THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 1 SRI L.R. - PART 12**

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the rate of Rs. 35 per litre. It was alleged by the relevant

employees that the payment of such allowances were

necessary to ensure that they will not be worse off working

for Browns Engineering than when they worked for Brown &

Co.

Since the appeals made by the relevant employees to the

management of Browns Engineering and later to the Board of

Directors of Brown & Co., did not bring any favourable

results, the dispute was referred to the 2nd Respondent-

Respondent-Respondent Commissioner of Labour for

conciliation in or about January 1995. However, since this

too was unsuccessful, the 1st Respondent-Respondent-

Respondent Minister of Labour, having been satisfed that

an industrial dispute was in existence, by an order dated

30th May 1997, referred the dispute to the 3rd Respondent-

Respondent-Respondent Arbitrator for settlement by arbitra-

tion under Section 4(1) of the Industrial Disputes Act of 1956.

The statement of matters in dispute, which formed part of

the said order, set out several disputes involved primarily the

alleged withholding of offcial transport facilities, non-

payment of salaries and other ex-gratia payments and

professional fees, and the alleged non reimbursment of

certain medical bills, all of which arose after 1st June, 1992.

The Arbitrator commenced his inquiry into the matters

in dispute between the relevant employees, Brown & Co. and

Browns Engineering on 18th September 1997 and concluded

the inquiry on 25th October 2002. It is signifcant to note

that when the matter was inquired into by the Arbitrator,

despite notice being issued on Browns Engineering, it deliber-

ately refrained from participating in the said inquiry. On the

other hand, Brown & Co., which participated in the inquiry,

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took up the position that the grievance had arisen after the

relevant employees commenced working for Browns

Engineering, which it was submitted, was on a fresh contract

of employment, and that their contracts of services with

Brown & Co., had come to an end in January 1992.

At the conclusion of the inquiry, the Arbitrator concluded

that the relevant employees had continued to serve as

employees of Brown & Co. even after the transfer to Browns

Engineering, and that the original letters of appointment

issued to them had contemplated the possibility of such

transfers to or from “any of the company’s departments or

branches or associate or subsidiary companies, whether such

department, branch, or associate or subsidiary is or is not in

existence at the time of the commencement of this contract

of employment”. He specifcally determined that they had

not been issued with any letters of appointment by Browns

Engineering, and the letter of transfer dated 17th January

1992 served on them, did not in fact or in law, effect any

change in their status as employees of Brown & Co. He

also found that they were engaged in the work of Browns

Engineering for and on behalf of Brown & Co., and that they

had reasonable grounds to expect that the offcial transport

facilities provided to them by the latter will be continued

even after they were so transferred to Browns Engineering,

which expectation was strengthened by the fact that the said

facilities had been continued even after the date of the

transfer for fve more months.

The Arbitrator, taking all relevant evidence into consid-

eration, by his award dated 31st January 1996, which was

published in the Government Gazette bearing No. 1299/18

dated 1st August 2003, determined that the relevant employees

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are each entitled to receive a sum of Rs. 270,000.00 as

travel expenses from 1st June 1992 up to the termination of

their services with effect from 23rd November 1994. He also

found that when the said amounts were added to the other

claims that the 4th, 5th and 6th Respondents had made, they

were entitled to receive respectively sums of Rs. 349,095.37,

Rs. 346,907.00 and Rs. 346,219.00 as total dues, and

further directed Brown & Co. to pay the said sums.

Being aggrieved by the said award of the Arbitrator,

Brown & Co. fled the writ application from which this appeal

arises, seeking a mandate in the nature of a writ of *certiorari*

quashing the said award and a writ of prohibition to prevent

the Commissioner of Labour from taking steps to enforce

the said award. Upon the conclusion of arguments, the

Court of Appeal by its judgment dated 30th November 2007,

dismissed the application of Brown & Co. and refused the

relief prayed for in the petition, without costs. This Court has

granted special leave to appeal, at the instance of Brown &

Co. against the said judgment of the Court of Appeal dated

30th November 2007 on the several substantive questions set

out in paragraph 29 of the petition of Appeal. These included

several questions as to the legality of the award against Brown

& Co. raised on the basis that the transfer from Brown & Co.

to Browns Engineering in effect constituted the termination

of the services of the relevant employees with the former and

the offer of employment by the latter with new and better

conditions of service, and the proper party against whom any

claim could be made, if at all, was Browns Engineering.

However, at the hearing before this Court, learned

President’s Counsel for the Appellant Brown & Co. indicated

that he would not press any of those grounds, and confned

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his submissions to the issue relating to the withholding of

offcial transport facilities, raised in paragraph 29(vi) of the

petition of appeal, which is quoted below in full:-

 (vi) Did the Court of Appeal totally fail to take into

consideration that-

 (a) the claim for cost of travelling was admittedly not

in the terms of the contract;

 (b) the 4th to 6th Respondents (relevant employ-

ees) did not claim that they were entitled to a

company maintained vehicle, but only claimed

that the 7th Respondent (Brown Engineering) did

not provide a loan facility to purchase;

 (c) the Arbitrator himself has stated in his award that

the provision of a vehicle by the company has not

been included as a term of the Letter of Appoint-

ment which is the Contract of Employment, and

therefore the provision of this facility cannot be

considered as obligatory on the employer; and

 (d) in any event, the Arbitrator’s award granting the

cost of travelling for all 30 days of the month for

the entire period of 30 months is arbitrary and

capricious.

It is material to note that this particular dispute involving

the withholding of offcial transport facilities was set out in

the statement of matters in dispute, which formed part of the

order made by the Minister of Labour dated 30th May 1997

by which the reference to arbitration was made in terms of

Section 4(1) of the Industrial Disputes Act No. 43 of 1950, as

subsequently amended, in the following manner:-

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 “1 (a) whether the withholding of the transport facilities

of these three offcers (relevant employees), that is

vehicle maintained by the company and fuel from

the month of June 1992; and

 (b) the withdrawal of the services of a driver to

Mr. S.N. Wickramasinghe (4th Respondent-

Respondent-Respondent) from the said date, is

justifed and if not, to what relief each of them is

entitled?”

The reasoning of the 3rd Respondent-Respondent-

Respondent Arbitrator contained in his Award dated 20th

June 2003 relating to the allowance of Rs. 270,000.00 for

travelling expenses incurred by the relevant employees after

1st June 1992 was as follows:-

 “It is to be mentioned here that provision of a vehicle by

the company has not been included by the Company as

a term in the letter of appointment, which is the contract

of employment. Therefore the provision of this facility

cannot be considered as obligatory on the Employer. *It*

*could rather be considered as a concession that had been*

*provided to the applicants.* Therefore I would consider the

payment of Rs. 300/- as transport expenses per day for

the 30 days in question as a fair rate of calculation. I would

award Rs. 30x30x30 = Rs. 270,000/- as being a fair claim

in this regard to each Applicant.” *(emphasis added)*

Learned President’s Counsel for the Appellant Brown

& Co. submitted that the Arbitrator’s award was perverse,

insofar as the relevant employees had no legal entitle-

ment to offcial transport in terms of their letter of appoint-

ment. He also complained that the Arbitrator had awarded

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Rs. 270,000.00 to each of the relevant employees on the

basis that they had incurred an expense of Rs. 300 per day on

all 30 days of the month for the entire period of two and half

years (30 months), even though certain days included therein

may have been public holidays and Saturdays and Sundays,

which he submitted were non-working days. He submitted

that on an average, there were only 20 working days in each

of the months that fell within the relevant period, and that

the Arbitrator’s award was fundamentally fawed as it was

founded on the fallacious basis that the relevant employees

reported for work on all 30 days during the entire period of

30 months. He also contended that the Arbitrator had relied

upon the documents marked A, B and C which had been

tendered with the written submission of the relevant employees

after the conclusion of evidence, and to that extent, the said

award is irrational and was extraneous material.

Learned President’s Counsel for Brown & Co. submit-

ted that for all these reasons, the part of the award of the

Arbitrator relating to the offcial transport facilities ought to be

quashed on the ground of “Wednesbury Unreasonableness”,

which has acquired the well known tag from the recogni-

tion Green MR accorded to irrationality as a major ground

for judicial review of administrative action in the now

famous decision in *Associated Provincial Picturehouses v.*

*Wednesbury Corporation*(1). Lord Diplock in the later case

of *Council of Civil Service Unions v Minister for the Civil*

*Service*(2) identifed illegality, irrationality and procedural

impropriety as the three grounds for such review, and went

on to describe Wednesbury unreasonableness at 410 thus:-

 “It applies to a decision which is so outrageous in its

defance of logic or accepted moral standards that no

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sensible person who had applied his mind to the question

to be decided could have arrived at it.”

In my opinion, these words are applicable with equal

force to the discretionary powers exercised by an arbitra-

tor, such as the 3rd Respondent-Respondent-Respondent in

an industrial arbitration under Section 4(1) of the Industrial

Disputes Act. It is noteworthy that the said Act provides for

the resolution of Industrial Disputes in various ways. Such

disputes may be settled through collective agreements in

terms of Sections 5 to 10 of the said Act, and may also be

referred under Section 4(2) of the Act to an Industrial Court

for settlement. Industrial disputes may also be settled by

the Commissioner of Labour (which term includes a Labour

Offcer) by conciliation or any other means under Section 2

read with Section 3(1)(b) of the Act, or may be referred by

the Commissioner to an authorized offcer for settlement by

conciliation under Section 3(1)(c) read with Sections 11 to 15

of the Act. An Industrial dispute, irrespective of whether it

is a minor or major dispute, may be referred for arbitration

by the Commissioner with the consent of the parties to the

dispute as contemplated by Section 3(1)(d) read with sections

15A to 21 of the Industrial Disputes Act. In terms of Section

4(1) read with Section 15A to 21 of the said Act, the Minister

may also refer a minor industrial dispute for arbitration to a

Labour Tribunal or to an Arbitrator nominated by the Minister

“notwithstanding that the parties to such dispute or their

representatives do not consent to such reference”. The

dispute that arose between the relevant employees with

Brown & Co. and Browns Engineering, has been referred

for settlement by arbitration in terms of Section 4(1) of the

Industrial Disputes Act, and the parameters of judicial

review of such arbitration has been explored by this Court in

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decisions such as *Thirunavakarasu v. Siriwardena and*

*others*(3), and *Brown & Co. Ltd., and Another v Ratnayake,*

*Arbitrator and Others*(4). As this Court noted in *Thiru-*

*navakarasu v. Siriwardena and others (supra)*, the

Arbitrator in such an industrial arbitration “has

much wider powers both as regards the scope of the

inquiry and the kind of orders he can make than an arbitra-

tor in the civil law” (*per* Wanasundera, J. at 191).

Arbitration under the Industrial Disputes Act is intended

to be even more liberal, informal and fexible than commercial

arbitration, primarily because the Arbitrator is empowered

to make an award which is “ just and equitable”. When an

industrial dispute has been referred under Section 3 (1)(d)

or Section 4(1) of the Industrial Disputes Act to an Arbitrator

for settlement by arbitration, Section 17(1) of the said Act

requires such Arbitrator to “make all 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”.

In my view, the word “make” as used in the said provision,

has the effect of throwing the ball in to the Arbitrator’s court,

so to speak, and requires him to initiate what inquiries he

considers are necessary. The Arbitrator is not simply called

upon “to hold an inquiry”, where the ball would be in the

court of the parties to the dispute and, it would be left to

them to tender what evidence they consider necessary requir-

ing the arbitrator to be just a judge presiding over the inquiry,

the control and progress of which will be in the hands of

the parties themselves or their Counsel. What the Industrial

Disputes Act has done appears to me to be to substitute

in place of the rigid procedures of the law envisaged by the

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“adversarial system”, a new and more fexible procedure,

which is in keeping with the fashion in which equity in

English law gave relief to the litigants from the rigidity of the

common law. The function of the arbitral power in relation

to industrial disputes is to ascertain and declare what in the

opinion of the Arbitrator ought to be the respective rights

and liabilities of the parties as they exist at the moment the

proceedings are instituted. His role is more inquisitorial, and

he has a duty to go in search for the evidence, and he is

not strictly required to follow the provisions of the Evidence

Ordinance in doing so. Just as much as the procedure before

the arbitrator is not governed by the rigid provisions of the

Evidence Ordinance, the procedure followed by him need not

be fettered by the rigidity of the law.

It is in this light that I proceed to examine the submissions

made by learned President’s Counsel for Brown & Co., learned

State Counsel who appeared for the Minister of Labour and

Commissioner General of Labour, and learned Counsel for

the relevant employees in the light of the evidence produced

in the course of the arbitration proceedings. As already noted,

the task of the Arbitrator was no doubt hindered by the fact

that Browns Engineering, which was presumably aware of

the material facts and circumstances, chose not to participate

in the inquiry and to present its case. Although, Brown &

Co. took up the position that it was not aware of the material

facts and circumstances relating to the dispute as it had

arisen after the transfer of the relevant employees to Browns

Engineering, a position which is not too convincing in the

light of the relationship between Browns & Co. and Browns

Engineering, the relevant employees have testifed before

the Arbitrator with respect to the material facts and circum-

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stances and they have been subjected to cross-examination

by learned President’s Counsel for Brown & Co.

Learned President’s Counsel for Brown & Co. has

submitted that the relevant employees had no legal entitlement

to offcial transport in terms of their letters of appointment,

which did not expressly provide that they were entitled to

the facility of a company vehicle for their offcial and/or

personal transportation. However, this submission completely

overlooks the facts that the jurisdiction of the Arbitrator is an

equitable one, and he is not constrained by the provisions of

the contract of employment. Furthermore, the Arbitrator had

in his award viewed the provision of a company vehicle as

a “concession” rather than a legal obligation, and the Court

of Appeal has in its impugned judgment, endorsed this view

and concluded that there was no error of law in the award

to justify the exercise of its supervisory jurisdiction. I see no

reason to differ from the approach of the Arbitrator and the

Court of Appeal.

It is clear from the testimony of the relevant employees

before the Arbitrator that they were each provided by Brown

& Co. with a company vehicle for not only offcial but also

personal travel, and that the vehicles so provided were in fact

sold to them within fve months of the transfer to Browns

Engineering. The 4th Respondent-Respondent-Respondent,

S.N. Wickramasinghe, who was the Assistant Works Manager

at the Ratmalana workshop has testifed that during the

period prior to 1st January 1992, he was provided with a

company owned petrol vehicle with a driver and 150 litres of

petrol (vide page 196 of the brief). He also produced in the

course of his testimony, a copy of the circular letter on the

subject of consumption of fuel dated 24th August 1989 marked

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AB 19 signed by the Administration Manager of Brown & Co

(vide proceedings at page 207 and the document AB 19 at

page 613 of the brief), which is clear evidence of the fact that

a company vehicle had been provided to him and other senior

engineers in service for offcial and personal use. He further

testifed that just after the transfer to Browns Engineering,

the Management of that company “agreed to provide us with

better vehicles with the same facilities, but they did not keep

up the promise”. The testimony of this respondent as well as

the other two relevant employees clearly show that the facility

of a company vehicle had been extended to them even after

their transfer to Brown’s Engineering for fve more months

till the end of May 1992, which no doubt created a legitimate

expectation in their minds that the facility will be continued

throughout their service. It also appears from the testimony

of the 4th Respondent-Respondent-Respondent that in May

1992 Brown & Co. sold to them the offcial vehicles that had

been used by them, and the facility of providing a company

vehicle with a driver and fuel, was discontinued with effect

from June 1992. (page 196 of the brief).

The testimony of 6th Respondent-Respondent-Respon-

dent, S.T.N. Perera was substantially to the same effect, and

at pages 391 to 392 of the brief, he has stated that he too was

provided with a petrol vehicle for offcial and personal use.

He was specially questioned about the quantity of fuel he was

entitled to, and he responded in the following manner:-

 Q- Who paid for the fuel?

 A- The Company.

 Q- Was there a limit on the fuel?

 A- 150 Litres per month.

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 Q- Were there any restrictive conditions attached to the

use of vehicles? Were you allowed to use for your

personal travelling?

 A- Yes.

 Q- If you use more than 150 Litres, then what will

happen?

 A- I will have to pay for that.

It appears from the evidence of the 5th Respondent-

Respondent-Respondent, P.A.Q. Fernando, that unlike in the

case of the 4th and 6th Respondent-Respondent-Respondents,

he was provided with a diesel vehicle, and he has testifed

at page 418 of the brief that he was given Rs. 3000 worth of

diesel fuel per month, and that whenever he had to travel to

distant outstations like Nuwara Eliya, he was given an extra

fuel allowance.

It is also apparent from the evidence recorded by the

Arbitrator that the facility of a company driver was provided

only to S.N. Wickramasinghe, the 4th Respondent-Respon-

dent-Respondent, and the other two relevant employees

have been agitating that they too should be provided with

company drivers, or in the alternative an allowance suffcient

to hire a driver of their own. The divergence in the manner

in which the company vehicle was provided to each of the

relevant employees, is in fact refected in the different amounts

(set out in the table below) claimed by them as travelling

expenses on account of the said facility being discontinued

with effect from June, 1992. The amounts set out in the table

that appears below have been extracted from the claims of

the relevant employees which were tendered to the Arbitrator

along with their written submission marked A, B and C.

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Respondent- Monthly Monthly Driver’s Total

Respondent rental for expense Salary claimed

(Rs)

Respondent the vehicle incurred per month

(Rs) for fuel (Rs)

for offcial

travel (Rs)

4th 15,000 5,250 3,000 23,250

5th 15,000 3,000 - 18,000

6th 10,000 3,500 - 13,500

Learned President’s Counsel has strongly objected to the

reliance placed by the Arbitrator on the documents marked

A, B and C, which were not marked in evidence and tendered

only with the written submissions of the relevant employees

to the Arbitrator. However, it is clear that these documents

were not intended to be evidence in the case, as learned Pres-

ident’s Counsel for Brown & Co. seems to contend, but were

merely summaries of their respective claims under different

heads which were helpful not only to the Arbitrator, but also

to the Court of Appeal and this Court in understanding their

case.

Learned President’s Counsel has also submitted that

the Arbitrator’s award was perverse, as a uniform sum of

Rs. 270,000.00 has been awarded to each of the relevant

employees on the basis that they had incurred an expense

of Rs. 300 per day on all 30 days of the month for the entire

period of two and half years (30 months), despite the differ-

ences in the facts and circumstances relating to the claims of

each relevant employee, and the fact that on an average, there

were only 20 working days in each of the months that fell

within the relevant period. There is no doubt that there was

some disparity in the nature of the transport facility extended

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by Brown & Co. and Browns Engineering to the relevant

employees, and it would appear that the Arbitrator has made

an award on the lower side, based on the comparatively lower

claim of the 6th Respondent-Respondent-Respondent, whose

total claim amounted to only Rs. 13,500.00 per month.

What has been awarded by the Arbitrator to all the relevant

employees was Rs. 9,000.00 per month (Rs. 300 x 30 = 9,000),

which is substantially lower than what has been claimed

by the relevant employees. In fact, the award at frst sight

appears to be grossly inadequate from the perspective of

the 4th Respondent-Respondent-Respondent, who was the

relevant employee who was actually provided with a company

driver, but he has chosen not to invoke the writ jurisdiction of

the Court of Appeal in this regard, and has suffered most by

reason of the long period of time to resolve the dispute.

I do not consider that there is any merit in the other

submission of learned President’s Counsel that any redress

afforded by the Arbitrator by his award should have been on

the basis of 20 working days per month. In the frst place,

there is clear evidence to the effect that the relevant employees

had to report for work of travel on duty even on non-work-

ing days, and in any event, the relevant employees have all

testifed that they were permitted to utilize the company

vehicles for their personal use as well, which is now the norm

in the private sector.

It is abundantly clear that the Arbitrator has relied on the

testimony of the said employees and the documents marked

in the course of their testimony, in arriving at his fndings.

The 4th Respondent-Respondent-Respondent, has produced

in evidence a copy of the circular letter on the subject of

consumption of fuel dated 24th August 1989 marked AB 19,

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wherein it is specifcally stated that “it has been decided to

allocate a fxed quantity of fuel to each vehicle per month to

be used by the engineers” (vide proceedings at page 207 and

the document AB 19 at page 613 of the brief). He has testifed

that in his case the allocation was 150 litres of petrol per

month, which at the then prevailing price of petrol, which

learned President’s Counsel conceded was Rs. 35.00 per litre,

justifed the award of Rs.5,250 per month or Rs. 175 per day

as petrol allowance alone. I fnd that the rate of Rs. 300 per

day allowed by the arbitrator as travelling expenses was a

composite sum intended to cover three heads of expendi-

ture, namely, the rental value of the vehicles belonging to the

relevant employees which they had graciously made available

for their offcial travel from 1st June 1992, driver’s salary and

cost of fuel. It is relevant to note that with respect to each of

these heads the relevant employees had claimed much higher

sums in the documents tendered with the written submissions

marked A, B and C. Of course, it is in evidence that the 4th

Respondent-Respondent-Respondent, who used a diesel

vehicle, was paid only Rs. 3000.00 by Brown & Co. as the

monthly fuel allowance, which works out to only Rs. 100 per

month, and what the Arbitrator has endeavored to do was to

arrive at a reasonable and uniform fgure for the cost of fuel,

car rental and driver’s salary. In my considered opinion, even

if one takes Rs. 100 to be the daily cost of fuel, the award of

Rs. 300.00 per day as the travelling allowance, appears to

be very reasonable, as they had to use their own personal

vehicles and fuel for their offcial travel from 1st June 1992

and allowing an additional sum of Rs. 200 per day to cover

the car rental and driver’s salary is not excessive. The award

is certainly supported by evidence, and is very reasonable.

It is important not to lose sight of the fact that this

appeal arises from an application for the writ of *certiorari* to

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quash the award of the Arbitrator in an industrial arbitration,

and the Court of Appeal which refused the application in the

circumstances of this case did so in the exercise of its

supervisory jurisdiction and not in its capacity as an appellate

court. In this context, it is important to recall the following

words of Green MR in *Provincial Picturehouses v. Wednesbury*

*Corporation (Supra)*, at 228 to 230:-

 “As I have said, it must always be remembered that the

court is not a court of appeal. When discretion of this

kind is granted the law recognizes certain principles

upon which that discretion must be exercised, but within

the four corners of those principles the discretion, in my

opinion, is an absolute one and cannot be questioned in

any court of law. What then are those principles? They

are well understood. They are principles which the court

looks to in considering any question of discretion of this

kind. The exercise of such a discretion must be a real

exercise of the discretion. If, in the statute conferring the

discretion, there is to be found expressly or by implica-

tion matters which the authority exercising the discretion

ought to have regard to, then in exercising the discretion

it must have regard to those matters. Conversely, if the

nature of the subject matter and the general interpreta-

tion of the Act make it clear that certain matters would

not be germane to the matter in question, the authority

must disregard those irrelevant collateral matters……..

 It is true the discretion must be exercised reasonably. Now

what does that mean? Lawyers familiar with the phrase-

ology commonly used in relation to exercise of statutory

discretions often use the word “unreasonable” in a rather

comprehensive sense. It has frequently been used and

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is frequently used as a general description of the things

that must not be done. For instance, a person entrusted

with a discretion must, so to speak, direct himself

properly in law. He must call his own attention to the

matters which he is bound to consider. He must exclude

from his consideration matters which are irrelevant to

what he has to consider. If he does not obey those rules,

he may truly be said, and often is said, to be acting “un-

reasonably”………

 It is true to say that, *If a decision on a competent mat-*

*ter is so unreasonable that no reasonable authority could*

*ever have come to it, then the courts can interfere.* That, I

think, is quite right; but to prove a case of that kind would

require something overwhelming, and, in this case, the

facts do not come anywhere near anything of that kind.

I think Mr. Gallop in the end agreed that his proposition

that the decision of the local authority can be upset if it

is proved to be unreasonable, really meant that it must

be proved to be unreasonable in the sense that the court

considers it to be a decision that no reasonable body

could have come to ……..” *(emphasis added)*

In all the circumstances of this case, I am of the con-

sidered opinion that the award is not vitiated by a failure to

consider relevant facts or taking into consideration irrelevant

facts and in particular does not suffer from what had been

termed “Wednesbury unreasonableness” and is certainly not

“outrageous” in the sense of the term used by Lord Diplock

in his *dictum* in *Council of Civil Service Unions v Minister for*

*the Civil Service (supra)* which has been quoted earlier in this

judgment.

For the aforesaid reasons, I hold that –

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(a) the Court of Appeal did not err in affrming the fnding of

the Arbitrator that although reimbursement of the cost

of travelling was not expressly provided for in the letter

of appointment issued to the relevant employees by

Brown & Co., it was just and equitable to award them an

allowance to meet the offcial travelling expenses, specially

considering the fact that they had been provided with a

company vehicle for their offcial and personal travel in

the past and the withholding of this facility had given rise

to an industrial dispute;

(b) the 4th to 6th Respondent-Respondent-Respondents had in

fact, claimed that they were entitled to a company main-

tained vehicle, and not merely a loan facility to purchase

a vehicle;

(c) the Court of Appeal has affrmed the fnding of the

Arbitrator that the provision of a company vehicle was not

obligatory but was a concession granted to the relevant

employees with respect to the continuation of which they

had a reasonable expectation and

(d) the Arbitrator’s award granting the cost of travelling for all

30 days of the month for the entire period of 30 months

was justifed and supported by evidence and was not

arbitrary or capricious.

I am of the opinion that the impugned award of the

Arbitrator is just and equitable, and there are no errors on

the face of the record to justify intervention by way of writ

of *certiorari.* However, before parting with this judgment, I

also wish to observe that the inquiry before the Arbitrator

which commenced on 18th September 1997 concluded on 25th

October 2002, and the lengthy proceeding and the consequent

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delay has defeated the objective of the reference for arbitra-

tion made by the relevant Minister in terms of Section 4(1) of

the Industrial Disputes Act. In particular, it is observed that

the proceedings before the Arbitrator very much resembled

court proceedings, and demonstrated a failure on the part of

the Arbitrator to take advantage of the equitable jurisdiction

conferred, and the fexibility in proceedings envisaged, by the

said Act, which has expressly provided in Section 36(4) that

the provisions of even the Evidence Ordinance will not apply

thereto. It is a great pity that due to the delay resulting from

the protracted arbitration proceedings and the subsequent

judicial proceedings, a minor dispute that arose in 1992 is

still unresolved after the lapse of nearly two decades.

I affrm the judgment of the Court of Appeal dated 30th

November 2007, and dismiss the appeal. In all the circum-

stances of this case, I award the 4th, 5th, and 6th Respondent-

Respondent-Respondents a sum of Rs. 35,000.00 each as

cost of this appeal.

**J.A.N. DE SILVA, C.J.** -I agree.

**RATNAYAKE, J.** - I agree.

*Appeal dismissed.*

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**HATTON NATIONAL BANk LTD.,V. M.S.HEBTULABHOY & CO.**

**LIMITED AND OTHERS**

SUPREME COURT

AMARATUNGA J.

IMAM, J. AND

SURESH CHANDRA, J.

S.C.APPEAL NO. 134 A/2009

C.H.C. CASE NO. 281/2001 (1)

SEPTEMBER, 17TH , 2010

***Validity of a proxy – objections raised belatedly after fve years,***

***at the very end of the proceedings – Failure to take jurisdictional***

***objections.***

The plaintiff fled action against the defendant on 19.11.2001 praying

for the recovery of a sum of Rs. 89.3 million together with interest there-

on. The case has proceeded up to the stage of fling of the answer and

thereafter much time has been spent on technical objections in connec-

tion with the fling of proxies by the plaintiff.

The substituted Plaintiff fled a petition and affdavit dated 10th

January 2008 along with a fresh proxy dated 9.1.2008 of the original

plaintiff signed by the Power of Attorney holder of the Plaintiff – bank

and prayed that the said proxy dated 9.1.2008 be accepted. The

defendant fled objections to the said application, the learned Judge

of the Commercial High Court delivered his order dated 8th July 2009

refusing to accept the said proxy dated 9.1.2008 on the ground that

the original Plaintiff was no longer a party in the case. Against order

substituted Plaintiff fled an application for leave to appeal to the

Supreme Court and the Supreme Court granted leave on the following

questions.

1. Has the learned High Court Judge erred in holding that the

substitution of the substituted Plaintiff Bank raised a legal bar to

the subsequent curing of any defect which may have existed in the

proxy fled by the original plaintiff bank;

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2. Has the learned High Court Judge erred in failing to realize that

the substituted Plaintiff was entitled in law to tender the proxy

marked X17 of the original Plaintiff bank for the purpose of regu-

larizing the record if any defect had existed in the original proxy

marked X2;

3. Has the learned High Court Judge erred in failing to correctly

apply the principle of law that, a defect in a proxy can be cured

provided it is evident that the person executing the proxy intended

to grant the authority of that proxy to the Attorney-at-law in whose

favour the proxy has been executed.

4. Where the party whose proxy is sought to be rectifed is not before

Court, can a party substituted in his place rectify an error in the

original proxy and tender a new proxy for the original party.

**Held:**

(1) Once substitution had taken place and was affrmed by the

Supreme Court on being challenged by the Defendant, the appli-

cation of the Defendant regarding the validity of the proxy raised

after about fve years from the time of fling of the action should

not have been allowed.

(2) Jurisdictional objections are required to be taken at the frst

opportunity, the failure of which would constitute acquiescence to

jurisdiction of the Court”.

per Suresh Chandra, J.—

 “The objections regarding the proxy was raised only after the

substitution of the Plaintiff had taken place, and after the said sub-

stitution was challenged in the Supreme Court, which objection

was taken by the defendant almost fve years after entering an

appearance in the case. Once the substituted plaintiff was in place

the case should have proceeded from that point.”

**AppEAL** from the order dated 8th July 2009 of the Commercial High

Court.

**Cases referred to:**

(1) *Udeshi V. Mather –* (1988) 1 SLR 12

(2) *Paul Coir (Pvt.) Ltd. V.Waas* – (2002)1 SLR 13

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(3) *Pinto V. Trelleborg Lanka – (Pvt) Ltd.* (2003) 3 SLR 214

(4) *S.P.Gunathilaka V. Sunil Ekanayake –* S.C. 26/2009 decided on

15.12.2010

*Prasanna Jayawardena* for substituted – Plaintiff – Appellant

*C.J. Fernando* for Defendant – Respondent

*Cur.adv.vult*

June 28th 2011

**SuRESH CHANDRA J.**

This is an appeal from the order dated 8th July 2009 of

the Commercial High Court.

The Plaintiff Bank fled action on 19th November 2001

against the defendant praying for the recovery of a sum of

Rs. 89.3 Million together with interest due thereon. The

Defendant fled answer on 26th February 2004 praying for

a dismissal of the plaintiff’s action. The case was thereafter

fxed for trial.

On 20th January 2005 the substituted Plaintiff made an

application to have itself substituted in place of the original

plaintiff in terms of section 404 of the Civil Procedure Code

on the ground that the business of the original plaintiff in

Sri Lanka had been transferred to the Substituted Plaintiff

Bank. On 9th May 2005 the Defendant fled its objections to

the proposed substitution. By order dated 5th August 2005

Court allowed the application for substitution.

The Defendant made an application against the said

order for substitution to this Court and the said applica-

tion was dismissed. On 30th January 2006 the defendant

had made an application in open Court to the effect that the

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original proxy fled by the original plaintiff was defective and

the defendant stated it would make an application in future.

The Original plaintiff fled a fresh proxy dated 28th Febru-

ary 2006 by motion dated 3rd March 2006. The Defendant

on 13th March 2006 fled a motion and moved to have the

case dismissed on the basis that the original proxy fled by

the original plaintiff was defective. The substituted Plaintiff

fled its statement of objections to the said application of the

Defendant on 15th May 2006.

Thereafter the substituted Plaintiff by motion dated 7th

August 2006 tendered a fresh proxy dated 2nd August 2006

on behalf of the original plaintiff setting out the fact that

the substituted plaintiff had recently become aware that the

aforesaid proxy dated 28th February 2006 had been defective

due to inadvertent clerical and/or typographical errors and

moving that the said fresh proxy dated 2nd August 2006 be

accepted. The defendant fled written submissions objecting

to the proxy dated 2nd August 2006. The defendant’s then

registered Attorneys-at-Law withdrew the proxy fled by them

on behalf of the defendant and on 19th March 2007 a new

proxy given by the Defendant to another Attorney-at-Law was

tendered on behalf of the defendant and the defendant made

an application to fle a further statement of objections.

The defendant fled its statement of objections objecting

to the substituted plaintiff’s statement of objections dated

15th May 2006. Thereafter, the Commercial High Court

directed the substituted plaintiff to fle a petition in this

connection and when the case had been called on 21st

November 2007 for inquiry the substituted plaintiff withdrew

its earlier applications and moved to fle a petition praying

for the acceptance of a corrected proxy signed by the original

plaintiff.

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Accordingly the substituted plaintiff fled a petition dated

10th January 2008 along with an annexed affdavit and a fresh

proxy dated 9th January 2008 of the original plaintiff signed

by the Power of Attorney holder of the original plaintiff bank

and prayed that the said fresh proxy dated 9th January 2008

be accepted and that the said fresh proxy be fled of record.

The defendant fled its statement of objections dated 19th

March 2008 and the parties had agreed to have the matter

regarding the acceptance of the proxy dated 9th January 2008

be decided by way of written submissions which they fled.

The learned Judge of the Commercial High Court delivered

his order on 8th July 2009 refusing to accept the aforesaid

proxy dated 9th January 2008 on the basis that the original

plaintiff was no longer a party in the case.

The Substituted plaintiff on making an application

for leave to appeal to this court, leave was granted on 10th

November 2009 on the following question of law-

(i) Has the learned High Court Judge erred in holding

that the substitution of the substituted plaintiff Bank

raised a legal bar to the subsequent curing of any

defect which may have existed in the proxy fled by

the original plaintiff bank;

(ii) Has the learned High Court Judge erred in failing to

realize that the substituted plaintiff was entitled in

law to tender the proxy marked X17 of the original

plaintiff bank for the purpose of regularizing the

record if any defect had existed in the original proxy

marked X2;

(iii) Has the learned High Court Judge erred in failing

to correctly apply the principle of law that, a defect

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in a proxy can be cured provided it is evident that

the person executing the proxy intended to grant the

authority of that proxy to the Attorney-at-law in whose

favour the proxy has been executed.

(iv) Where the party whose proxy is sought to be rectifed

is not before Court, can a party substituted in his

place rectify an error in the original proxy and tender

a new proxy for the original party.

This case which was instituted in November 2001 has

been proceeded with only up to the stage of the fling of

answer by the defendant so far and throughout the interven-

ing period much time has been spent on technical objections

regarding the fling of proxies, rectifcations and objections

regarding substitution. This is the second time that it has

come up to the Supreme Court as it had come up earlier

regarding the question of substitution which was rejected by

this Court in 2006.

It is rather disheartening to note that the objection

regarding the defect in the proxy had been raised by the

defendant for the frst time in January 2006 which was

after about fve years from the fling of the original action and

that too after the substitution referred to above had taken

place. From then onwards it had been a case of raising

objections to the fling of proxies which was done by the plaintiff

apparently to cure defects in the original proxy if any as

stated by them.

The plaintiff has fled three proxies thereafter seeking

to cure defects in the proxies. It is the last proxy dated 9th

January 2008 which is the subject matter of the present

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application before Court. It is to be noted it is only against the

last proxy that was fled by the plaintiff that the Court has

made an order.

This begs the question as to the validity of the other

three proxies fled on behalf of the plaintiff and the substi-

tuted plaintiff which remain in the record. There is of course

one thread running through all these proxies, it is the same

Attorneys-at-law who have been authorized by the plaintiff

and the substituted plaintiff which makes it clear that the

intention of the plaintiff and the substituted plaintiff to

authorise the same Attorneys-at-law regarding their action

against the defendant, which basis has been accepted in a

series of cases. Vide *Udeshi v Mather*(1) , *Paul Coir (Pvt) Ltd v*

*Waas*(2); *Pinto v Trelleborg Lanka (Pvt) Ltd*(3).

The learned High Court Judge has refused to accept the

proxy dated 9th January 2008 on the basis that a defective

proxy can be cured only if there was no positive rule of law

against such curing. Having considered the cases regarding

the curing of defective proxies the learned High Court Judge

has arrived at this conclusion.

The Defendant in their written submission have stated

that once the substitution has been effected (which was chal-

lenged by them and which failed) the original party has no

part to play in the action and the subsequent fling of the

proxy in 2008 has no validity. Although the substituted party

steps into the shoes of the plaintiff, it does not debar the

plaintiff to cure a technical defect such as the curing of a

proxy which is defective. The substituted plaintiff has taken

it upon itself after the defendant had raised a query regard-

ing the original proxy after the substitution had taken place,

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to have taken steps to cure what it considered as defective

proxies if any while stating that the original proxy was valid

and went to the extent of stating that those steps were being

taken out of an abundance of caution without prejudice to

the validity of the original proxy. This would mean that the

original proxy was still considered valid by the plaintiff and

the substituted plaintiff.

It is my view that once substitution had taken place

and was affrmed by this Court on being challenged by the

defendant, the application of the defendant regarding the

validity of the proxy raised after about fve years from the

time of fling of the action should not have been allowed. In

the recent decision of the Supreme Court, *S.P.Gunathilake vs*

*Sunil Ekanayake* (4), Chief Justice J.A.N. de Silva has exhaus-

tively dealt with the effect of section 27 of the Civil Procedure

Code, taking into consideration all the relevant cases and in

respect of the objection taken belatedly regarding the defect

or absence of a proxy observed thus “if jurisdictional objec-

tions are permitted at the very end of proceedings and up-

held, all proceedings would have to be held void thus wasting

precious judicial time and resources and causing grave in-

justices. Therefore jurisdictional objections are required to be

taken at the frst opportunity, the failure of which would con-

stitute acquiescence to jurisdiction of the court.” In the pres-

ent case the objection regarding the proxy was raised only

after the substitution of the plaintiff had taken place, and

after the said substitution was challenged in the Supreme

Court, which objection was taken by the defendant almost

fve years after entering an appearance in the case. Once

the substituted plaintiff was in place the case should have

proceeded from that point.

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In the above circumstances I am of the view that the

order of the learned High Court Judge cannot stand and the

questions of law on which leave was granted by this Court are

answered in favour of the plaintiff. The appeal of the plaintiff

is allowed and the order of the learned High Court Judge

is set aside and the High Court is directed to proceed with

the trial in the case expeditiously. As both parties have

contributed to the delay in proceeding with the case on

technicalities, each party will bear its own cost.

**AMARATuNGA J.** - I agree.

**IMAM J.-**I agree.

*Appeal allowed. The order of the High Court Judge is set aside*

*and the High Court is directed to proceed with the trial.*