1963 *Present:* **Weerasooriya, S.P.J., and Herat, J.**

STRATHEDEN TEA CO. LTD., Petitioner, *and*
R. R. SELVADURAI *et al.*, Respondents

S. C. 428—Application for the issue of a Mandate in the Nature of a Writ of Certiorari

Industrial Disputes Act (Cap. 131)—Section 17 (1)—Meaning of expression "just and equitable"—Invalidity of award ordering payment of compensation to a labourer without a decision as to re-instatement—Certiorari.

Although the power conferred by section 17 (1) of the Industrial Disputes Act on an arbitrator is a wide one, it must be exercised in accordance with justice and equity, and not arbitrarily. As between two innocent parties, one of whom bas sustained a loss, there is no ground in justice or equity for shifting the burden of the loss to the other party. The rule in such a case is that the loss must lie where it falls.

An estate labourer who sought employment in an estate was not selected by the management of the estate. The arbitrator to whom the dispute was referred under section 4 (1) of the Industrial Disputes Act held that there had been no contract for the employment of the labourer but, nevertheless, awarded him compensation on compassionate grounds.

Held, that the order for compensation was made on a misconstruction of the expression "just and equitable" in section 17 (1) of the Industrial Disputes Act, and was an error of law. As the error of law appeared on the face of the record, it was liable to be quashed by writ of *certiorari*.

Held further, that an order for payment of compensation could not be made except as an alternative to re-instatement.

APPLICATION for a writ of *certiorari* to quash an award made by an arbitrator in respect of an industrial dispute referred to him under section 4 (1) of the Industrial Disputes Act.

H. V. Perera, Q.C., with *L. Kadirgamar*, for the Petitioner.

M. Tiruchelvam, Q.C., with *K. Kandaswamy*, for the 2nd Respondent.

Cur. adv. vult.

December 20, 1963. WEERASOORIYA, S.P.J.—

This is an application for a writ of certiorari to quash an award made by the 1st respondent in his capacity as an arbitrator in respect of an industrial dispute referred to him under section 4 (1) of the Industrial Disputes Act (Cap. 131) for settlement by arbitration. The dispute was whether the failure of the management of Henfold Estate, Lindula, to offer work to one Palaniyandy and six other members of his family named in the reference was justified and to what relief they were entitled. The petitioner-company is the owner of Henfold Estate.

Prior to the 5th July, 1958, Palaniyandy and the six others were working on Stanford Hill Estate. Towards the end of June, 1958, the management of Henfold Estate was desirous of recruiting about twenty-five additional labourers and this fact was announced at the muster ground of the estate by the Kanakapulle Ponnusamy. Palaniyandy, who came to hear of the proposed recruitment, decided that he and his family should leave Stanford Hill Estate and obtain employment on Henfold Estate. Having obtained their discharge tickets on the 5th July, 1958, from the Superintendent of Stanford Hill Estate, who in this instance waived the usual one month's notice, Palaniyandy and the six others went to Henfold Estate on the following day, after informing Ponnusamy of their arrival. When they got there Ponnusamy arranged accommodation for them in the estate lines pending their employment.

Just at this time the Superintendent of Henfold Estate was going on furlough and the question of the employment of the newcomers was kept in abeyance. It was only on the 17th July that, while certain other labourers who had also come to the estate at the same time as Palaniyandy in search of employment were taken on, Palaniyandy and the six members of his family were told that they would not be employed. This decision was made by the Acting Superintendent who, as a result of information obtained by him in the meantime regarding the antecedents of Palaniyandy, had come to the conclusion that it was not in the interests of the estate to employ him or the others. In the result they were left stranded as they had already terminated their employment on Stanford Hill Estate. The 2nd respondent is a union of which the workers employed on Henfold Estate were members. It is not clear whether Palaniyandy and the six others were also members, but on their behalf the 2nd respondent took up the position that the management of Henfold Estate had, through their agent Ponnusamy, entered into a contract for their employment and that the refusal on the 17th July to give them work amounted to a breach of contract. This position was contested by the management. Hence the reference to arbitration.

Section 4 (1) of the Industrial Disputes Act provides for the reference of a minor industrial dispute for settlement by arbitration notwithstanding that the parties to the dispute do not consent to such a reference. Mr. Tiruchelvam, who appeared for the 2nd respondent-union, conceded that the award of the arbitrator on such a reference could be quashed by writ of certiorari.

The 1st respondent held that there was no contract for the employment of Palaniyandy and the other members of his family as contended for by the 2nd respondent-union. He had several adverse comments to make regarding Palaniyandy's character and his temperament as a worker. He also held that the Acting Superintendent of Henfold Estate did not act unfairly in refusing to employ Palaniyandy and the six others and that in the circumstances the non-employment of those persons was justified. He held, further, that no question of estoppel arose against the management in respect of the non-employment. Notwithstanding these findings, which were in favour of the management of Henfold Estate, the 1st respondent ordered that Palaniyandy and the six others should be compensated by the management to the extent of paying each of them two and a half months' wages and allowances, computed on the hypothetical basis that they had worked on every working day from Monday the 7th July, 1958.

The 1st respondent held that it was " but just and equitable " that Palaniyandy and his family should be compensated in the manner indicated. Section 17 (1) of the Industrial Disputes Act empowers an arbitrator to whom a dispute is referred under section 4 (1) for settlement by arbitration to make " such award as may appear to him just and equitable ". Mr. H. V. Perera submitted on behalf of the petitioner that the order for compensation is based on a misconception on the part of the 1st respondent as to the meaning of the words " just and equitable " in section 17 (1) and on that ground he asked that the order be quashed for an error of law on the face of the record.

In making the order for compensation, the 1st respondent stated that he took into account that Palaniyandy and his family threw up their jobs on Stanford Hill Estate, that they were put to the expense of moving from there to Henfold Estate and that they had been " induced " to do so on the understanding that they would be employed on Henfold Estate. But the findings of the 1st respondent on the issue relating to the alleged contract of employment absolve the management of Henfold Estate from any liability, legal or moral, towards Palaniyandy and his family. On these findings it is clear that whatever inducement was offered to them as a result of which they terminated their employment on Stanford Hill Estate came from a quarter other than the management. It would appear that there is a universal practice requiring an applicant for employment on one estate to produce his discharge ticket from another estate where he had previously worked. This practice was condemned by the 1st respondent as " thoroughly pernicious ", but, even so, he held that when Palaniyandy and his family obtained their discharge tickets from Stanford Hill Estate before setting out for Henfold Estate, it was a risk which they knowingly took and that the management of Henfold Estate was not liable in damages on that ground.

The question then arises whether in the circumstances stated above it was open to the 1st respondent to make an order for compensation against the management of Henfold Estate on the just and equitable ground in section 17 (1) of the Industrial Disputes Act. Although the power conferred by that section is a wide one, there are limitations to the exercise of it which are implicit in the wording of the section. That is to say, the power is to be exercised in accordance with justice and equity, and not arbitrarily. " In the most general sense, we are accustomed to call that Equity, which, in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex aequo et bono* "— Story on Equity (2nd ed.) Vol. 1, page 1. As between two innocent parties, one of whom has sustained a loss, I can see no ground in justice or equity for shifting the burden of the loss to the other party. The rule in such a case is that the loss must lie where it falls. As indicated by the Privy Council in *Davis & Co., Ltd. v Brunswick (Australia) Ltd.*,[1] where the meaning of the phrase " just and equitable " in the New South Wales Companies Act, 1899, was considered, the Court is required to hold " an even hand " between the conflicting interests.

The order for compensation in the present case seems to be based entirely on charitable or compassionate grounds and, in my view, is not in accordance with the findings. I do not mean to say that an arbitrator should put aside all considerations as these in determining what is just and equitable. But such sentiments should not be the deciding factor in making an order to the detriment of a party who has been held to be as free from blame as the party whom the order is intended to benefit. In my opinion, the order for compensation made by the 1st respondent against the management of Henfold Estate has proceeded on a misconstruction of the expression " just and equitable " in section 17 (1) of the Industrial Disputes Act, and is an error of law. As the error of law appears on the face of the record, I quash so much of the award as relates to the payment of compensation.

Apart from the reasons which have weighed with me in coming to the above conclusion, it was decided recently by a Divisional Bench of this Court in *Taos Ltd. v. P. O. Fernando and Others* [2] that an order for payment of compensation cannot be made in an award except as an alternative to re-instatement. The decision in that case, which is binding on us, proceeded on a consideration of section 33 (1) of the Industrial Disputes Act. In the award of the 1st respondent there is, of course, no order for re-instatement as the question did not arise. If the *ratio decidendi* of the case which I have just cited is applicable to the present case, as I think it is, the order for compensation is *ultra vires* of the powers of an arbitrator appointed under the Industrial Disputes Act. This would be an additional ground for quashing the order for compensation.

The 2nd respondent will pay the petitioner-Company the costs of this application, which I fix at Rs. 262.50.

Application allowed.

HERAT, J.—I agree.

[1] *(1936) 1 A. E. R. 299.*

[2] *(1963) 65 N. L. R. 259.*