CEYLON TOBACCO CO., LTD.

v.

J. ILLANGASINGHE, PRESIDENT, LABOUR TRIBUNAL AND OTHERS

COURT OF APPEAL.
ABEYWARDENA, J. AND G. P. S. DE SILVA, J.
C. A. APPLICATION No. 1073/80 L. T. 2/13050/80.
JULY 26, 1985.

Can remedy under Industrial Disputes Act s.31 be sought where a workman has already sought relief under Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971? – Meaning of expression "Legal remedy " – S. 31B (1) and (5) of Industrial Disputes Act.

The 2nd respondent was employed in the Kandy office of the petitioner as a stenographer (designated Secretary) on contract on a temporary basis for six months ending 12.8.1979. She had previously served in the Colombo office of the petitioner on contract for varying periods as private and confidential Secretary. When the 2nd respondent's contract ended on 12.8.1979 her employment ceased and she was paid a terminal benefit as gratuity.

Upon the termination of her employment the 2nd respondent made an application under the provisions of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 to the Commissioner of Labour. The Commissioner made order that her case was not covered by the said Act as she had consented to the termination of her services. She then applied for relief to the Labour Tribunal under section 31B of the Industrial Disputes Act. The question was whether having resorted to her legal remedy under Act No. 45 of 1971 she could now seek relief under the Industrial Disputes Act.

Held –

Section 31B (5) bars a workman from seeking relief under the Industrial Disputes Act where he has first resorted to any other legal remedy.

The expression 'legal remedy' means a remedy provided by law whether it be under the common law or under statute but it will not include administrative relief.

The bar imposed by s. 31B (5) is also aginst a workman *seeking,* and not only against *obtaining* both his legal remedy under the Industrial Disputes Act and any other legal remedy.

APPLICATION for writs of certiorari and prohibition against the President of the Labour Tribunal.

H. L. de Silva, P.C. with *N. Sinnetamby* for petitioner.
D. C. Palliyaguru for 2nd respondent.

Cur. adv. vult.

September 20, 1985.

G. P. S. DE SILVA, J.

The petitioner (Ceylon Tobacco Co., Ltd.) seeks writs of Certiorari and Prohibition on the 1st respondent, the President of the Labour Tribunal. At the hearing before us, Counsel agreed that the facts which gave rise to this application are not in dispute. The 2nd respondent was first employed by the petitioner on a contract of employment as the private and confidential Secretary for a period of five years commencing from 15th December 1968. The contract was renewed for a further period of two years ending on 14th December 1975. Once again the contract was renewed for a still further period of three years ending on 14th December, 1978.

On 14.2.78 the 2nd respondent applied for 4 1/2 months leave. The leave was approved. Subsequently she asked for overseas leave for a period of 20 weeks commencing on 4.9.78 and ending on 22.1.79. The overseas leave was also granted. By letter dated 20th November 1978 written from Australia she requested a further period of two weeks "no pay leave" and also sought a transfer from the Colombo office of the petitioner to its Kandy office. The petitioner granted her request for 2 weeks "no pay leave". As regards the request for a transfer to Kandy, the petitioner informed her that the matter is under consideration. She returned to Sri Lanka in January, 1979.

On her return to Sri Lanka, she had discussions with the officers of the petitioner and it was agreed to grant her temporary employment as a stenographer in the Kandy office for a period of six months commencing from 12th February 1979. This offer of temporary employment in Kandy was subject to the conditions stated in the letter dated 30.1.79 (P2) addressed to her by the petitioner. P2 sets out the conditions in the following terms :–

"1. Your services as a secretary at Ceylon Tobacco Co. on the basis of your earlier contract will cease on 6th February 1979.

2. You will be given a temporary contract of six months commencing 12th February 1979 whereby during that period you will attend to the duties of a stenographer.

3. However, during this period you will have the designation of Secretary and your salary will be what you received under the earlier contract.

4. It is clearly understood that at the end of the six months, i.e. on 12th August 1979 your temporary services will cease and the company will be under no obligation to provide you with employment".

She accepted the offer of employment on the above terms and worked in the Kandy office until 12th August 1979 on which date her employment with the petitioner ceased in terms of P2. She was paid her "terminal benefits" which included, a sum of Rs. 19,350 *as gratuity.*

On 26.10.79 she made an application to the Commissioner of Labour (P4) under the provisions of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971. In P4 she complained that the petitioner failed to obtain her consent or the permission of the Commissioner of Labour in respect of the purported termination of her employment. The Commissioner of Labour requested the petitioner to reply to the application of the 2nd respondent. The petitioner did so by letter dated 16th November 1979 (P5) wherein the petitioner stated inter alia that the 2nd respondent consented in writing to the termination of her services with effect from 12th August 1979. By P6 and P7 dated 27th November 1979 and 14th December 1979 respectively the Commissioner of Labour communicated his order that the 2nd respondent's case is not covered by the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 *since she had consented to the termination of her services.* In the circumstances the Commissioner of Labour advised her to seek relief from the Labour Tribunal – advice which Mr. H. L. de Silva, Counsel for the petitioner characterized as "gratuitous".

Thereafter the 2nd respondent by application dated 21st January 1980 made in terms of section 31B of the Industrial Disputes Act invoked the jurisdiction of the Labour Tribunal. It is to be noted that the relief prayed for in this application is very similar to the relief sought from the Commissioner of Labour, namely re-instatement and back wages. At the hearing before the Labour Tribunal, the petitioner raised a preliminary objection, viz. that the 2nd respondent having first sought a legal remedy before the Commissioner of Labour in terms of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, is not entitled to the remedy under section 31B (1) of the Industrial Disputes Act in view of the provisions of section 31B (5) of the latter Act. After hearing submission, the Tribunal overruled

the preliminary objection by its order dated 4.6.80 and decided to fix the 2nd respondent's application for hearing. The petitioner now seeks to quash the said order of the Tribunal dated 4.6.80 and to restrain the Tribunal from taking further proceedings in respect of the 2nd respondent's application before the Labour Tribunal.

The present application for the prerogative writs turns on section 31B (5) of the Industrial Disputes Act which reads thus :

> "Where an application under sub-section (1) is entertained by a Labour tribunal and proceedings thereon are taken and concluded, the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which that application relates, and *where he has first resorted to any other legal remedy,* he shall not thereafter be entitled to the remedy under sub-section (1)".

Th expression "legal remedy" means a remedy provided by law, whether it be under the common law or by statute. If a party had sought any form of administrative relief, then, of course, it cannot be said that such party had resorted to a legal remedy. In the instant case, the 2nd respondent has first resorted to a remedy recognised by statute, namely the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971.

Moreover, the powers conferred on the Commissioner of Labour under the aforesaid Act No. 45 of 1971 and the just and equitable jurisdiction of the Labour Tribunal are very similar. The Act gives the Commissioner of Labour the power to grant or refuse his approval to an employer to terminate the "scheduled employment" of any workman and to decide "the terms and conditions subject to which his approval should be granted including any particular terms and conditions relating to the payment by such employer to the workman *of a gratuity or compensation for the termination of such employment*" vide s. 2 (2) (*e*). Where an employer terminates the scheduled employment of a workman contrary to the provisions of the Act, the Commissioner has the power to order the employer to continue to employ the workman in the same capacity in which he was employed and to pay his wages and all other benefits which he would otherwise have received if his services were not terminated – vide section 6. Further in the conduct of the proceedings before the Commissioner of Labour strict rules of evidence would not apply – vide section 17. Thus it is seen that the Commissioner of Labour is empowered to

make an order which is in many ways similar to the award that could be made by a Labour Tribunal. The Commissioner, like Tribunal, is not bound by the terms of the contract of employment.

Admittedly, the 2nd respondent made an application to the Commissioner of Labour in terms of the said Act No. 45 of 1971. Section 2 (1) provides :

"No employer shall terminate the scheduled employment of any workman without –

(*a*) the prior consent in writing of the workman ; or

(*b*) the prior written approval of the Commissioner".

Once the termination is with the "prior consent in writing of the workman" the prohibition in section 2 (1) would not apply. On the material placed before him, the Commissioner found that the termination of the services of the 2nd respondent was with her "prior consent in writing"– a decision which "shall not be called in question whether by way of writ or otherwise –

(i) in any court, or

(ii) *in any court, tribunal or other institution established under the Industrial Disputes Act".*

vide section 2 (2) (*f*) as amended by Law No. 4 of 1976. It is a matter of significance that the 2nd respondent did not at any time seek to *directly* challenge the Commissioner's decision on the central issue of "consent" on the ground of ultra vires in appropriate proceedings. It is to be noted that section 31 B (1) (*a*) of the Industrial Disputes Act postulates the termination of services "by the employer" and therefore the question of the prior consent given by the workman to the termination of services has a direct bearing on the application made by the 2nd respondent to the Labour Tribunal.

On a consideration of the matters set out above I am of the view that the provisions of section 31 B (5) of the Industrial Disputes Act operate, in the circumstances of this case, as a statutory bar to an application being made by the 2nd respondent to the Labour Tribunal for relief.

Mr. Palliyaguru, Counsel for the 2nd respondent, relying strongly on the decision in *Mendis v. The River Valleys Development Board,* 80 CLW 49, contended that what section 31 B (5) provides is not that a workman cannot seek his remedy under the Act and any other legal remedy also but that he cannot obtain both I find myself unable to

agree with this submission as it does violence to the plain language used in the section – "where he has first resorted to any other legal remedy" The ordinary meaning of the word "resorted to" is "to have recourse, to apply (to)". Lord Guest and Lord Devlin in their dissent in *The United Engineering Workers Union v. Devanayagam*, 69 NLR 289 at 305 made the observation :

> "The workman has to make *his choice* between the remedy afforded by the Act and any other legal remedy he may have : he cannot *seek both*". (The emphasis is mine).

This statement is no doubt obiter but is an indication of the true meaning.

In the result, I direct the issue of an order in the nature of a writ of Certiorari quashing the decision of the 1st respondent dated 4th June, 1980 (P 10) and an order in the nature of a writ of prohibition restraining the 1st respondent from taking further proceedings in case No. L.T. 2/13050/80. In all the circumstances, I make no order as to costs.

ABEYWARDENE, J. – I agree.

Certiorari and prohibition issued.