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

S.C. Appeal No. 143/2010
S.C. (Spl.) L.A. No. 132/2010
C.A. Appl. No.04/2009 (Writ)

Asian Hotels & Properties PLC
(formerly known as Asian Hotels and Properties Ltd.,),
No.77, Galle Road,
Colombo 03.

Petitioner-Appellant

Vs

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1. Frederick S. Benjamin,
   No.15/2, Off de Saram Road,
   Mount Lavinia.

2. The Commissioner of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.

3. Athauda Seneviratne,
   Minister of Labour Relations and Foreign Employment,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.

4. T. Piyasoma,
   No.77, Panniptiya Road,
   Battaramulla.

5. The Registrar,
   Industrial Court,
   9th Floor,
   Labour Secretariat,
   Colombo 5.

6. Minister of Labour Relations and
   Foreign Employment,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.

Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, C J.
Chandra Ekanayake, J. &
S.I. Imam, J.

COUNSEL : Gomin Dayasiri with Manoli Jinadasa and
K. Sivaskantharajah for Petitioner-Appellant

S. Barrie, SC., for 2nd, 3rd and 6th Respondents-Respondents

ARGUED ON : 29.03.2011

DECIDED ON : 03.09.2012

Dr. Shirani A. Bandaranayake, CJ.

This is an appeal from the Judgment of the Court of Appeal dated 02-07-2010. By that Judgment the Court of Appeal had dismissed the application of the

petitioner-appellant (hereinafter referred to as the appellant), which had sought a writ of certiorari to quash the Order of the Arbitrator dated 14.11.2008. The appellant came before this Court seeking for Special Leave to Appeal from the said Order of the Court of Appeal for which such leave was granted by this Court.

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The 1st respondent-respondent (hereinafter referred to as the 1st respondent) was employed by Messers. Crescat Developments Limited in the capacity of Manager Apartments Leasing and Rentals, which was a subsidiary of the appellant. After holding an inquiry, the appellant had terminated his services. By an Order dated 11-04-2005, the 3rd respondent-respondent (hereinafter referred to as the 3rd respondent) referred a purported industrial dispute, between the 1st respondent and the appellant for arbitration before the 4th respondent-respondent (hereinafter referred to as the 4th respondent). The purported dispute was, according to the appellant, that,

1. whether the termination of the services of the 1st respondent by the appellant is justified and if not, to what relief he is entitled and/or;

2. whether the granting of annual bonus for the financial year 2003/2004 to the 1st respondent by the appellant is justified and if not what relief he is entitled.

The 1st respondent had not attended a single sitting of the arbitration. Learned Counsel for the 1st respondent had claimed that the 1st respondent is out of the

country for medical treatment. According to the learned Counsel for the appellant, upto the date the writ application was made before the Court of Appeal, which was three years since the commencement of the arbitration, the 1st respondent had not made a single appearance in person before the arbitration as he continued to stay abroad.

The arbitration proceedings had continued and after the conclusion of the evidence in chief of the 3rd witness produced on behalf of the appellant, the appellant had given notice to the Arbitrator that they intend to summon Mr. F.N. de Silva, retired President of the Labour Tribunal and independent Inquiring Officer before whom the domestic inquiry of the 1st respondent was held, to produce the entire record of domestic inquiry proceedings. Learned Counsel for the 1st respondent had not raised any objection to the said summoning of Mr. F.N. de Silva as a witness, to produce the domestic inquiry proceedings.

On 16-09-2008, when the witness Mr. F.N. de Silva was summoned to produce the said domestic inquiry proceedings and the Report, learned Counsel for the 1st respondent for the very first time had objected to the production of the said proceedings, stating that it is in violation of the *audi alteram partem* rule. Learned Counsel for the 1st respondent had thereafter moved for time to file written submissions on the said objection raised by him.

Written submissions were filed on behalf of the appellant by his Counsel.

Thereafter the 4th respondent, being the Arbitrator, had made Order dated 14-11-2008 upholding the objection raised by the 1st respondent and had held that the domestic inquiry proceedings cannot be marked until the witnesses who gave evidence at the domestic inquiry are called upon to testify and disallowed the application to mark the domestic inquiry proceedings through Mr. F.N. de Silva.

The appellant had thereafter filed an application in the Court of Appeal seeking a writ of certiorari on the basis that the said Order of the 4th respondent dated 14-11-2008 is unlawful and/or invalid.

The Court of Appeal had dismissed the said application on the basis, *inter alia*, that the marking of the domestic inquiry proceedings would cause prejudice to the 1st respondent , as one of the witnesses at the domestic inquiry, one T.T. Al Nakib had not been produced as a witness before the arbitration.

When this appeal was taken for hearing learned Counsel for the appellant submitted that the argument could be based on the following question.

> "Whether domestic inquiry proceedings should be allowed to be marked in arbitration and/or Labour Tribunal proceedings irrespective of the fact that the witnesses of the Domestic Inquiry were summoned to give evidence or not."

Learned Counsel for the appellant strenuously contended that, the arbitrations and Labour Tribunal proceedings are guided by the principles laid down on the basis that they grant just and equitable relief and therefore there should not be mandatory requirement for all the witnesses who gave evidence before the domestic inquiry to give evidence before the arbitration proceedings.

Learned Counsel for the appellant relied on Section 17(1) of the Industrial Disputes Act in support of his contention that the Arbitrator is bound to hear all evidence presented by parties. Consequently it was contended that in terms of Article 17(1), that the Arbitrator must entertain and admit the domestic inquiry proceedings and thereafter consider which parts and portions he should rely upon. The contention therefore was that the decision of the Arbitrator to

disallow the marking of the domestic inquiry proceedings is erroneous in law. It was also contended that the Arbitrator had failed to consider the provisions contained in Section 36(4) of the Industrial Disputes Act. Learned Counsel for the appellant contended that in terms of Section 2(1) of the Evidence Ordinance, arbitration proceedings are outside the Evidence Ordinance. The contention was that according to the aforesaid statutory provisions the Arbitrator and the parties get a wider scope in entering, presenting and determining evidence than in a court of law.

Section 17(1) of the Industrial Disputes Act deals with the role of the Arbitrator in settlement of disputes by arbitration, which reads as follows;

> "When an industrial dispute has been referred under Section 3(1)(d) or Section 4(1) to an arbitrator for settlement by arbitration, he shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable. A labour tribunal shall give priority to the proceedings for the settlement of any industrial dispute that is referred to it for settlement by arbitration."

The provisions of Section 17(1) of the Industrial Disputes Act and its applicability was considered by the Court of Appeal in **Kalamazoo Industries Ltd and Others v Minister of Labour and Vocational Training and Others** ([1998] 1 Sri L.R. 235). In that matter all parties to the dispute had consented at the outset of the arbitration inquiry that the dispute is common to all four companies and the inquiry into the claim for all demands be consolidated and amalgamated. Both the applicant trade union and the respondent companies

were given time to tender their written submissions with the documents produced on their behalf. The applicant handed in the written submissions with the documents, but the four respondent companies failed to submit their written submissions and documents until the time that the award was drawn up and signed by the Arbitrator. The marked documents relied on by the four respondent companies were not tendered. On the basis of the above position, the Court had held that,

> "Although Section 17(1) of the Industrial Disputes Act stipulates that the arbitrator shall make all inquiries into the dispute, hear evidence and thereafter make his award, no duty is cast on him to invade private offices of litigants and take forcible possession of documents. It is not now open to the petitioners to annex the documents R1 to R35 and on their strength assail and impugn the award."

It is not disputed that the question at issue had taken place at a time when the matter was before the Arbitrator. It is also to be noted that the issues raised were on the basis of an industrial dispute that was to be adjudicated by an Arbitrator.

It is well settled law that the Labour Tribunals are expected to grant just and equitable reliefs. It is also necessary to be borne in mind that for the purpose of granting such relief there is no necessity for the Labour Tribunals to follow the rigid rules of law.

This position was considered in **The Bharat Bank Ltd., Delhi v The Employees' of the Bharat Bank Ltd., Delhi** (A.I.R. 1950 S.C. 188) that had

expressed the role of the Labour Tribunals in very clear terms, which reads as follows:

> "In settling the disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party, which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It is not merely to interpret or give effect to the contractual rights or obligations of the parties.
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> . . . . The Tribunal is not bound by the rigid rules of law."

The true position with regard to the exercise of the functions of the Labour Tribunal was clearly illustrated in the majority judgment of **United Engineering Worker's Union v K.W. Devanayagan** ((1967) 69 N.L.R. 289, where it was stated that,

> "The powers and duties of an arbitrator under the Industrial Disputes Act of an Industrial Court and of a Labour Tribunal on a reference of an industrial dispute are the same. In relation to an arbitration, the arbitrator must hear the evidence tendered by the parties. So must a Labour Tribunal on a reference. An Industrial Court has to hear such evidence as it considers necessary. In each case the award has to be one which appears to the Arbitrator, the Labour

> Tribunal or the Industrial Court just and equitable. No other criterion is laid down. They are given an unfettered discretion to do what they think is right and fair."

The Labour Tribunals were established over five (5) decades ago for the prevention, investigation and settlement of industrial disputes and when an industrial dispute is referred to an Arbitrator to adjudicate upon it, such an Order has to be based on just and equitable relief.

As clearly referred to in **Daniel v Rickett, Cockrell and Co.** (1938 2 K.B. 322) if the Tribunal or the Arbitrator is given the power to decide a matter justly and equitably, it is undoubtedly given a discretion.

Similarly, the provisions of the Evidence Ordinance, would not be applicable in an inquiry conducted by the Labour Tribunal or by the Arbitrator. The Evidence Ordinance has clearly stipulated the degrees of proof and the ascertainment of standards that are necessary for the administration of justice. As the Labour Tribunals should dispense just and equitable relief, to arrive at their decisions, they would not require strict degrees of proof that is required in a court of law since there is no necessity to comply with the provisions of the Evidence Ordinance. Furthermore, Section 36(4) of the Act specifically states that strict compliance with the provisions of the Evidence Ordinance is not required.

However this does not mean that the Labour Tribunals are barred from accepting any evidence. They could, if necessity arises, to rely on material available before the Tribunal. What is necessary is to grant just and equitable relief and for this purpose it is essential that the principles of natural justice should be followed. This position was clearly, expressed by Tambiah, J. in **The Ceylon Workers Congress v The Superintendent, Kallebokka Estate** (Supra).

> "Although, by subjective standards of an employer, a dismissal may be bona fide and just and equitable, nevertheless when looked at objectively, it may be unjust and inequitable . . . .
>
> Whenever a Tribunal is given the power to decide a matter justly and equitably, it is given a discretion (**Daniel v Rickett)**. Therefore the Industrial Disputes Act, as amended, gives a discretion to the Labour Tribunal, to make an Order which may appear just and equitable and such a jurisdiction cannot be whittled away by artificial restrictions."

It is therefore quite clear that although there is no necessity for the Labour Tribunals to strictly comply with the provisions of the Evidence Ordinance, they are bound by the rules of natural justice. Out of the two salient principles that govern the principles of natural justice, viz; no man should be a judge in his own cause (*nemo judex in re sua*) and both sides shall be heard (*audi alterm partem*), the latter would be more salutory in regard to this appeal since the said Rules would be applicable to arbitration proceedings as well. This means that the Arbitrator has to hear both parties. He cannot hear one party and his witnesses only in the absence of the other party. However, an Arbitrator could proceed to hear a case, *ex parte*, if a party who had been noticed, is not present.

Learned Counsel for the appellant contended that the 4th respondent had refused to mark the proceedings of the domestic inquiry on the basis that the witnesses had not been summoned to give evidence and therefore there had been a breach of the rules of natural justice. As stated earlier, the appellant had terminated the services of the 1st respondent, which was an admitted fact. The

appellant had taken the position that the services of the 1st respondent were terminated after holding a due inquiry and on the basis of the findings of the said inquiry. Learned Counsel for the appellant contended that as the termination of services of the 1st respondent was an admitted fact, the appellant was called upon by the 4th respondent to commence the case. Accordingly, it was necessary to place before the 4th respondent all the evidence relied upon by the appellant to justify the termination of the services of the 1st respondent prior to closing their case. Since the appellant relied on the inquiry that was held prior to the termination of services of the 1st respondent, the proceedings of the domestic inquiry were extremely necessary to be marked.

The said domestic inquiry proceedings, according to the appellant, contained only the evidence of four (4) witnesses, out of which two of them had already given evidence before the Arbitrator.

Learned Counsel for the appellant submitted that there is no bar for the 1st respondent to call any witness and examine that witness, if there is such a necessity.

In **The Batticaloa Multi-Purpose Co-operative Societies Union Ltd v V. Velupillai** ((1971) 76 N.L.R. 60) the Court had specifically held that for the purpose of granting just and equitable relief, a President of the Labour Tribunal, after satisfying himself that the evidence had been properly recorded, could act on the basis of the evidence led at the domestic inquiry. Considering the said aspect, Alles, J. in that decision held that,

> "In considering, however, what "just and equitable" Orders should be made, I see no objection to Presidents of Labour Tribunals examining or even acting on the evidence led at the domestic inquiry,

> after satisfying themselves, that the evidence has been properly recorded, ensuring that the workman had a fair opportunity of meeting the allegations made against him and seeking support for his findings from the evidence so led."

An Arbitrator, who has been empowered to make such award should do so, as may appear to him just and equitable. Section 17 of the Industrial Disputes Act, referred to earlier, clearly had granted an unfettered discretion for the Arbitrator to mete out just and equitable relief.

The question in the present appeal arose when the Arbitrator had rejected the marking of domestic inquiry proceedings in the arbitration proceedings. When the said rejection was placed before the Court of Appeal, that Court had decided in favour of the Arbitrator on the basis that a presumption could be drawn in terms of Section 114 (f) of the Evidence Ordinance that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The Court of Appeal in this regard had referred to the evidence of the witness, namely, T.T. Al Nakib.

The domestic inquiry proceedings contained the evidence of four (4) witnesses. Out of those four (4) witnesses, 2 of them, viz., Gerard Abeysinghe and Stephen Anthonisz had already given evidence before the Arbitrator. The 3rd witness was the 1st respondent himself and the said T. Al Nakib, according to the appellant, was the witness summoned by the 1st respondent himself to give evidence before the domestic inquiry.

Learned Counsel for the appellant brought to the notice of the Court that there is no bar for the 1st respondent to call the said witness if he so desired to examine him, as the 1st respondent has not even commenced his own case.

Considering such circumstances, it is evident that the refusal of the Arbitrator to mark the domestic inquiry proceedings on the basis that the witnesses have not been summoned to give evidence is not correct. Thus it is apparent that the steps that were taken by the Arbitrator in his refusal to accept the proceedings of the domestic inquiry is a clear violation of the rules of natural justice.

For the reasons aforesaid the question on which this appeal was argued is answered in the affirmative.

This appeal is accordingly allowed. The Judgment of the Court of Appeal dated 02-07-2010 and the Order of the Arbitrator dated 14-11-2008 are set aside.

I make no order as to costs.

Chief Justice

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court