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 a mandate in the nature of Writ of Mandamus.

Heenatigalla Kanaththage Kusum
Heenatigalla,
No. 102/33A, Nadun Uyana,
Muthuhenawatta, Meegoda.

PETITIONER

Vs.

Court of Appeal Case No:
CA/WRIT/634/2023

1. Urban Development Authority,
   6th, 7th and 9th Floor,
   Sethsiripaya, Battaramulla.

2. Ramal I. Siriwardena,
   Arbitrator,
   No. 3, Nebilikotuwa Watta,
   Gampaha Road, Yakkala.

3. Manoj Priyantha,
   Commissioner General of Labour,
   Industrial Relations Division,
   Department of Labour, Colombo 05.

4. B.K. Prabath Chandrakeerthi,
   Commissioner General of Labour,
   Department of Labour, Colombo 05.

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

RESPONDENTS

Before:	S.U.B. Karalliyadde, J Mayadunne Corea, J
Counsel:	Prince Perera for the Petitioner Navodi de Zoysa, SC for the 1st, 3rd, 4th and 5th Respondents
Argued on:	09.09.2024
Written Submissions:	For the Petitioner on 12.09.2024 For the 1st, 3rd, 4th and 5th Respondents on 25.10.2024
Decided on:	20.12.2024

Mayadunne Corea J

When this case was taken up for argument, we found that the 2nd Respondent was not present and was unrepresented. However, as the journal entries bear, although notices have been sent to the 2nd Respondent on 03.01.2024, the said Respondent had never been present before this Court.

The facts of the case briefly are as follows. The Petitioner was an employee of the 1st Respondent and had worked in various capacities at the 1st Respondent institution. As per the submissions, the Petitioner had joined the 1st Respondent on 16.04.1985. Subsequently, a dispute arose between the Petitioner and the 1st Respondent which resulted in the Petitioner making a complaint to the Department of Labour. Thereafter, on the reference of the 4th Respondent, the Minister of Labour and Foreign Employment had appointed the 2nd Respondent as an arbitrator under the provisions of the Industrial Disputes Act, mainly under Section 4(1) of the Industrial Disputes Act as amended by Act No. 43 of 1950. The letter of appointment of the arbitrator dated 28.12.2022 is marked as P7. Subsequently, the arbitration commenced and both parties conceded that the terms of reference were in the document marked as P8 and are as follows:

> "*The matter in dispute between the aforesaid parties is*
>
> *Whether Miss H.K.K. Heenatigala employed at the Urban Development Authority has been caused injustice*

- *By the Administration Officer post not being backdated to 01.07.2002 if entitled,*
- *By the Assistant Director post not being backdated to 01.07.2007 if entitled,*
- *By not being placed in the post of Deputy Director if entitled (and from which date she is entitled) and*
- *By not receiving the professional allowance if not entitled (and from which date she is entitled)*

and if such injustice has been caused, to what relief is she entitled."

The terms of reference which are reflected in the award published in Gazette No. 2337/06 dated 19.06.2023 (P23) states as follows:

"*නාගරික සංවර්ධන අධිකාරියේ සේවයේ නියුතු එච්.කේ.කේ. හිනටිගල මෙනවියට,*

පරිපාලන නිලධාරී තනතුර 2002.07.01 දිනට පෙර දාතම කර හිමිද? හිමිනම් එය ලබා නොදීම

සහකාර අධ්‍යක්ෂක තනතුර 2007.07.01 දින සිට පෙර දාතම කර හිමිද? හිමිනම් එය ලබා නොදීම

නියෝජ්‍ය අධ්‍යක්ෂ දුරය හිමිද? හිමිනම් එය කවරදා සිට හිමිද යන්න හා එය ලබා නොදීම

වෘත්තීය දීමනාව හිමිද? හිමිනම් එය කවරදා සිට හිමිද යන්න හා ලබා නොදීම

යන කරුණු මගින් අසාධාරණයක් සිදුව තිබේද? යන්නත් එසේ අසාධාරණයක් සිදුව තිබේ නම් ඇයට හිමිවිය යුතු සහනයක් කවරේද?

යන්නත් පිළිබඳව වේ."

The arbitration commenced and the parties filed their respective pleadings. The Petitioner was represented by an Attorney-at-Law and evidence of the Petitioner was led (P15). Thereafter, the inquiry had been adjourned to 11.05.2023. As per P15, the Petitioner gave evidence and it was brought to the attention of the Court, that at the end of the evidence, the word "conclude" is visible. However, there are no proceedings submitted to demonstrate that she had been subjected to cross-examination. On the day the inquiry was to be resumed, as per P16a, the Petitioner had not been present, nor had there been a legal representation on behalf of the Petitioner. The Counsel appearing for the Respondents raised two objections, and made an application namely, to dismiss the application on the grounds that the Petitioner is not present and is unrepresented and on the second ground that the Petitioner had retired on 15.01.2020 and therefore, the

reference for arbitration had to be dismissed as on the date of the reference there was no employer-employee relationship. The arbitrator, by his order dated 11.05.2023 had accepted the objections and had dismissed the arbitration. The said award had been published in the aforesaid government gazette. The Petitioner has filed a motion and an affidavit before the arbitrator dated 18.05.2023 and had submitted to the arbitrator that she had not been present on the date of arbitration namely, 11.05.2023, due to a viral fever and had requested to set aside the order of dismissal of the arbitration and to refix it for inquiry. It is not clear as to whether there is an order pertaining to this Application. However, this Court finds the document marked as P23 whereby the arbitrator had published the award in the government gazette. Thereafter, the Petitioner had repudiated the award and the said notice of repudiation had been published in Gazette No. 2342/50 dated 28.07.2023 marked as P24. Thereafter, the Petitioner has filed this Writ Application.

The Petitioner's contention

The Petitioner's main contention is that she had taken part in the arbitration proceedings and the date on which she could not be present was requested by the Petitioner herself. However, as the Petitioner had contracted a viral fever, she had not been able to be present on 11.05.2023 for the inquiry. It was also contended that due to a fault in her telephone, the Petitioner was not in a position to inform her attorney or the Industrial Court that she was unable to be present. However, it is also pertinent to note that the Petitioner has failed to establish this ground through any independent evidence other than to submit two medical reports to demonstrate that she had been sick and that medicines had been prescribed for her illness. The said medical reports were marked as P20 with the affidavit she had tendered to the arbitration Court marked as P22. The medical report was issued for 5 days and covers the date for which the arbitration proceedings were to be held. However, the Petitioner has failed to submit any material to establish her attempts to communicate with her Counsel and the failure to do so. The Petitioner contends that the arbitrator should have acted under Section 17(1) of the Industrial Disputes Act and have used his discretion fairly and reasonably but by not doing so the arbitrator's award is impugned on the basis that it violates the rules of natural justice, error on the face of record and also on the basis that it violates her legitimate expectations.

The Respondent's case

The Court finds that objections to the Application were filed by the 3rd and 4th Respondents and in their objections, among other grounds, they had submitted that the

Petitioner had failed to establish any grounds that warrant judicial review and have challenged the Petitioner's right/entitlement to obtain any reliefs prayed for in the Petition. Also, the Petitioner's failure to bring in necessary parties.

The Petitioner's main contention is that an arbitrator who is appointed under Section 4(1) of the Industrial Disputes Act should act under Section 17(1) of the Act and should endeavor to make all such inquiries into the dispute and make a just and equitable order. It is her contention that the arbitrator should not have dismissed the arbitration on the grounds referred to, but fell short of suggesting that the arbitrator should have given an adjournment. However, it is contended that dismissal of the action without giving notice to the Petitioner was unreasonable.

This Court observes that other than the Petitioner's contention that the arbitrator dismissed the application without notice, the Petitioner has failed to impugn the decision on any other grounds. The learned State Counsel appearing for the Respondents brought to the attention of the Court the document marked as P7, the appointment of the arbitrator by the Ministry. This Court observes as per paragraph 3, the arbitrator is given the power to use his discretion and to make an order pursuant to the terms of the Industrial Disputes Act. The said paragraph states as follows:

> "*Furthermore, in the event of failure to participate in the inquiry of either party without a reasonable cause, after having been informed to be present and ready for the inquiry on the scheduled time, you have the discretion to conduct the inquiry unilaterally and make an order in terms of the Industrial Disputes Act*."

The circumstances of the case are that all parties had been present and the date in question was requested by the applicant. As borne out by the proceedings, at the end of the applicant's evidence the word "conclude" appears. As per paragraph 3 of the letter of appointment, the arbitrator then has the discretion to conduct the inquiry unilaterally and make an order according to the Industrial Disputes Act. In a situation where the applicant is not present, is unrepresented, and has not given a reason for her absence, the arbitrator could have acted under the paragraph mentioned above. However, in this instance, the Respondents have moved for dismissal on several grounds. Section 17(1) of the Act deals with the duties and powers of the arbitrator. In enduring to answer a dispute referred to the arbitrator, the arbitrator has to make all such endeavors to hear the necessary evidence to arrive at conclusions to the points referred for arbitration. In obtaining the relevant evidence, the arbitrator should not be confined to the Petitioner's case but the arbitrator is also required to hear the evidence of the Respondents.

It is also observed that the Petitioner on the previous day had been represented by an Attorney-at-Law. However, on the day the Petitioner requested the arbitration to be resumed, not only the Petitioner, but the Petitioner's Attorney-at-Law too was not present. The failure of the Petitioner's Attorney-at-Law to be present was not explained by the Petitioner. Even if we are to consider that the Petitioner was ill, still the Attorney-at-Law should have appeared on that day. As pointed out by the learned Counsel for the Respondent, the Petitioner's Attorney also had not appeared on the said date. It is also observed that the Petitioner had not annexed an affidavit by the Attorney-at-Law for his non-appearance. Leaving the said contention as it may, this Court observes that the arbitrator's dismissal of the arbitration is not only based on the absence of the Petitioner.

The arbitrator had also dismissed it on the preliminary objection taken by the Respondents namely, whether there was a live dispute at the time of reference for arbitration.

Even if this Court is to agree on the submission that the said dismissal of the arbitration due to the absence of the Petitioner is not just and equitable still it would be futile to issue a writ in view of the second ground reflected in the order of the arbitrator. The Courts will be reluctant to issue a writ if the outcome is futile.

In the case of ***Selvamani v Dr. Kumaravelupillai and others*** **(2005) 1 SLR 99**, it was held that

> "*A writ of Mandamus will not be issued if it will be futile to do so and no purpose will be served*."

This Court will now consider the second ground of the order whereby the arbitrator dismissed the application on the basis of the dispute referred not being a live dispute. This objection has been taken before the arbitrator by the Respondents. This Court observes the second statement of the party of the 2nd part which is marked as P11 specifically takes up this objection. In the said statement, they had taken a preliminary objection on the basis that there is no live dispute between the parties.

Is there a live dispute between the parties at the time of referral for arbitration?

In paragraph 12(a) of the Petition to this Court, the Petitioner concedes that she had retired from service on 15.01.2020. Both parties were not at variance that it had been

referred for arbitration and an arbitrator had been appointed by the letter dated 28.12.2022 marked as P7. The reference for arbitration was published in the gazette. As per page 5A of the document marked P23, the arbitration reference had been reproduced in Gazette No. 2314/04 dated 09.01.2023. This Court finds that this was not disputed by the learned Counsel appearing for the Petitioner. However, it is observed that P23 is not the Gazette that contains the referral for arbitration.

It is also pertinent to note that the Petitioner has failed to submit to this Court the gazette that referred the dispute for arbitration. However, as the learned Counsel for the Petitioner did not object to the said date, this Court can only come to the conclusion that the date of the gazette was in 2023, which is long past the date of the Petitioner's retirement. Thus, in our view, the arbitrator had sufficient material to answer the Respondent's preliminary objection as to whether there was a live dispute for arbitration at the time of referral. It is also observed that as the objection is raised in the guise of a preliminary objection the arbitrator had to determine the said objection at the outset.

It is also pertinent to note that even at the argument stage the learned Counsel appearing for the Petitioner failed to answer this crucial objection raised by the Respondents, namely whether there was a live dispute between the parties when the matter was referred for arbitration. It is observed that as per the pleadings of the Petitioner, it is clear to this Court that the Petitioner has reached the age of retirement and had retired on 15.01.2020 (paragraph 13(a) of the affidavit). Further, this fact is substantiated by her birth certificate marked as P1. The dispute had been referred for arbitration and the arbitrator has been appointed by letters marked as P6 and P7 which are dated 03.01.2023 and 28.12.2022 (paragraph 4 of the Petition). Hence, it is established by the Petitioner's own documents that by the time the arbitrator was appointed and the matter was referred for arbitration, the Petitioner had retired. It is observed that the said referral had been made nearly two years after the Petitioner's retirement. With her retirement, the employer-employee relationship the Petitioner had with the 1st Respondent comes to an end. Hence, after 15.01.2020 there is no contractual relationship between the parties in the capacity of employer and employee. With the cessation of such relationship there cannot be a live industrial dispute between the parties to refer to an industrial arbitration under Section 4(1) of the Industrial Disputes Act.

In the case of ***J.A. Sumith Adhihetty v. Mercantile Investments Ltd*** **SC Appeal No. 22/2012 decided on 15.02.2016,** by referring to Section 19 of the Industrial Disputes Act, Eva Wanasundera, PC. J. held that

> "*It is obvious that when an award is made, the terms of the award becomes implied terms attached to the contract of employment. So, there should be an*

existing contract of employment for the award to take effect at the time of making the award at the end of arbitration. This section presupposes the existence of a valid contract between the employee and the employer."

Further, it was held that

"*The dispute is not 'live' any more because then the employee is not an employee any more and the relationship between them comes to an end*."

Hence, in my view in this context, it is clear that for an industrial dispute to exist there should be an employer and employee relationship. With the retirement of an employee, the employment contract and the said relationship ceases to exist.

In ***State Bank of India v S. Sundaralingam*** **(1970) 73 NLR 514** it was held that

"*An arbitrator appointed by the Minister under section 4(1) of the Industrial Disputes Act has no jurisdiction to entertain an alleged industrial dispute between an employer and an ex-employee who has already retired from the services of the employer and thus ceased to be an employee. Such a case is one of cessation of employment and not one of termination or re-instatement, and therefore, is not an 'industrial dispute'*."

In the absence of an employer-employee relationship, there cannot be a live dispute. In the absence of a live dispute, our Courts have held as stated above that a Section 4(1) reference cannot stand. Hence, the arbitrator's second conclusion of dismissing the application on the basis that there is no live dispute is upheld and also, this court observes that there was sufficient material before the arbitrator to come to the conclusion he arrived at namely, dismissal on the ground of absence of a live dispute.

<u>Suppression of material facts</u>

A Petitioner who invokes the writ jurisdiction is duty bound to submit all relevant material before the Court in invoking the writ jurisdiction. In this instance, I find that the Petitioner has failed to submit material pertaining to the most vital question which was raised as an objection before the arbitrator and which the arbitrator held with, i.e., whether a live dispute existed.

The Petitioner has failed to submit to this Court the gazette notification which referred the dispute for arbitration which would have demonstrated the date on which the arbitration was referred. The Petitioner has failed to address this Court on the most important question of whether the arbitration, at the time of referral, was a live dispute or not. This becomes one of the most crucial questions that should have been addressed as it is one of the grounds the arbitrator upheld, and especially when in the order it is determined that there is no live dispute. In our view by not submitting the said gazette and by failing to address the said issue, the Petitioner has suppressed material facts to this Court, and suppression of material facts disentitles the Petitioner to the reliefs sought.

In ***Biso Menika v Cyril De Alwis &others*** **(1982) 1 SLR 368** it was held

> *"A person who applies for the extra-ordinary remedy of writ must come with clean hands and must not suppress any relevant facts from Court. He must refrain from making any misleading statements to Court***"**

In ***Namunukula Plantations Limited v Minister of Lands and others*** **(2012) 1 SLR 376** it was inter alia held that

> *"It is settled law that a person approaches the Court for grant of discretionary relief, to which category and application for a writ of certiorari would undoubtedly belong, has to come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case. In other words, he owes a duty of utmost good faith (uberimafides) to the Court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence*."

Similarly in ***Blanca Diamonds (Pvt) Ltd v Wilfred Van Else and others*** **(1997) 1 SLR 360 at 362** Jayasuriya, J. emphasized the duty a party owes to Court for a full disclosure when initiating writ proceedings in the following manner:

> *"In filing the present application for discretionary relief in the Court of Appeal Registry, the petitioner company was under a duty to disclose uberrima fides and disclose all material facts to this Court for the purpose of this Court arriving at a correct adjudication of the issues arising upon this application. In the decision in Alphonoso Appuhamy v Hettiarachchi Justice Pathirana in an erudite judgement, considered the landmark decisions on this province in English law, and cited the decision which laid down the principle that when a party seeking*

discretionary relief from the Court upon an application for a writ of certiorari he enters into a contractual obligation with the Court he files an application in the Registry and in terms of that contractual obligation he is required to disclose uberrima fides and disclose all material facts fully and frankly to his Court."

Want of necessary parties

As per Section 4(1) of the Industrial Disputes Act, the referral for arbitration is made by the Minister. This Court is invited to quash the arbitrator's impugned decision. The decision is a direct outcome of the opinion of the Minister whereby he had formed the opinion that there was an industrial dispute which warrants referral to arbitration. Hence, the decision of this Court pertaining to the impugned arbitral award has a direct bearing on the Minister who appointed the arbitrator and referred the dispute for arbitration and it is the view of this Court that the Minister should have been made a party to this application and the Petitioner has failed to do so.

In ***British Ceylon Corporation v C.J. Weerasekara & Others*** **[1982] 1 SLR 180** the Court held that

"*It is clear that the appellant-company in the petitions before the Court of Appeal and in the appeal filed before us in questioning the legality or validity of every order, of reference or revocation made by the Minister of Labour. Under the provisions of Section 4(1) of the Industrial Disputes Act No. 43 of 1950, the Minister of Labour is not called upon to exercise any judicial function in regard to the actual industrial dispute. He has merely to form an opinion whether the dispute was a minor dispute that could be settled by compulsory arbitration. Once he forms that view he is only concerned with taking the preliminary step of ordering a reference to have the dispute settled by arbitration. The power he exercises is of a purely administrative nature and it is his duty to see that there is industrial peace in the country. There is nothing in the Act itself to indicate that once he makes an order his powers are exhausted nor are there any expressed prohibitions on the exercise of that power. As the exercise of the powers of Minister of Labour were being questioned he should properly have been made a party to the petition before the Court of Appeal from the very outset*."

And, also, in the decision of ***Central Cultural Fund v Lanka General Services Union & three others*** **2008 [B.L.R.] 269** it was held

"(a) The Minister under Section 4(1) makes the initial order referring the matter for arbitration therefore the Minister should have been made a party to the proceedings since it was his order that was being challenged.

(b) The failure to make the Minister a Respondent to the Application is fatal to the Petitioner's Application."

Therefore, for the aforementioned reasons this Court upholds the dismissal of the arbitration on the grounds of there being no live dispute. As this Court affirmed the dismissal and for the reasons stated above in this judgement, this Court sees no reason to interfere in the arbitrator's final decision which has been published in the gazette marked as P23. It is the view of this Court the Petitioner has failed to establish any ground to enable the Court to grant the relief prayed. Accordingly, we proceed to dismiss this Writ Application. Considering the facts of this case we do not award any costs.

Judge of the Court of Appeal

S.U.B. Karalliyadde, J

I agree

Judge of the Court of Appeal