

EKSATH KAMKARU SAMITHIYA
V.
CEYLON PRINTERS LIMITED AND OTHERS

SUPREME COURT.

G.P.S. DE SILVA, C.J.

RAMANATHAN, J. AND

ANANDACOOMARASWAMY, J.

S.C. APPEAL NO.114/94.

S.C. SPECIAL L.A. NO. 283/93.

C.A. APPLICATION NO. 369/93.

17TH JUNE, AND 15TH JULY, 1996.

Certiorari-Industrial Disputes Act-Reference of dispute for arbitration-dispute regarding a clause in a collective agreement, selectively extended to the employer-sections 4(1) and 10 of the Act-vires of the reference-Jurisdiction of the Arbitrator.

The Minister, acting under section 4(1) of the Industrial Disputes Act, referred to an Arbitrator a dispute between the Appellant union and the Employers-Respondents. The first matter referred for arbitration was in respect of the payment of a Non-recurring Cost of Living Gratuity, payable in terms of a clause in a collective agreement which clause had been extended by the Minister to the Employers-Respondents in the purported exercise of his power under section 10 of the Industrial Disputes Act.

Held:

As the selective extension of the clause relating to the Non-recurring cost of Living Gratuity is invalid in law, the reference of the dispute is itself bad in law. The said reference was an act which amounted to doing indirectly what the Minister could not do directly; hence the Arbitrator had no jurisdiction to embark upon the arbitration.

Cases referred to:

1. *A.F. Jones (Exports) Ceylon Ltd., v. Balasubramaniam* (1982)2 Sri L.R. 793.
2. *Frewin Co., Ltd. v. Atapattu* (1993) 2 Sri L.R. 53.
3. *Kodakanpillai v. Mudanayake* (1953)54 NLR 433.
4. *Bandaranaike v. Weeraratne and Others* (1981)1 Sri L.R. 10, 16.
5. *Perera v. Commissioner of National Housing* 77 NLR 361.
6. *Thambimuttu v. Thambipillai* 77 NLR 97.

APPEAL from the judgment of the Court of Appeal.

D.W. Abeykoon, P.C. with W.D. Deen, Miss. Priyadarshini Premaratne and Ms. Nuwanthi Dias for Appellant.

Faisz Musthapha, P.C. with S. Mahenthiran for Petitioners-Respondents.

K.C. Kamalabayson ASG for State.

Cur.adv.vult.

4th October, 1996.

ANANDACOOMARASWAMY, J.

This is an appeal from the judgment of the Court of Appeal issuing a Writ of Certiorari quashing the order of the Arbitrator the 3rd Respondent- Respondent dated 28.04.1993.

The facts relevant to this appeal are briefly as follows :-

The Appellant is a Trade Union. On 15.08.1983 the Minister of Labour under section 4(1) of the Industrial Disputes Act referred the dispute between the Appellant and the Petitioners-Respondents for settlement by arbitration to Mr. H.C. Gunewardene who was appointed as the Arbitrator. The Petitioners-Respondents challenged the jurisdiction of the Arbitrator and the reference made by the Minister in an Application for Writs of Certiorari and Prohibition both in the Court of Appeal and the Supreme Court. These Applications were dismissed both by the Court of Appeal and the Supreme Court which held the references valid. After the application was finally dismissed by the Supreme Court, the Arbitrator Mr.H.C. Gunewardene proceeded to record evidence and hear the matter. The evidence had been concluded and written submissions also had been filed. The Arbitrator Mr H.C. Gunewardene died in September, 1992. Thereafter the then Minister of Labour Mr. D.B. Wijetunga acting under section 4(1) of the Industrial Disputes Act referred the dispute to Mr. H.P. Abeysekera the new Arbitrator who is a Respondent in this case. When the inquiry commenced before Mr. Abeysekera, the new Arbitrator the Petitioners-Respondents challenged the jurisdiction of the Arbitrator to proceed with the inquiry and the Minister's reference to Arbitration. The Arbitrator Mr. Abeysekera ruled that the reference was in conformity with law and that he had jurisdiction to act on the reference.

The Petitioners-Respondents filed a writ application bearing No. C.A. 369/93 challenging his order on the ground that by the reference, the Minister was trying to do indirectly what he could not do directly, namely to resuscitate the Non Recurring Cost of Living Gratuity. At the hearing the State also conceded this position and the Court of Appeal quashed the reference on this basis. The present appeal is from that judgment.

The terms of reference to both Arbitrators were substantially the same but not the same. Therefore the question of jurisdiction of the Arbitrators can be challenged for the second time.

The first matter referred for Arbitration is in respect of the payment of Non recurring Cost of Living Gratuity to the members of the Union. The payment of such an allowance has been first promulgated in the collective agreement which was the subject of litigation in the case of *A.F. Jones (Exports) Ceylon Ltd v. Balasubramaiaam*.⁽¹⁾ In the said case, the extension of selected clauses from a collective agreement was held to be in-valid in Law. In the case of *Frewin Co. Ltd v. Atapattu*⁽²⁾, it was held that the order of the reference made by the Minister regarding the dispute in respect of the payment of the said Non Recurring Cost of Living Gratuity was an act which amounted to doing indirectly what the Minister could not do directly. (*Vide Kodakan Pillai v. Mudanayake*⁽³⁾) and *Bandaranaike v Weeraratne and Others*⁽⁴⁾. Samarawickrema, J. delivering a judgment of a bench of three judges of the Supreme Court observed as follows:-

"There is a general rule in construction of statutes that what a Court or person is prohibited from doing directly it may not do indirectly or in a circuitous manner".

"On a consideration of the matters set out above the reference made by the Minister cannot be upheld in law". Since the reference is bad in law, the order of the 3rd Respondent-Respondent dated 28.04.1993 upholding the said reference is not tenable in law.

As the reference to the Arbitrator was bad in law and void the Arbitrator did not have jurisdiction to embark upon the arbitration. This is a case of patent lack of jurisdiction – *Vide Perera v. Commissioner of National Housing*⁽⁵⁾ and *Thambimuttu v. Tambipillai*.⁽⁶⁾

For these reasons we affirm the judgment of the Court of Appeal and dismiss this appeal. No costs.

G.P.S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.