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The Gazette of the Democratic Socialist Republic of Sri Lanka

EXTRAORDINARY

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No. 2041/22 – THURSDAY, OCTOBER 19, 2017

(Published by Authority)

PART I: SECTION (I) – GENERAL

Government Notifications

My No.: IR/10/25/2012.

THE INDUSTRIAL DISPUTES ACT, CHAPTER 131

THE award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Mr. A. P. K. Weeraratne, Kudagama, Dombemada of the one part and National Water Supply and Drainage Board, Head Office, Galle Road, Ratmalana of the other part was referred by order dated 05.04.2016 made under section 4(1) of the Industrial Dispute Act, Chapter 131 (as amended) and published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 1961/30 dated 07.04.2016 for Settlement by Arbitration is hereby published in terms of section 18(1) of the said Act.

A. WIMALAWEERA,
Commissioner General of Labour

Department of Labour,
Labour Secretariat,
Colombo 05.
10th October, 2017.

Ref. No.: IR/10/25/2012.

IN THE MATTER OF AN INDUSTRIAL DISPUTE

Between,

Mr. A. P. K. Weeraratne,
Kudagama,
Dombemada.

Party of the First part,

Case No. A3643

and

National Water Supply and Drainage Board,
Head Office,
Galle Road,
Ratmalana,

Party of the Second part.

AWARD

The Honourable Welantantirige Don John Seneviratne Minister of labour and Trade Union Relations, do by his virtue of the powers vested in him by Section 4 (1) of the Industrial Disputes Act, Chapter 131 of the Legistative Enactment of Ceylon (1956 Revised Edition), as amended by Acts, No. 14 of 1957, 4 of 1962 and 39 of 1968 (read with Industrial Disputes – Special Provisions) Act, No. 37 of 1968 hereby appointed me as the Arbitrator by his order dated 05th April 2016 and referred the dispute between the aforesaid parties for settlement by Arbitration.

The statement of the matter in dispute between the above said parties is as follows:

Whether Mr. A. P. K. Weeraratne who had served the National Water Supply and Drainage Board, as a clerk has been caused injustice by,

1. not receiving the promotions, salary increments or gratuity in accordance with the permanent appointment letter dated 29.08.2001 and casual (temporary) appointment letter dated 10.08.2000 as well as the recruitment and promotion procedures,

2. being deprived of the salaries from 11.07.2007 to 10.11.2010 by letter of re-instatement dated 08.11.2010 and all the other entitlements for that period and,

3. issuing the order of vacation of post dated 08.10.2007 even though he had informed the Board of his sickness and forwarded Medical Certificates, and if so, to what reliefs he is entitled.

Both parties stated above submitted a detailed statement dated 26th May 2016 that has led to the dispute in terms of the Regulations 21 (1) and 21 (2) under the Industrial disputes Act, No. 43 of 1950, and on the said date (26.05.2016) the party of the Second Part namely, National Water Supply and Drainage Board was charged to commence proceedings and as such their first witness Ratnasiri Manikgama Arachige – the Senior Human Resource Officer recorded his evidence in chief on 14.10.2016 and while that said proceedings were in progress it transpired in evidence on dated 28.02.2017 that the services of the party of the First Part namely Weeraratne had been terminated, well prior in time to the said reference of the Industrial Dispute, and by application dated 18.01.2013 in the Labour Tribunal Colombo in Case No. 2/ADDL/3615/2013 still remained.

Pending for adjudication. Remedies claimed thereto were re-instatment from date of termination dated 15.02.2012, increments with backwages or compensation in lieu of Re-instatement to the tune of Repees 10 Million.

Whereas the party of the First Part demanded reliefs from Arbitration Tribunal such as due promotion, salary increments, backwages from 29.08.2001 the date on which he was made permanent as a clerk. It is pertinent to note here that the party of the Second Part in their 1st statement annexed document marked X15 and at the inquiry as R22 dated 08.11.2010 where in para 3, the reinstatement was subject to the following condition, ''that you are not entitled to any backwages and any other benefits or entitlement acrued thereto.''

on the other hand, it is crystal clear that Weeraratne the workman again was charge sheeted, found guilty and by letter dated 22nd October 2012 he was terminated with effect from dated 15th February 2012.

In Labour Tribunal he claimed Re-instatement with effect from 15th February 2012 to the date of award with backwages and increments and/or in lieu of re-instatement compensation to the tune of Rupees 10 Million.

With this background if one proceeds to scrutinize the statements, marked documents and the part-heard evidence of the witness, one could readily ascertain the Remedies/reliefs claimed by the party of the First Part is some what identical or similar.

Be that as it may, the question is, whether there is a life dispute. According to Sundaralingham V State Bank of India 1971, 73NLR, 514..... Supreme Court held ''when a person ceases to be in employment that cannot be a life dispute between the parties, which can ever culminate in on award affecting the terms of employment.''
It is settled law that an Arbitrator has the jurisdiction to determine whether a valid Industrial dispute has been legally referred to him.

In the case of Ceylon Bank Employees Union V Yatawara 64 N. L. R. 49 at page 56/57 it was held that a tribunal of Special Jurisdiction created by statute can only act, if the terms contained in the statute giving it Jurisdiction are complied with. If they are not complied with that Jurisdiction does not arise. In the circumstances whether there is a life dispute is questionable because the employee Weeraratne is again out of employment.

As such there is no life dispute. According to case law and principles of law he is bereft of any remedy and should necessarily fail.

When considering the facts and the circumstances of, the Industrial Disputes and according to Section 31B (2) (b) of the Industrial Disputes Act stipulates ''where it is so satisfied that such matter constitutes, or forms part of, an Industrial Dispute referred by Minister under Section 4 for settlement by Arbitration to an Arbitrator or for settlement to an Industrial Court, make order dismissing the application without prejudice to the right of the parties in the Industrial Disputes.'' Section 31B (3) where and application (1) relates.

(*a*) to any matter which, in the opinion of the Tribunal, is similar to or identical with a matter constituting or included in an Industrial Dispute to which the employer to whom that application relates is a party and into which an inquiry under this Act is held, or

(*b*) to any matter, the facts affecting which are, in the opinion of the tribunal, facts affecting any proceedings under any law,

The tribunal shall make order, order suspending its proceedings upon that application until the conclusion of the said inquiry or the said proceedings under any other law, and upon such conclusion the tribunal shall resume that proceedings upon that application and shall in making an order upon that application, have regard to the award or decision in the said inquiry or the said proceedings under any other law.

IN fact the Labour Tribunal has not adhered this procedure. This may be overlooked for the that Labour Tribunal function now are of a judicial nature and the President thereof are Judicial Officers. And as such in the present scenario precedence must be given to them over Arbitration Tribunals.

Thus it dawned on me in the interest of fair play and justice as the party of the First part, admitted that his evidence is being led and recorded and the matter is still pending.

While, the party of Second Part is progressings with their evidence in chief. Thus concurrently the parties lead evidence in two forums which is an unhealthy state of affairs.

In the premises considering the fact and circumstance I thought it fit to terminate the Arbitration proceedings and I make order that after the conclusion of Labour Tribunal case, the workman be bestowed with the right to his statutory claims, if any.

I make order that there is no Award, however subject to his right to claim statutory dues if any.

Accordingly, I consider this Award is just and equitable in the circumstances.

Colombo,
Dated 11th July 2017.

T. Edmund Santharajan
Arbitrator

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My No.: IR/22/48/2011.
IR/22/24/2012.

THE INDUSTRIAL DISPUTES ACT, CHAPTER 131

The award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Mr. E. Hettiarachchi, No. 329, Alagalla Terrace, Kadugannawa, Mr. R.M. Dhanapala, No. 466/A, Ududeniya Road, Meeruppa, Marassana, Mr. M. R. R. M. S. Peiris, No. 554, Wewala, Church Road, Weligampitiya, Ja- Ela of the one part and Sri Lanka Transport Board, No. 200, Kirula Road, Colombo 05 of the other part was referred by order dated 12/03/2015 made under Section 4(1) of the Industrial Dispute Act, Chapter 131 (as amended) and published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 1907/13 dated 23.03.2015 for Settlement by Arbitration is hereby published in terms of Section 18(1) of the said Act.

A. WIMALAWEERA,
Commissioner General of Labour.

Department of Labour,
Labour Secretariat,
Colombo 05.
10th October, 2017.

IN THE MATTER OF AN INDUSTRIAL DISPUTE

Between,

1. E. Hettiarachchi, No. 329, Alagalla Terrace, Kadugannawa.

2. R. M. Dhanapala, No. 466/A, Ududeniya Road, Meeruppa, Marassana.

3. M. R. R. M. S. Peiris, No. 554, Wewala, Church Road, Weligampitiya, Ja-Ela.

Party of the First part,

Case No. A/3589

and

Sri Lanka Transport Board, No. 200, Kirula Road, Colombo 05.

Party of the Second part.

AWARD

The Hon. Minister of Justice and Labour Relations Wijeyadasa Rajapaksha by the powers vested in him by Section 4 (1) of the Industrial Disputes Act, Chapter 131 of the Legistative Enactment of Ceylon (1956 Revised Edition), as amended by Acts, No. 14 of 1957, 4 of 1962 and 39 of 1968 (read with Industrial Disputes – Special Provisions) Act, No. 37 of 1968 appointed me as the Arbitrator by his order dated 12.03.2015 and referred the aforesaid dispute to me for settlement by Arbitration.

The statement of the matter in dispute between the abovesaid parties is as follows:

"Whether the cut down of salaries earned by Mr. E. Hettiarachchi as the Managing Director of the Rajarata Bus Company Limited, Mr. R. M. Dhanapala as the Finanace Director of the Rajarata Bus Company Limited and Mr. M. R. R. M. S. Peiris as the Director Engineering of the Gampaha Bus Company Limited, by the Employer, Sri Lanka Transport Board after, they had been removed from these posts by the Secretary to the Treasury is just, and if not so, to what reliefs each of therein is entitled".

Appearances:

Mr. G. W. Gratian De Silva Representative represented the party of the 1st Part.

Mr. Ranjith Ranawaka Attorney-At-Law with Shanika Gallage the Legal Officer appear for the Party of the Second Part.

After both parties mentioned above have submitted their respective statements that has led to the disputes in terms of Regulations 21 (1) and (2) of the Industrial Disputes Regulations, 1958. I made every endeavour to explore a possibility of an amicable settlement which proved in futility.

In the circumstances I charged the party of the 1st Part to commence adducing the evidence of all employees of the party of the First Part namely E. Hettiarachchi, R. M. Dhanapala and M. R. R. M. S. Peiris having concluded their evidence a new witness N. S. K. Perera (Director Engineering) was also led. The party of the Second Part refrained from leading any evidence.

The main contention as the Preliminary objection of the party of the 2nd Part is adverted in their written submission is detailed hereunder:-

44B(1) – Notwithstanding anything to the contrary in any other written law:-

(c) a suit for the recovery of any sum due under this Act from any employer to any workman shall be maintainable if it is instituted within two years (02) after that sum has become due;

44B (2) – For the purposes of this Section "sum of money" includes, where any benefit is due under this Act from an employer and where such benefit is capable of being computed in terms of money, such amount as may be determined by the Court in which the action for the recovery of the value of such benefit is brought.

The Three employees who are parties to this Arbitration were reffered in 2015 March. Their directorship were removed by the Secretary to the Treasury, in year 2004 in the months of June and July. From the day of removal from the director post or from the date of their salaries were reduced they should have instituted action immediately or within two years after the sums became due if it is entitled. They have completely failed to comply the requirements stated in Section 44B (1) (c).

It is evident that they have taken more than 10 years to take legal action against the employer. During the inquiry all three employees confirmed that they have not taken any legal steps against the employer on this matter, except for complaining to the ombudsman.

Labour Commissioner and/ or Labour Minister have not considered the time factor when directing this matter to the Industrial Court. Thus, their direction to the Arbitration is null and void.

The second legal objection is the direction made by the Minister to determine "whether the cut down of salaries earned by Mr. E. Hettiarachchi as the Managing Director of the Rajarata Bus Company Limited, Mr. R. M. Dhanapala as the Finance Director of the Rajarata Bus Company Limited, and Mr. M. R. R. M. S. Peiris as the Director Engineering of the Gampaha Bus Company Limited, by the Employer, Sri Lanka Transport Board after had been removed from those posts by the Secretary to the Treasury is just, and if not so, what reliefs each of them entitled".

The Hon, Minister has considered the salaries paid to the Directors as earned salaries. This is a misdirection of facts and bad in law.

Employees are paid salaries as per their service contract. End of the year they are entitled for the salary increments due under the contract. That is the earned salary of an employee.

In this Arbitration, employees were appointed as Directors by Secretary to the Treasury. Their appointments are outside the service contracts. With the appointments as Directors, salaries were increased as recongnition of the post. During the period of Directors the employees were granted their annual salary increments as per their respective grades. That portion of the salary is the earned salary as per the service contract.

Nature of the Director post is not a permanent post. paragraph 116 of the Article of Association has stated very clearly the right of the Treasury Secertary to remove the post for any reason. Employees were well aware of this situatation. Under these circumstances claiming the Director's allowance after removal from the post is illegal, baseless and without any valid rational.

In the case, PREMADAS AND OTHERS VS. SABARAGAMUWA DEVELOPEMENT BANK AND OTHERS - 1SLR 2005 Page 161 it was decided that, (MARKED AS X3)

(The petitioners complained of infringement of Article 12 (1) of the Constitution.)

Held:

Increments of salary is not a right and had to be earned. As such the decision to recover the monies paid to the Petitioners after 1.1.2002 was invalidly paid.

There was no violation of the petitioner's fundamental rights under Article 12 (1) of the constitution.

In this Arbitration matter Petitioner’s claim was that their earned salary cannot be deducted. The fundermental question is whether the increments what they were offered could be catergorized as an earned salaries. The increases were made due to holding the director posts and with the withdrawal of the post the increments were withdrawn. It is manifestly clear that the allowance added to the salary is not a part of earned salary.

The Ratio Decidendi of the said case is ‘‘increments of salary is not a right and had to be earned’’. The allowance added to the salary is not an earned increment within the service contract.

For the reasons aforesaid I respectfully urge to dismiss this Arbitration in limine.

A review of the written submission of both parties as well as the evaluation of the evidence reveals that the primary issue is whether there is a valid reference to me in the first instance.

The provision mentioned above namely Section 44B (1) (C) and Section 44B(2) of the Industrial Disputes Act, No: 43 of 1950 (as amended) is invoked in response to the statements of dispute in terms of Section 16 of the Industrial Disputes Act ‘‘ ..... every order under Section 4(1) referring such dispute to an Arbitrator for settlement by Arbitration SHALL BE ACCOMPANIED by a statement prepared by the Commissioner setting out each matter to HIS KNOWLEDGE is in dispute between the parties’’.

The three employees who are parties to this Arbitration were referred in 2015 March. Their directorships were removed by the Secretary to the Treasury, in year 2004 in months of June and July from the day of removal from Director post or from the date of their salaries were reduced they should have instituted action immediately or within TWO YEARS after sums became due if it is to be enforced. They have completely failed to comply the requirement stated in Section 44B (1) (C).

It is evident that they have taken 10 years to take legal action against the employer. During the inquiry all three employees have confirmed that they have not taken any legal steps against employer on this matter, excepts for complaining to the Ombudsman which was of no avail.

Labour Commissioner and / or Labour Minister have not considered that TIME FACTOR which is the only prescriptive period enshrined in the said Act. The failure of the Commissioner to address this to his mind is detrimental to the said reference. The ignorance or otherwise of one cannot stand in the way of just and equity. The maxim that 'delay defeats equity ' comes into operation in this instant case. And another maxim," He who is earlier in point of time is more powerful at law" , also stand in good stead for this purpose.

Therefore their reference and direction to the Arbitrator is NULL AND VOID as held in Upali Newspaper Limited Vs Eksath Kamkaru Samithiya 1999 2SLR 205, in this case Court of Appeal held that the Minister of Labour does not have unlimited powers to refer dispute under Section 4 (1) of Industrial Disputes Act and Court quash reference if bad in law.

It is settled law that an Arbitrator has the jurisdiction to determine whether a valid Industrial Dispute has been legally referred to him. In the case of Ceylon Bank Employees Union *Vs* Yatawara 64 NLR 49 at page 56/57 it was held a Tribunal of Special Jurisdiction created by statute can only act, if terms contained in the statute giving it jurisdiction are complied with if they are not complied with the jurisdiction does not arise.

Recently the Supreme Court had an occasion to refer section 44B of Industrial Disputes Act in RANAWEERA V. MAHAWELI AUTHORITY OF SRI LANKA Saleem Marsoof J reported in 2004 (BLR) page 8 at 10, " In fact, it is essentially from Sections 43A(3) and 44B of the Industrial Disputes Act that the responsibility of recovering any money due to a workman from an employer is cast on the COMMISSIONER OF LABOUR. Therefore it is imperative rule that the Commissioner the final authority as to enforcement of Order/ Award farely and squarely falls on him and as such he must exercise his obligation diligently in the interest of the State and its stakeholders particularly and to the general public and Industrial peace in general. So much so, it is unnecessary to go into the merits of the case as an Award given on an invalid reference is invalid from ab intio.

Therefore the reference referred to me by the said Minister under Section 4(1) of the Industrial Disputes Act is contrary to Section 44B(1) (C) and is incapable of proving as earned salaries of the Directors and that the direction to me is misdirection cannot be enforced in law. In passing in a similar scenario the Court of Appeal Case No: CA/456/98/F and CA/608/ (F) had decided that removal from the Director Post is lawful and not entitle to any compensation and as such employees are not legally entitled for any benefit after removal.

If should be noted and appreciated that the Counsel for the party of the 2nd Part whose written submission stands to reason and analyzed legal principles cogently and succinctly.

IN the circumstance I make NO AWARD.

Accordingly, I consider this Award is just and equitable in the circumstances.

At Colombo,
07th September, 2017.

T. EDMUND SANTHARAJAN
Arbitrator.

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