

SIVA SITHAMPARAM
v
NATIONAL PAPER CORPORATION AND OTHERS

COURT OF APPEAL

JAYASINGHE, J.

EDIRISURIYA, J.

CA 1251/98

ARBITRATION NO. A 2629

Arbitration Award – Doctrine of Severability – Could a writ of certiorari be issued to quash a part of the award?

After petitioner was reinstated a dispute arose between the petitioner and the respondents regarding the petitioner's increments and promotion. The matter was referred for Arbitration, of the four matters inquired into, the award was made only as regards salary increments.

The Petitioner sought to have the award reviewed, and sought relief No. 2 only – non promotion of the Employees to Executive Grade, after passing the EB Examination.

Held:

- (i) Unless the invalid part is inextricably interconnected with the valid the court is entitled to set aside or disregard the invalid part having the rest intact, it is appropriate to sever what is invalid if the character of what remains is unaffected.
- (ii) Item 2 in the Arbitrator's award is severable from the rest of the order. The Arbitrator has misdirected himself in coming to a finding that it was amply clear that the examination that the workman had passed was not an Efficiency Bar examination.

APPLICATION for writ of certiorari.

Cases referred to:

1. *New Dimbulla's Company Ltd. v R.L. Brohier & others* - 64 NLR 380
2. *Shanmugam v Maskeliya Plantations Ltd.*, 1996 1 Sri LR 208 at 213
3. S.C. Application 561/74 – SCM 21.10.75 – BASL News Digest Supplement September 75 – June 1996.
4. *Regina v Bournemouth Licensing Justices* – 1963 1 WLR 320
5. *Kent County Council v Kenworthy Investment (Kent) Ltd.* 1971 AC 72
6. *Potato Marketing Board v Merrik* – 1958 2 QB 317

S.N. Vijithsingh for petitioner.

Gamini Senanayake for 1st and 2nd respondents.

A. Gnanathanan, D.S.G. for 3rd respondent.

Cur.adv.vult.

September 6, 2002

JAYASINGHE, J.

This is an application for *writ of certiorari* to quash the award made in so far it relates to the findings in respect of dispute 2 to 4 set out in P5. 01

Mr. Vijithsingh, Counsel for the petitioner states that the petitioner was interdicted on 03. 04. 1984 and he was prosecuted before the Magistrate Court of Fort and was discharged and thereafter reinstated on 12.09. 1986. Upon the petitioner being reinstated his increments promotions up to the Special Grade have been granted, vide P1-B at page 6. He was appointed to the Special Grade on 01.01. 1989 and this fact has not been disputed by the respondents. Thereafter a dispute arose between the petitioner and respondents regarding the petitioner's increments and promotion and the said dispute was referred for arbitration for determination: 10

1. Whether non-granting of salary increment to the petitioner for the years 1985, 1986 and 1987 is justified and what relief is he entitled to?
2. Whether non-promotion of the petitioner to Executive Grade on his passing the efficiency Bar examination is justified.
3. Whether the non-granting of the monthly risk allowance annual bonus and incentive allowance is justified and 20
4. Whether non provision of free text books to his three children and subsidized textiles is justified.

The Arbitrator after inquiry granted relief as at 1 of P5 but held that the petitioner is not entitled to reliefs as set out in 2,3, and 4.

The present application is to have the Arbitrator's award reviewed by this Court.

Mr. Vijithsingh for the petitioner however submitted before this Court that he is not asking relief as per 3 and 4 above but confining himself to the question of non-promotion of the petitioner to the executive grade as at 2 above of P5. 30

Mr. Senanayake counsel for the respondent submitted that the petitioner was prosecuted on two occasions viz

1. On an allegation that he aided and abetted the disposal of stolen property and;

2. Thereafter in a case of cheating in relation to a job agency.

That the petitioner has been discharged from proceedings in the cheating case and convicted on his own plea where he was accused of aiding and abetting for the disposal of stolen property.

However we are unable to take cognizance of this fact for the reason that the respondents sought to reinstate the petitioner as from 12.09.1986 with back wages. The respondents did not seek to institute a domestic inquiry for the determination of the suitability of retaining the petitioner in service. The respondents have also promoted the petitioner up to the Special Grade but refused promotion to the Executive Grade thereafter. 40

Mr. Vijithsingh states that the petitioner sat the examination at the Sri Lanka Institute for Development Administration and thereafter the examination conducted by the Eastern University of Sri Lanka which he successfully completed. 50

Mr. G. Senanayake however stated that the respondents do not recognize the examination which the petitioner claims that he has successfully completed.

We have considered the submissions of counsel. We find that if the respondents found the petitioner suitable enough to be promoted up to the Special Grade in the clerical service after reinstatement. Therefore there cannot be a serious impediment or objection to him being promoted to Executive grade.

Respondents are unable to demonstrate before this Court any reason why the petitioner ought not to have been promoted to the Executive Grade, except that he was under interdiction between the years 1984 to 1986 and that he was convicted as stated above, which the respondent did not take cognizance of. 60

We are satisfied that there is some injustice that has occasioned to the petitioner and the inaction of the respondents to institute disciplinary proceedings to ascertain the suitability of the petitioner to be promoted to the executive grade cannot in any way deprive the petitioner of what is now due to him. We are of the view

that this is a fit case for this Court to intervene. We do not however interfere with the findings of the Arbitrator in respect of dispute of 3 and 4 as Mr. Vijithsingh did not press for relief thereof.

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We are of the view that the arbitrator has misdirected himself in coming to a finding that it was "amply - clear that the examinations that the workman had passed was not an efficiency bar examination." Mr. Vijithsingh contended that the "Efficiency Bar Examination" is for Public Servants in terms of section 15 of chapter 2 of the Establishment Code.

Mr. Vijithsingh then submitted that this Court is entitled to quash a part of the award which is erroneous and to that extent the award is in excess of Jurisdiction. He relied on *New Dimbulla's Company Ltd., v R.L. Brohier and others* ⁽¹⁾ where Weerasuriya, J. stated that "where an arbitrator, when giving his award, misdirects himself in *interpreting* a previous award in a different case, the misdirection would be an error of law on the face of the award and would render such part of the award as is affected by the error liable to be quashed by *certiorari*." He also referred *Halsbury's Administrative Law Vol I page 29 in chapter 26* "where it is provided that an order or other instrument or an action may be partly valid and partly in valid. Unless the invalid part is inextricably interconnected with the valid, the Court is entitled to set aside or disregard the invalid part leaving the rest intact....It may be appropriate to server what is invalid if the character of what remains is unaffected."

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In *Shanmugam v Maskeliya Plantation Ltd.* ⁽²⁾ where G.P.S.de Silva, C J. had held that *writ of certiorari* will issue to quash that part of the award which relate to the appellants claim for extension in service.

Mr. Vijithsingh also referred us to a case reported in the digest of judgments in *BASL News* ⁽³⁾ where it has been held that the Supreme Court was not exercising an appellate jurisdiction and could therefore vary an Arbitrator's award unless the defective part was severable so that the remainder can be left intact. It was held that the Supreme Court cannot substitute its own order or refer the award back with the direction as to the proper application of the law.

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In *Regina v Bournemouth Licensing Justices* (4) it was held that
 ".....the order of certiorari should go to quash that part of
 the order requiring the appellant to pay....."

In *Kent County Counsel v Kenworthy Investments (Kent) Ltd.*(5).

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"Lord Reid and Lord Upjohn dissenting observed that "if condition (ii) were held ultra vires, it would be severable because it does not alter the character of the permission given. The majority of their Lordships held that condition ii was ultra vires and therefore did not consider the severability of what is bad. In *Potato Marketing Board v Merricks* (6) Devlin, J. observed that "In all these cases the question to be asked is whether the bad part can be effectively severed from the good. I think that the demand relating to total arable acreage of the farm can be struck out from the farm without altering the character of the rest of it".

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Even though these cases referred to above do not relate to arbitration proceedings by embording the principle that what is bad could be served from the rest of it can be done without altering the character of the rest of it.

We have considered the submissions of counsel. We are of the view that item(2) referred to in the arbitrator's award is severable from the rest of the order. We accordingly for reasons stated above set aside item (2) of the award and direct the respondent to appoint the petitioner to the executive grade when the appointment becomes due.

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Subject to above that part of the arbitrator's award is set aside. No costs.

EDIRISURIYA, J. - I agree.

Item 2 of the award set aside.

Respondent directed to appoint the Petitioner to the Executive Grade when appointment becomes due.