arbitrator has also held that without sufficient cause and justification he has made false allegations and accusations against the Personnel Officer.

The arbitrator thereafter proceeds to hold in respect of count five that by the aforesaid first two acts the employee Hemasiri has created displeasure, disaffection and ill feeling between the workers and the employer-company. There has been no evidence or material whatsoever elicited before the arbitraror which entitled him to arrive at the aforesaid inference and findings.

The arbitrator to whom a reference has been made in terms of section 4 (1) of the Industrial Disputes Act as amended is expected to act judicially. He is required in arriving at his determinations to decide legal questions affecting the rights of the subject and hence he is under a duty to act judicially. Although such arbitrator does not exercise judicial power in the strict sense, it is his duty to act judicially. In *Attorney-General of Australia v. Regina*[1] Lord Simonds delivering the Privy Council judgment observed :

> "It is desirable to repeat that the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order. However, the decisions clearly mark out that such an arbitrator is required to act judicially."

See the decision in *South Ceylon Democratic Workers' Union v. Selvadurai*[2]; *Stratheden Tea Co., Ltd v. Selvadurai*[3]. In *Heath & Co. Ltd. v. Kariyawasam and 2 Others*[4], Justice A. L. S. Sirimane delivering the Supreme Court judgment emphasizes that in the assessment of the evidence an arbitrator appointed under the Industrial Disputes Act must act *judicially* and that if he does not, his award is liable to be quashed in an application for certiorari. Justice Sirimane describes the findings reached by the arbitrator in that case as being so completely contrary to the weight of evidence that one can only describe it as being perverse.

It has been stressed that such an arbitrator's function is judicial in the sense that he has to hear parties, decide facts, apply rules with judicial impartiality and his decision is objective as that of any court of law, though ultimately he makes such award as may appear to him to be just and equitable. Vide the decision in *Nadaraja Ltd. v. Krishnadasan*[5].

Thus, there is no evidence or material which has been adduced which could support the aforesaid inference and findings reached by the fourth respondent. Findings and decisions unsupported by evidence are capricious, unreasonable or arbitrary. *Minister of National Revenue v. Wrights Canandian Ropes Ltd.*[6]; *Argosy Company Ltd. v. IRC*[7]; *Osgood v. Nelson*[8]; *Maradana Mosque Trustees v. Mahamud*[9];

De Smith in his judicial review of Administrative Action – 4th edition page 133 – sets out the principle that a deciding authority "which has made a finding of primary fact wholly unsupported by evidence or which has drawn an inference wholly unsupported by any of the primary facts found by it will be held to have erred in point of law. . . The 'no evidence rule is well-established; . . . *and* it has established itself because superior courts exercising appellate or supervisory jurisdiction in respect of errors of law need to have power to intervene wherever manifest and gross error is revealed."

The "no evidence rule" does not contemplate a total lack of evidence; it is equally applicable where the evidence taken as a whole, is *not reasonably capable of supporting* the finding or decision (vide *Allinson v. General Medical Council*[10] at 760 or where no deciding authority *could reasonably reach* that conclusion on that evidence (vide *R. v. Roberts*[11] at 423).

Lord *Atkinson in Folkestone Corporation v. Brockman*[12] at 367 remarked : "an order made without any evidence to support it is truth, in my view, made *without jurisdiction.* Contra – *R. v. Nat Bell Liquors Ltd.*[13] at 151 per Lord Sumner. *R. v. Ludlow*[14] per Lord Goddard CJ. However, Lord Denning in *O'reilly v. Mackman*[15] at 253 has impugned the statement of the law pronounced by Lord Sumner as the darkest moment of the "Blackout of any development of Administrative Law". Other decisions have described a "no evidence finding" as unreasonable, perverse and arbitrary and therefore *ultra vires* for other reasons".

Wade and Forsyth on Administrative Law – 7th edition at page 316 – conclude that despite the absence of an authoritative decision reviewing the justification for and against the "no evidence rule", "it seems clear that this ground of judicial review ought *now* to be regarded as established on a general basis . . . it conforms so well to other developments in administrative law that one can only assume that the older authorities to the contrary, impressive though they are, may now be consigned to the limbo of history. 'No evidence' seems destined to take its place as yet a further branch of the principle of *ultra vires,* so that Acts giving powers of determination will be taken

to imply that the determination must be made upon some acceptable evidence. If it is not, it will be treated as arbitrary, capricious, and obviously unauthorised".

In *R. v. Northumberland Compensation Appeal Tribunal – ex parte* Shaw 1951[11] (affirmed in 1952 1 KB 338), the Divisional Court of the Kings Bench Division held that certiorari would issue to quash the decision of a statutory administration tribunal for an error of law on the face of the record, even though that tribunal was not a court of record and although that error did not go to the jurisdiction of the tribunal. This decision pronounced by Lord Denning appeased at least to a certain extent, the public demand for better justice in the welfare state and it marked the commencement of a new era of judicial review.

I hold that there is an error on the face of the record which entitles this Court in the exercise of its power of certiorari to quash the aforesaid award as the finding in regard to ground five had been reached bereft of any evidence or any material which has been elicited before the arbitrator. In the circumstances we allow the application of the petitioner and make order quashing the award made by the fourth respondent dated 9th July, 1996, which has been marked as P7 and which has been published in the Govt. *Gazette* Extraordinary No. 938/1 dated 26th of August, 1996.

We allow the application but having regard to the attendant circumstances which have been disclosed upon this application, we make no order as to costs. We direct and order the Honourable Minister of Labour to make another reference in terms of section 4 (1) of the Industrial Disputes Act No. 14 of 1957 (as amended) appointing another arbitrator to settle the aforesaid dispute by arbitration. This direction is made in view of the principle laid down by Justice Sharvananda in the decision in *Nadaraja Ltd. v. Krishnadasan* (*supra*) which is referred to and adopted in *Shell Gas Company v. All Ceylon Commercial & Industrial Workers' Union*[17] at 124. The application is allowed without costs.

KULATILAKE, J. – I agree.

Application allowed.