IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Article 140 of the Constitution for an Order in the nature of a writs of Certiorari.

Ceylon Steel Corporation Limited

Kaduwela Road,

Oruwela,

Athurugiriya.

Petitioner

Case No: 92/2013

Arbitration Case No:- A 3291

(Industrial Court of Colombo)

Vs.

1. T.Piyasoma
   The Arbitrator,
   Industrial Courts,
   Department of Labour,
   Narahenpita.

2. Hon. Minister of Labour Relation and Manpower,
   Ministry of Labour Relations and Manpower,
   Labour Secretariat,
   Narahenpita.

3. The Commissioner General of Labour
   Department of Labour,

Narahenpita.

4. H. Wijerathna
No.245, Mullegama,
Homagama.

5. E.D.Dharmasena
No.273, Arawwala,
Pannipitiya.

6. W. Chathurapala
No.463/1, Dedimuththuduwa,
Dedigamuwa.

7. A.P.G.U. Amarasinghe
No.17, Wijerama Road,
Gangodawila, Nugegoda.

8. L. Jayasena
No.610/95, Pitipana,
Homagama.

9. P. Thilakarathne
Egodawatta, Unawatuna West,
Unawatuna.

10. K.E. De S. Senevirathna
No.66, Dikhenawatta,
Polgasowita.

11. K.D.K.Wijenayaka
No.16/408, Samanpura,

Kottawa.

12. T.D. Jayawardena
No.406/9 B, Kurundawatta,
Athurugiriya.

13. K. Karolis
No.146/1, Brahmanagama,
Pannipitiya.

14. S. Shanmugasundaram
No.230/5, Bandaranayaka Mawatha,
Colombo 12.

15. A.K. Thilakarathne
No.29, Piliyandala Road,
Maharagama.

16. M. Weerarathne
No.227/14 A, Nirmana Mawatha,
Nawala Road, Nugegoda.

17. K.L.S. Chandrarathne
No.7/1, 6th Lane, Kudagama Road,
Avissawella.

18. A.E.I. De Silva
No.483, Aggona,
Angoda.

19. S. Selvarathnam
No.33, 36th Lane,
Colombo 06.

20. A.K Perera
No. 253/1, Cemetery Road,

Pore, Athurugiriya.

21. K.A. Samarasinghe
No. 136/4, Piliyandala Road,
Sikurada Pola, Pannipitiya.

22. J.M. Ranasinghe Banda
No.14, Uyankele Road,
Panadura.

23. D.G. Nandasiri
No.1/489, Aggona,
Mulleriyawa New Town, Angoda.

24. D. Yapa
No.239, High Level Road,
Kottawa.

25. G.P. Jayawardena
No.18/A, Jaltara,
Ranala.

26. P.S. Peiris
No.10/10,
Kumbukgahapokuna Road,
Udahamulla, Nugegoda.

27. N.W. Piyatissa
No.933, “Dumindu”,
Kottawa, Pannipitiya.

28. P. Warusavithana
No.A/147,
Maddumagewatta Housing Scheme,
Gangodawila,

Nugegoda.

29. K. Wimalathunga
No.67/1, Mullegama,
Habarakada, Homagama.

30. M.D. Perera
No.701, Korathota North,
Kaduwela.

31. K.L.D. Ruparathna
No.269, Kesbewa,
Piliyandala.

32. P.S. Gomas
No.2/27, Fransisku Place,
Moratuwa.

33. V. Premasiri
No.452.11, Kottawa Road,
Athurugiriya.

34. W.A.S. Warnakulasooriya
Millenium City,
Oruwala, Athurugiriya.

35. W.A. Piyasena
No.50/1, Pitipana North,
Homagama.

36. K.M. Dayasiri
No.195/5, Abeytissa Mawatha,
1st Lane, Oruwala,
Athurugiriya.

37. P.D. Wijesena

No.224, Rukmale,
Pannipitiya.

38. K.P. Perera
No.48, Robert Gunawardana Mawatha,
Thalangama South,
Battaramulla.

39. A. Jayasundara
No.46/15, Samanala Mawatha,
Athurugiriya.

40. D.S. Amarasekara
No.92, Mailangama,
Athurugiriya.

41. M.P.S. Perera
No.369/9, Hokandara North,
Hokandara.

42. C. Ranasinghe
No.25/28, De Alwis Road,
Mount Lavinia.

43. M.V. Jayalath
Assedduma,
Nagollagoda.

44. T.D. Gunadasa
No.31, Oruwala,
Athurugiriya.

45. L.D.C. Perera
No.1/13, Gnanawimala Mawatha,
Athurugiriya.

46. Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondents

Before	:	Dhammika Ganepola, J.
Counsel	:	Kamal Dissanayake with Sureni Amaratunga for the Petitioner. Manohara Jayasinghe, DSG for the 2nd, 3rd and 46th Respondents. Uditha Egalahewa, PC with Amaranath Fernando for the 4th-7th, 10th-14th, 16th-20th, 22nd-24th, 26th-29th, 31st-42nd, 44th and 45th Respondents.
Argued On	:	01.07.2024
Written Submission tendered On	:	Petitioner : 11.09.2024
Decided On	:	02.10.2024

Dhammika Ganepola, J.

The Petitioner, Ceylon Steel Corporation had been sold to the Ceylon Heavy Industries and Constructions Company by an Agreement dated 31.10.1996 (P4) entered into between the Government of Sri Lanka and Korean Heavy Industries and

Constructions Company (HANJUNG). The 4th - 45th Respondents are the ex-employees of the Petitioner who retired therefrom after completing the age of 58 years. Thereafter, the 4th-45th Respondents had worked for a further period on a contract basis. The said Respondents claim that as per the said Agreement P4 they are entitled to be in permanent employment till the age of 60 years. However, the said Respondents and three others made a complaint to the 2nd Respondents that they were employed on less favorable conditions under a contract of employment by the Petitioner. Consequently, the 2nd Respondent referred the said matter for arbitration to the 1st Respondent under case bearing no. A 3291. The Petitioner states that the Applicants of the said application bearing no. A 3291(4th – 45th Respondents and three others who died pending the inquiry) relied on Clause 4.3(b) of the Agreement P4 to say that the retirement and the employment under contract basis of the 4th-45th Respondent are violations of the rights of the Applicants. However, the Petitioner states that the dispute concerning the retirement and the subsequent employment on a contract basis and the terms of such employment were permanently resolved by the collective agreement dated 01.02.2002 (P5) entered into between Ceylon Heavy Industries Company Ltd and Sri Lanka Nidhahas Sevaka Sangamaya on behalf of the employees who accepted the terms of the above collective Agreement by their own conduct. After the conclusion of the inquiry, the 1st Respondent delivered the award (P20) directing the Petitioner to correctly compute the dues payable to the Applicants (except those who died pending the inquiry and the Applicant who resigned from the services of the Petitioner) and make such payments to the other Applicants within three weeks from the date of the publication of the Gazette Notification. However, the rights of the Applicants who died pending the inquiry in the Case bearing no. A 3291 and the Applicant who resigned from the services of the Petitioner to claim before the Commissioner General of Labour were reserved. The Petitioner claims that the award of the Arbitrator is in excess of the jurisdiction, *ex facie* erroneous, arbitrary, capricious, and unreasonable on the reasons set out in the Petition. Accordingly, the Petitioner seeks a mandate in the nature of Writ of Certiorari quashing the award P20 made by the 1st Respondent Arbitrator.

The Respondents state that as per Clause 4.3 of the Agreement P3 employees of the Ceylon Steel Corporation were permitted to continue in employment until the age

of 60. It is claimed that the Petitioner has violated said Clause by subjecting the employees to less favourable terms and conditions. Respondents submit that the Collective Agreement (P5) relied upon by the Petitioner was not one that was approved by the Commissioner of Labour and said the Agreement failed to uphold the rights of the employees. The Respondents state that according to Agreement P4, the employees of the Petitioner, including the 4th to 45th Respondents, were given an undertaking. The Respondents state that according to Agreement P4, the employees of the Petitioner, including the 4th to 45th Respondents, were given an undertaking which was aimed at assuring that subsequent to the sale of the Petitioner Company, the employees would continue in service under terms that were not less favourable than what they enjoyed prior to the sale. Accordingly, the Respondents submit that the Arbitrator has acted within the statutory powers and the award P20 granted by the Arbitrator was just and equitable.

As per the document marked P2, which constitutes the reference to arbitration, the matter in dispute between the parties is as follows;

> "*whether any injustice was caused to the forty-five employees whose names are referred to in the attached schedule and who had joined the Ceylon Steel Corporation prior to the year 1975 and those who were subsequently absorbed to the service of the Ceylon Heavy Industries and Constructions Company Ltd in terms of the agreement entered into between corporation and the said Company on 31/10/1996 in consequence of the employment of them on contract basis for a period of two years under the Company with less privileges and if any injustice was caused to what relief each of the forty-five employees is entitled*."

Accordingly, what the Arbitrator was required to consider and determine was whether any prejudice had been caused to the 4th-45th Respondents consequent to them being employed on a contract basis pursuant to Agreement P4 entered into between the corporation and the Ceylon Heavy Industries and Constructions Company on 31.10.1996.

The Petitioner contends that issues and concerns pertaining to retirement and the subsequent employment on a contract basis of the 4th-45th Respondents and the terms of their employment were permanently resolved by the above-mentioned Collective Agreement P5. However, the 4th-45th Respondents have taken up the

stance that the said Collective Agreement P5 is contrary to the agreement P4 and is also invalid before the law. The Petitioner argues that as the respective Respondents dispute the legality of the Collective Agreement P5, such a question of law is not one that comes within the scope of "minor dispute" as referred to in Section 4(1) of the Industrial Dispute Act. In other words, the Petitioners contend that the Arbitrator could not have considered the legality of the Collective Agreement P5 as it is a question of law which can only be adjudicated by a Court of law having competent jurisdiction.

In view of the judgement in ***Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and others [1988] 1 Sri L.R. 235 at p.249,*** the relief by way of certiorari concerning an Award made by an Arbitrator will be forthcoming to quash such an Award only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an Award which is eminently irrational or unreasonable or is guilty of illegality. The key argument of the Petitioner in the instant application is that the Arbitrator has reached an erroneous conclusion in his Award in excess of jurisdiction.

The Arbitrator has found that the Collective Agreement in question is an informal document because it has not been registered as required by Section 6 of the Industrial Dispute Act and is also seven years old. Thus, the Arbitrator had been of the view that the industrial dispute arose in view of the fact that the Collective Agreement was informal. Considering whether the said Collective Agreement is valid before the law or not by the Arbitrator would be a direct or indirect exercise of powers by the Arbitrator to make any order for a declaration of a right or status, arising out of or in respect of or in derogation of any order that the Commissioner General of Labour was empowered to make in terms of Section 6 of the Industrial Dispute Act. Unless and until the said Collective Agreement is declared invalid in law by a Court with competent jurisdiction, the Arbitrator cannot invalidate the effect of such an agreement. Such a question of law can only be adjudicated by a Court of law having competent jurisdiction and cannot be dealt with by an Arbitrator. The role of an arbitrator should be limited to considering the relevancy and admissibility of documents produced before him and should not extend to considering the legal validity of such documents. As such, the nature of the order of the Arbitrator does not reflect the exercise of arbitral power but is a clear exercise of judicial power. It is

settled law that the Arbitrators under the Industrial Dispute Act exercise arbitral powers and not judicial powers. I wish to reproduce the observation made by ***Bandaranayake****, J.* in ***The State Bank Of India v. Edirisinghe and Others, [1987]1 SLR 395 at P.399,*** which was confirmed by a majority decision of the Supreme Court in ***State Bank of India v. Edirisinghe and Others*** *reported in* ***[1991]1 SLR 397***.

> *"The only power an arbitrator is authorised to make is to make an award which decides what the agreement between the parties should be in the future and not to act as a judge and determine the rights of parties which is what he has done. The effect of the award is not the exercise of arbitral power but the exercise of judicial power which was beyond his jurisdiction. Since the award was judicial in nature Art. 170 of the 1978 Constitution required the presiding officer of a Tribunal exercising judicial power to be appointed by the Judicial Service Commission. The arbitrator was not so appointed in this instance. Therefore, his award must be struck down"*

Nevertheless, it is significant to note that the respective Respondent had not taken any steps to challenge or repudiate the legality of the Collective Agreement before the Commissioner General of Labour as per the Industrial Dispute Act or before any other appropriate forum.

In the above circumstances, I am of the view that the Arbitrator was not empowered under the law to directly or indirectly exercise its powers to consider the legality or validity of the Collective Agreement P5. As such, I take the view that the Arbitrator by holding that the Collective Agreement P5 is an informal arrangement and/or ineffective before law, has acted in excess of the powers vested upon him.

It is submitted that the respective Respondents have ceased their contract of employment under the Collective Agreement upon reaching the age of 60. It is observed in clause 4.3(b) agreement P4 upon which the respective Respondents rely stipulates that:

> *"This clause shall not restrict the rights of the Company to terminate the services of employees for cause nor prevent the Company accepting truly voluntary resignations and mutually agreed resignations*."

Accordingly, the said Clause does not prevent mutually agreed resignations which is given effect under the Collective Agreement.

At the stage of inquiry before the Arbitrator, the witness Henadeerage Wijerathne who gave evidence on behalf of the Respondents conceded that the termination of employment of 44 out of 45 Respondents had been done after acceptance of the Collective Agreement [page 7 of inquiry proceedings dated 14.05.2012]. It appears that the respective Respondents have agreed to the extension of service until the age of 60 as per the Collective Agreement. The post conduct of the respective Respondents implies the acceptance and the compliance with the Collective Agreement. Hence the respective Respondents are estopped from challenging the validity of the Collective Agreement pursuant to having complied with the conditions provided under said Collective Agreement without any apparent objection while there was an active contract between the employer and the workmen.

Consequently, the Petitioner submits that no dispute has arisen within the meaning of industrial dispute as interpreted in the interpretation Section 48 of the Industrial Dispute Act. Section 48 of the Industrial Dispute Act defines 'industrial dispute' as follows.

> *" industrial dispute " means any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, of any person, and for the purposes of this definition."*

As per the above, any dispute that arises between an employer and workmen during the course of employment is an industrial dispute. However, in the instant application, there is no such live dispute that has arisen while the relationship of employer and workmen subsisted[1] for such dispute to come within the scope and meaning of 'industrial dispute.' No evidence has been presented during the arbitration hearing to demonstrate that there was, in fact, a disagreement between the employer and workmen while the relationship of employer and workmen subsisted.

[1] The Colombo Apothecaries Company Ltd (70 NLR481)- it was held that "a dispute connected with the termination of services can be referred to an industrial court or tribunal for settlement only if the dispute arose while the relationship of employer and workman subsisted, and on the principle *inclusio unius exclusio ulterius*, a dispute on such a matter which arises between an ex-employer and an ex-workman after the employer workman relationship has ceased to exist is not an industrial dispute within the meaning of the Act"

Furthermore, section 19 of the Industrial Disputes Act states that every term within an arbitral award shall be “implied terms” in the contract of employment between the employer and workmen.

> 19. *Every award of an arbitrator made in an industrial dispute and for the time being in force shall, for the purposes of this Act, be binding on the parties, trade unions, employers and workmen referred to in the award in accordance with the provisions of section 17 (2) ; and the terms of the award shall be implied terms in the contract of employment between the employers and workmen bound by the award.*

Where there is no active contract between the aforesaid parties, the terms of the arbitral award cannot be made “implied terms”, thus making the arbitral award futile and ineffective.

As the impugned dispute referred to the Arbitrator is not a live dispute which comes under the meaning of ‘Industrial Dispute’ the Arbitrator does not hold jurisdiction under Section 4(1) of the Industrial Dispute Act to arbitrate this matter. Under such circumstances, any order made by the Arbitrator under the reference is *ultra-vires* in terms of Section 4(1) of the Industrial Dispute Act.

In ***Anz Grindlay's Bank v. Ministry of Labour and Other [1995] 2 SLR 53,*** it was held that a dispute can be referred for settlement only if the Dispute arose while the relationship of Employer-Workman subsists. I would like to draw attention to the observations made by Senanayake, J in the above case.

> *“I am unable to agree that the 1st Respondent could act under Section 4 (1), where there was no Industrial Dispute existing at the time where the workman ceased to be an employee. An Industrial Dispute must necessarily arise at the time of employment, not after the cessation of employment either voluntarily or by termination. If one were to take the view that there could be an Industrial Dispute after cessation of employment, we would be opening the gateway for all employees to refer matters for arbitration in terms of Section 4 (1) of the Act even after passage of a long period.” (at p. 59)…In the circumstances, I hold that the Minister's order referring the purported dispute between the petitioner and the 4th respondent is ultra vires Section 4 (1) of the Act.*

In the instant case, the Arbitrator was of the view that the power of the Arbitrator is not restricted by decision of the any Court, and he has authority over any matter referred to him by the Minister. The Arbitrator was influenced by the decision of ***State Bank of India v. Edirisinghe and Others [1991]1 SLR 397*** in which the Supreme Court held "*An Industrial Arbitrator is not tied down and fettered by the terms of*

contract of employment between the employer and the workman. He can create new rights and introduce new obligate ties between the parties". … "The effect of the award is to introduce terms which become implied terms of the contract."

However, I am agreeable with the position taken up by the Petitioner that the said judgment is in reference to the scope of power of the arbitrator but not the jurisdiction of the Arbitrator. Said judgment distinguished two functions of an Arbitrator: the arbitral function of the Arbitrator and the judicial function of the Judge.

Sansoni, C.J. in ***Walker Sons & Co. Ltd., v. Fry & others (5) 68 NLR73, pp. 84,85***, discusses the distinction between an Arbitrator's function and a Judge's function citing with approval certain dicta in the judgment in *Waterside Workers' Federation of Australia v. J.E. Alexander Ltd. (1918) 25 CLR 462, 463.* and in *Federated Saw Mill v. James Moore & Son Proprietary Ltd. (1909) 8 CLR 521* as follows.

> *"The arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it then proceeds if necessary to enforce the law. ...The arbitrator will have to decide, not what agreement was made, but what is to be made in regard to the future. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties. …thus creating new rights and obligations. ... then the determination is essentially of a legislative character. . .If the dispute is industrial, it is not an ordinary legal dispute, i.e., it is not a dispute as to what are the rights and liabilities of the parties with respect to the past or existing facts. It necessarily looks to tie future."* ***[State Bank of India v. Edirisinghe and Others(1991)Sri L R 397 at p.413]***

The power given to an Arbitrator to make a just and equitable award is not unlimited. In the assessment of evidence, he must act judicially (per ***Sirimanne J***., in ***Heath & Co. (Ceylon) Ltd., v. Kariyawasam 71 NLR 382 at p.384***.)

In the instant application, a direction has been given to the Petitioner to correctly compute the dues payable to the Applicants (Respondents) and make such payments to them. Further, the Arbitrator refrained from making any effectual decision in respect of the claim of the deceased Applicant-Respondents and the Applicant-Respondent who voluntarily retired and delegated such authority to the Commissioner General of Labour. An Arbitrator or Industrial Court cannot delegate its function of deciding a dispute which has been referred to it for settlement to a

third party in the absence of express provisions under the applicable law to do so. Hence, any award in such nature would be *ultra vires.* Where the award made by the Arbitrator is *ultra vires,* based on such an *ultra vires* award, the Commissioner General of Labour cannot move the Magistrate's Court in terms of Section 33(2) of the Industrial Dispute Act to enforce the *ultra vires* award of the Arbitrator.

In *Jayasena V. Sideek (1963) 63 NLR 425* the Court held, that the direction amounted to a delegation of the functions of the Industrial Court rendering the award itself bad. In the said case the award of an Industrial Court contained, inter-alia, a direction the terms of which were as follows:-

> *" We direct that all payments due under this award shall be made through the Commissioner of Labour to whom the manager of Messrs. Wahid Brothers shall submit a schedule of the amounts due to the various workers. Should any disagreements arise as regards the correct computation, the decision of the Commissioner of Labour or any other officer nominated by him shall be final."*

T. S. Fernando. J.- observed that,

> *"The functions of an Industrial Court under the Act are undoubtedly in the nature of judicial functions, and judicial functions cannot normally be delegated-see per Lord Somervel of Harrow in Vine v. National Dock Labour Board.[1 (7957) A. C. at 512.] The English Courts have consistently refused to enforce awards which are bad as being made by persons to whom the power to make the award could not have been delegated."*

As upheld in the above case I am of the view that the award of the Arbitrator is ultra vires for want of jurisdiction. Accordingly, I am inclined to issue a writ of certiorari quashing the award made by the 1st Respondent marked P20 as prayed in the prayer to the Petition. I refrain from making an order for costs.

Application is allowed.

Judge of the Court of Appeal