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1968 *Present :* H. N. G. Fernando, C.J., and Abeyesundere, J.

MALIBAN BISCUIT MANUFACTURERS LTD., Petitioner,
and R. SUBRAMANIAM (President, Labour Tribunal) and
3 others, Respondents

S. C. 498/67—Application for a Mandate in the nature of a Writ of Certiorari and/or Prohibition

Industrial Disputes Act (Cap. 131)—Effect of an award of an industrial court—Scope of section 26.

Thirty workmen were transferred or demoted or interdicted by their employer-Company. Their dispute with the Company, which was referred by the Minister to an Industrial Court, was withdrawn because the workmen ceased to be members of the trade union (National Employees' Union) which represented them. Accordingly, on 19th February 1967, the Industrial Court made an " award " stating : " As there is now no dispute between the Union and the Company I make no award ". Subsequently, nearly 400 workmen, including the 30 workmen, were dismissed by the Company and, on 14th June 1967, the Minister referred the dispute for settlement by arbitration by a Labour Tribunal. The workmen were represented this time by the Ceylon Mercantile Union. The Commissioner of Labour referred separately to the cases of the 30 workmen in the following or similar terms : " Whether the transfer, demotion and the subsequent termination of employment of the following employees is justified and to what relief each of them is entitled ".

Held, that the " award " of the 19th February 1967, as it did not adjudicate upon and settle the disputes which had been referred to the Industrial Court, could not be binding, or operate as *res judicata*, in the present reference concerning the 30 workmen. In such a case, section 26 of the Industrial Disputes Act has no application.

APPLICATION for a Writ of *Certiorari* and/or Prohibition on the President of a Labour Tribunal.

C. Ranganathan, Q.C., with *S. J. Kadirgamar, Q.C.*, *K. D. P. Wickremasinghe*, *C. A. Amerasinghe* and *H. A. Abeywardena*, for the Petitioner.

N. Satyendra, for the 2nd Respondent.

H. L. de Silva, Crown Counsel, for the 3rd Respondent.

Cur. adv. vult.

April 9, 1968. H. N. G. FERNANDO, C.J.—

By order made under the Industrial Disputes Act (Chap. 131) and dated 14th June 1967, the Minister of Labour referred for settlement by arbitration by a Labour Tribunal an industrial dispute between the Ceylon Mercantile Union (the 2nd Respondent to the present application) and Maliban Biscuit Manufacturers Ltd. (the present Petitioner). In terms of the Act, the matters in dispute were specified in a statement published in the *Gazette*, and some of the matters were :—

(1) Whether the termination of employment of about 300 named employees of the Petitioner was justified ;

(2) Whether the non-offer of work to over 60 named employees was justified ;

(3) Whether the transfer, demotion of and subsequent termination of the employment of about 25 employees was justified ;

(4) Whether the transfer, and demotion of and subsequent non-offer of work to about 20 employees was justified ;

(5) Several demands of the employees regarding their conditions of employment.

The Petitioner thereupon submitted to the Labour Tribunal a statement of its case. Paragraph two of the statement referred to two matters :

Firstly, that there had previously been another reference to an Industrial Court in the case of a dispute between the Petitioner and some of its employees, and that an award had been made in that dispute ;

Secondly, that some persons named in the reference now under consideration had instituted proceedings in a Labour Tribunal, i.e. under Part IV A of the Industrial Disputes Act, and that the proceedings so instituted had been terminated according to law.

With regard to the second of these matters, the arbitrator to whom the present reference was made has upheld the Petitioner's contention that the questions which had been decided by another Labour Tribunal upon the applications made to it cannot be the subject of a new reference to arbitration. There is accordingly no need for any prohibition from this Court against the determination of such matter on the present reference.

With regard to the first of these matters, I shall deal later with the legal implications which are involved.

The third and fourth paragraphs of the Petitioner's statement of case were as follows :—

> The Company submits that this Tribunal has no jurisdiction, in any event, to entertain the reference or make any award in regard to termination of services or non-offer of work or transfer, demotions or interdictions.
>
> The Company also submits that the Hon'ble the Minister has no power to make a reference ' en masse ' involving so many persons.

The grounds stated in the third and fourth paragraphs quoted above have also been taken in the present application to this Court. But Counsel who appeared for the Petitioner before us addressed no argument in support of these grounds. Instead, he desired it to be recorded, and I now so record, that these grounds were raised because of a possible eventuality that the Petitioner may be advised in future proceedings to canvass before the Judicial Committee of the Privy Council the correctness of the decision of Their Lordships in the case of *The United Engineering Workers' Union v. Devanayagam* [1].

The matter mentioned in the fifth, sixth and seventh paragraphs of the Petitioner's statement of case also challenged the jurisdiction of the arbitrator to entertain the reference made to him by the Minister under the Act. But these matters were apparently not pressed at the proceedings before the Labour Tribunal, and they were not mentioned at all in the application made to this Court or during the argument before us.

The eighth to the last paragraphs of the Petitioner's statement of case referred to various matters pertinent to the actual dispute which was referred for arbitration, which matters would of course have been considered by the arbitrator upon the present reference, if the Petitioner had not objected, by the plea against jurisdiction which the Petitioner raised before the arbitrator and in this Court, to the taking of proceedings by the arbitrator.

The objections raised by the Petitioner in his statement of case (not including of course the matters referred to in paragraphs 8 *et seq.* of the statement) were dealt with by the arbitrator in his Order of 12th

[1] *(1967) 69 N. L. R. 289.*

December 1967. He over-ruled all the objections, save that concerning the binding effect of previous determinations of another Labour Tribunal. The arbitrator has thus indicated that he will not re-consider the correctness of those determinations.

Thereafter the Petitioner made the present application to this Court for a writ of prohibition against the taking of any further proceedings by the arbitrator on the reference made to him. The grounds upon which the writ was sought are set out in 9 sub-paragraphs of paragraph 15 of the petition to this Court. But during his argument, Counsel for the Petitioner frankly and properly admitted that he could not press the grounds stated in 5 of the sub-paragraphs. In addition, the ground stated in sub-paragraph (vii), which referred to the previous determinations of another Tribunal, had already been decided by the arbitrator in favour of the Petitioner and did not therefore call for argument before us.

Of the other 3 grounds, one of them (in sub-paragraph ii) was formally taken with a view to reserve the right to challenge before the Privy Council the correctness of Their Lordships' decision in *Devanayagam's case*. We are of course unaware of the course which the Petitioner proposes to take in that connection. But I must express emphatically the opinion that, even if the Petitioner did intend to ask for a re-consideration of the decision of the Privy Council, the proper stage for so doing would be after the arbitrator makes his award on the dispute referred to him.

There remain two grounds for this application, namely those set out in sub-paragraphs (i) and (vi) of paragraph 15 of the petition. The ground stated in sub-paragraph (i) is that the arbitrator " had no jurisdiction to entertain a reference relating to demotion, transfer, interdiction, non-offer of work, non-employment and termination of services ". Counsel however did not urge, as a general proposition, that such matters cannot form the subject of an " industrial dispute " within the meaning of the Act. The objection taken in sub-paragraph (i) relates only to the special circumstances of this case, and is connected with the grounds stated in sub-paragraph (vi), which reads as follows :—

> "Matters relating to some of the workers in the said reference by the Minister having been the subject of a reference previously to an Industrial Court and an award having been made namely ID No. 361 dated 19.2.67 no Industrial Dispute in respect of the said matters and the said workers survives in law and/or the award made by the Industrial Court is Res Judicata and/or the Minister has no power in law to make this reference and is "Functus officio" ; a true copy of the said award is produced herewith as part and parcel of the 2nd Respondent's answer already marked " F "."

Some mention of the history of this dispute is now necessary. Sometime before November 1966 about 30 workmen had been either transferred or demoted or interdicted by the Petitioner. Those workmen were at that time members of the National Employees' Union, and a dispute between that Union and the Petitioner concerning the cases of those workmen was referred to the Industrial Court by an order made by the Minister on 22nd November 1966. By the time the case was taken up for hearing by the Industrial Court, it appears that the workmen had ceased to be members of that Union. For this reason, a representative of the Union informed the Court on 18th February 1967 that " they were withdrawing the applications ". It seems fairly clear that in fact the workmen no longer had confidence in that Union.

In these circumstances, the Industrial Court, on 19th February 1967, executed a document having the formal appearance of an award made under the Act. But the only effective statement in that " award " is " As there is now no dispute between the Union and the Company *I make no award* ".

Events now took a much more serious turn. In circumstances to which I will not here refer, because it will be the task of the arbitrator to consider them, nearly 400 workmen were dismissed by the Petitioner, including the 30 workmen concerning whom there had been the earlier dispute, and the principal matter now referred to arbitration is whether those dismissals were justified. In setting out the matters now in dispute, the Commissioner of Labour has referred separately to the cases of these 30 workers in the following or similar terms :—

> " Whether the transfer, demotion and the subsequent termination of employment of the following employees is justified and to what relief each of them is entitled."

The objection now taken in sub-paragraph (vi) of paragraph 15 of the petition is that because the matters of the transfers and/or demotions of the 30 workmen were the subject of the former reference to the Industrial Court, those same matters cannot be the subject of another reference under the Act. But considerations both of law and of commonsense render this objection untenable.

Section 26 of the Act declares that the award of an Industrial Court shall be binding on the parties, trade unions, employers and workmen referred to in the award. But although the Industrial Court, in the case of the dispute referred in November 1966, made its order in the form of an " award ", there was surely no legal award made in that case. On the contrary, the Court explicitly stated that it made no award. In such circumstances, the Act has no provision which prevented the Minister from referring to arbitration the disputes concerning the 30 workers to whom the former dispute related. Nor, even if the doctrine of *res judicata* is to apply, does that doctrine operate where there has not been either an adjudication or a dismissal of an action.

In fact, at the time when the Minister made the present reference there was quite clearly in existence a dispute between the Ceylon Mercantile Union and the Petitioner concerning the termination of the services of these 30 workmen and also concerning the earlier transfers and/or demotions of those workmen. One object of the Act is the settlement of such disputes, and so long as there had not come into force an award which adjudicated upon and settled the disputes, it was entirely reasonable and necessary that the Minister included them in his reference of the wider disputes which subsequently arose.

Counsel for the Petitioner was driven into the position of having to argue that the former reference to the Industrial Court is still pending in that Court, and that the matters of the transfer and/or demotion of the 30 workmen must be adjudicated upon by that Court, and not by the arbitrator upon the present reference. If then relief is yet available in law with respect to these matters, the Petitioner's objection to the question of relief being now considered and decided by the arbitrator is purely technical and obstructive. The course of proceedings in the present and other cases which have come to the notice of this Court create in my mind the fear that any attempt to resume proceedings in the Industrial Court will be resisted by the Petitioner with the argument, embodied in paragraph 15 (vi) of the present petition, that the " award " made by the Industrial Court on 19th February 1967 is *res judicata*.

I hold that the present reference properly included the specified matters in dispute concerning the 30 workmen regarding whom a dispute existed in November 1966.

Before the arbitrator, and again in the application to this Court, the Petitioner sought to prevent altogether the taking of proceedings by the arbitrator for the investigation and settlement of the disputes which had arisen. In the petition to this Court, several objections to jurisdiction were taken, which the Petitioner's Counsel did not consider to be worthy of argument before us. One of the objections, namely that the dispute in this case is not a minor dispute is almost absurd. Indeed, as I have shown, the one objection pressed before us related only to the cases of 30 workmen from among nearly 400 cases ; and even if that objection had been upheld, that would have afforded no ground whatsoever for an order of this Court restraining the arbitrator from investigating the disputes concerning the dismissal of over 300 other workmen and various other disputes concerning the terms and conditions of their employment. In fine, not one of the several grounds of objection could have justified any hope of a decision, either by the arbitrator or by this Court, that proceedings should not be taken by the arbitrator upon the reference. It is regrettable that advantage is often taken of the right of recourse to this Court without any substantial expectation of success, and with the consequence only that harassment is caused to opposing parties in the form of delays, inconvenience and expense.

I cannot leave this case without stressing the need for employers and their legal advisers to become reconciled to the existence of the Industrial Disputes Act and of the machinery which Parliament has therein provided in the public interest for the settlement of industrial disputes and the preservation of industrial peace. Obstructive tactics by an employer involved in such a dispute serve only to create the impression that the employer *either* has no faith in the merits of his own case, *or else* that he is in rebellion against the law of the land.

I dismiss the Petitioner's application with costs fixed at Rs. 1,050 payable to the 2nd Respondent.

ABEYESUNDERE, J.—I agree.

Application dismissed.