Wimalasena
v.
Navaratne and two others

COURT OF APPEAL
RATWATTE, J. AND ATUKORALE, J.
C.A. 811/78
FEBRUARY 12, 1979

Industrial Disputes Act, sections 4 (1), 31 B (2) (b)—Reference to arbitration by Minister—Proceedings alredy pending in Labour Tribunal—Whether such reference valid—Whether interference with judicial proceedings then pending—Powers of Minister under section 4 (1).

The question that arose for consideration in this case was whether the Minister of Labour has the power to refer an industrial dispute for arbitration under section 4(1) of the Industrial Disputes Act when there was at the time an inquiry pending in the Labour Tribunal regarding the same dispute. By virtue of the operation of section 31 (B) (2) (b) a proceeding pending before the Labour Tribunal would have to be dismissed once reference to arbitration is made. It was contended on behalf of the petitioner in this case that a pending dispute could not be referred in this way to arbitration and that the Executive could not be permitted to interfere in a pending proceeding of a judicial nature.

Held

Tht Minister had the power to refer a dispute for settlement by arbitration under section 4(1) of the Industrial Disputes Act, even though an inquiry was pending in the Labour Tribunal regarding the same dispute. The reference to arbitration is a lawful exercise of the powers vested in the Minister by statute and does not amount to an inteference with the pending proceedings of a judicial nature.

Cases referred to

(1) *Nadaraja Ltd. v. N. Krishnadasan,* (1975) 78 N.L.R. 255.
(2) *S.C. 291/63—S.C. Minutes of 23.7.1964.*
(3) *S.C. 460/75—S.C. Minutes of 7.7.1976.*
(4) *S.C. 122/68, L.T. 2/19537—S.C. Minutes of 13.11.1972.*
(5) *Estates and Agency Co. Ltd. v. Perera.* (1975) 78 N.L.R. 269.

APPLICATION for a Writ of Prohibition.

H. L. de Silva, with *M. Y. M. Faiz* for the petitioner.

C. Ranganathan, Q.C., with *R. L. Jayasuriya* and *Iftikar Hussain,* for the 2nd respondent.

Cur. adv. vult.

February 12, 1979.

RATWATTE, J.

The question that arises for consideration on this application is whether the Minister has the power to refer an industrial dispute for arbitration under section 4 (1) of the Industrial Disputes Act, when there was an inquiry pending in the Labour Tribunal regarding the same dispute.

The petitioner had on 16.06.1971 been appointed by the 2nd respondent as an Extension Officer in the Co-operative Wholesale Establishment, by the letter of appointment which has been produced marked A. At about the same time 166 others had been appointed as Extension Officers in the C.W.E. The petitioner functioned as an Extension Officer for nearly 7 years when by letter B dated 16.01.1978 the petitioner's services were terminated with immediate effect. On the same day the services of 156 other Extension Officers were also terminated. The reason given for the termination in the letter B is that the 2nd respondent had decided to close down the Extension Service. The petitioner was informed that in lieu of notice he would be paid a month's salary and a half month's salary for every year of service as compensation. On 02.03.1978 the petitioner made an Application under section 31 (B) (1) of the Industrial Disputes Act to the Labour Tribunal against the 2nd respondent, stating that the termination of his services by the 2nd respondent was unjustified and seeking relief by way of re-instatement and back wages. The application has been marked as C. The 2nd respondent on 31.05.1978 filed his answer, which has been marked D. Applications to the Labour Tribunal for similar relief against the 2nd respondent have been made by 152 other persons whose services as Extension Officers had been terminated. The application of the petitioner and that of 10 other applicants were taken up for inquiry on 25.08.1978 and with the consent of all parties the eleven applications were consolidated and the matter proceeded to inquiry on the same date. Senior State Counsel who appeared for the 2nd respondent led the evidence of D. P. R. Colonne, the Additional General Manager of the C.W.E. The representative of the petitioner and of the 10 other Applicants, Mr. Panditha commenced the cross-examination of Colonne and further inquiry was postponed for 04.10.1978. The above facts are not in dispute.

On 04.10.1978 the inquiry was resumed and the witness Colonne was further cross-examined and according to the petitioner, during the cross-examination Senior State Counsel intimated to the President of the Labour Tribunal that a conference would be held in the chambers of the Solicitor-General between all parties in order to settle the matter.

According to the 2nd respondent on 04.10.1978, it was Mr. Panditha who asked for a postponement of the inquiry to ascertain whether a settlement was possible or not and that thereupon Senior State Counsel stated that a discussion could be held in the Chambers of the Solicitor-General. There is a dispute as to who made the first suggestion, but there is no dispute that the inquiry was postponed in order to ascertain whether a settlement was possible. But this dispute as to who made the first suggestion is immaterial in deciding the question that arises in this case. The 11 applications were to be called on 24.10.1978 in order to determine whether a settlement had been arrived at. A copy of the proceedings of 04.10.1978 has been annexed marked E. The petitioner states that between 04.10.1978 and 24.10.1978 he received no intimation of any conference pertaining to this matter. The 3rd respondent, the Minister of Labour on 20.10.1978 made Order under section 4(1) of the Act which was published in the *Government Gazette* of 24.10.1978, which has been produced marked F, appointing the 1st respondent as Arbitrator and referrring for arbitration by the 1st respondent, the industrial dispute in respect of the matter specified in the statement of the Commissioner of Labour, which accompanied the Order. The dispute that was referred was whether the termination of the services of the members of the two Unions referred to in Schedules A and B in the Gazette F respectively and the 129 workmen referred to in Schedule C, by the Board of the C.W.E. is justified and to what relief each of them is entitled. The petitioner pleads that the said Order made by the 3rd respondent is ultra vires the powers conferred on him by the Act and has not been made *bona fide* but for extraneous reasons. The petitioner further states that the 1st respondent purporting to act on the Order made by the 3rd respondent has taken certain steps and that the petitioner believes that 1st respondent would proceed to adjudicate upon the matter referred to him. The petitioner contends that the 1st respondent has no jurisdiction to adjudicate upon the dispute referred to him and therefore asks for a Writ of Prohibition restraining the 1st respondent from adjudicating upon the question as to whether the termination of the services of the petitioner by the 2nd respondent is justified or not.

Learned Counsel for the petitioner submitted that the matter that was before the Labour Tribunal was included in the dispute that was referred to Arbitration. When a matter is referred for settlement by arbitration, an important consequence follows in that, in terms of section 31B(2) (*b*) in such a situation any application that is filed before a Labour Tribunal in respect of the same dispute has to be dismissed. Mr. H. L. de Silva for

the petitioner submitted that section 31B (2) (b) will not apply where there is a subsequent reference to arbitration. He contended that the process cannot be reversed. He therefore argued that two separate proceedings will be pending in regard to the same matter. He further submitted that the primary question is how may the powers under section 4 of the Act be exercised by the Minister. He contended that the Minister's powers under this section are limited. For instance where the Minister has made a reference under section 4(1) of the Act referring an industrial dispute for settlement by arbitration, he has no power to revoke the said Order of reference. He relied on the judgment of Supreme Court in *Nadaraja Ltd. v. N. Krishnadasan* (1). He also cited two unreported judgments in S.C. 291/63. S.C. Minutes of 23.07.1964 (2) and S.C. 460/75—S.C. Minutes of 07.07.1976 (3). Relying on these authorities he argued that one cannot refer to arbitration a pending dispute on the principle that the Executive cannot be permitted to interfere in a pending proceeding of a judicial nature. Another important consideration Mr. de Silva submitted is that an award made by an arbitrator can be repudiated in terms of section 20 of the Act and therefore that an Arbitration Award from the point of view of an employee is fraught with many risks at the hand of an unscrupulous employer. He contended that the act of the 3rd respondent was a *mala fide* exercise of the power given to him. He argued that the termination of the services of the petitioner and the others was in January 1978, but no action was taken for 10 months and that the Minister found it expedient to refer the matter for arbitration only when the 2nd respondent found a settlement inexpedient and impracticable. He further contended that the Legislature never intended that section 4 of the Act could be used arbitrarily and capriciously. Mr. de Silva further submitted that whatever doubts there may have been before about the nature of the functions of Labour Tribunal Presidents, today there is no doubt. He contended that in terms of Article 170 of the Constitution there is no question that Labour Tribunal Presidents are Judicial Officers. He also referred to Section 116 of the Constitution and submitted that the 3rd respondent's Order referring this matter for arbitration amounted to an interference in a Judicial proceeding.

The 3rd respondent in his affidavit has stated that in referring the dispute relating to this Application for arbitration under section 4(1) of the Act, he acted *bona fide*. The 2nd respondent explained the circumstances under which the services of the petitioner and the other Extension Officers were terminated. The Answer D filed by the 2nd respondent in the Labour Tribunal sets out the reasons. The 2nd respondent further states that after

the postponement of the Labour Tribunal Inquiry on 04.10.1978 the Board considered the question of a settlement and took the view that as altogether 153 persons had gone before the Labour Tribunal and as there were Trade Unions that were involved, it would be inexpedient and impracticable to settle the dispute in the 11 cases that came up for trial before the Labour Tribunal. In the circumstances the 2nd respondent took steps to have the matter referred to arbitration. Mr. Ranganathan, learned counsel for the 2nd respondent contended that it was in these circumstances that the 3rd respondent came to make the Order under section 4(1). He argued that there was nothing wrong in the Minister doing so. The Minister becomes aware of a dispute only when one of the parties brings the matter to the notice of the Minister through the Commissioner of Labour and moves that he makes an Order under section 4(1). When that is done the Minister considers the matter and makes an Order under section 4(1), if he so decides in the interest of bringing about industrial peace. Mr. Ranganathan further submitted that the predominant purpose of the Act is as set out in the preamble to the Act. He therefore submitted that the Minister's powers under section 4(1) of the Act to refer an industrial dispute for settlement by compulsory arbitration, are very wide. Section 31(2) (*b*) clearly indicates that the Minister's rights prevail over individual workmen's rights to go before a Labour Tribunal. The question then arises, is the power of the Minister superseded by an application made by an individual workman or to put it in another way, can an individual workman oust the power of a Minister by rushing to the Labour Tribunal ? The intention of the Legislature is made clear by section 31 B (2) (b) and Mr. Ranganathan submitted that the section has no limitation to a case where there has been a prior reference to arbitration. He contended that the Minister can make a reference under section 4(1) at any time before a Labour Tribunal makes its Order.

Mr. Ranganathan submitted that the judgment in the case of *Nadaraja Ltd. v. N. Krishnadasan* (*supra*) and the two unreported cases cited by Mr. H. L. de Silva have no bearing to the question at issue in the instant case. I am in agreement with this submission of Mr. Ranganathan. Those decisions were on the principle that on the same set of facts once the Minister exercised his power he cannot therafter exercise the same power on the same matter, because once he has exercised his power he becomes functus. Mr. Ranganathan cited an unreported judgment in S.C. 122/68 L.T. 2/19537—S.C. Minutes of 13.11.1972 (4). That is a judgment of G. P. A. Silva, S. P. J. (as he then was). The facts in that case are similar to the facts in the instant case. There too the Minister referred the dispute for arbitration under section 4

(1) whilst a L. T. Case was pending. The President refused to suspend the proceedings. He went on to hear the case and dismissed the application on the ground that it was out of time. Silva, S. P. J. held that the proceedings were irregular and without jurisdiction in view of the imperative provisions of section 31(2) (b) and he further held that the President should have dismissed the application in view of the section. As Mr. H. L. de Silva submitted, it is true that the employer-respondent was not represented in that appeal and that the question as to whether the Minister had the power to make an Order under section 4(1) does not appear to have been argued, but the case is almost exactly in point and the judgment is a decision on the point, and I am of the view that the judgment is of some weight. Mr. Ranganathan cited the case of the *Estates and Agency Co. Ltd. v. Perera* (5) in which a somewhat similar question arose. The facts of that case are set out in paragraph 1 of the headnote. After the 2nd application to the Lobour Tribunal was dismissed on the ground that the principle of *res judicata* applied, the Minister referred the dispute for arbitration. A preliminary objection was taken to the arbitration proceedings on the ground that the reference was bad in Law inasmuch that there was no industrial dispute in existence at the time of the reference. It was held by the Supreme Court, *inter alia,* that if the Minister is satisfied of the existence of an industrial dispute, no doctrine of estoppel by *res judicata* between the parties can prevent the performance by the Minister of his statutory duty. Mr. Ranganathan referred to certain passages in the judgment of Sharvananda, J. which indicates that the Minister's power under section 4(1) are very wide. For all these reasons I am of the view that the Minister had the power to refer the dispute in the instant case for settlement by arbitration under section 4(1) of the Act in spite of the fact that there was an inquiry pending in the Labour Tribunal regarding the same dispute.

As regards Mr. H. L. de Silva's submission that the Minister's act amounted to interference in a pending proceeding of a judicial nature, Mr. Ranganathan submitted that the Minister was exercising powers given to him by the Act. The reference to arbitration is a lawful exercise of the power given to the

Minister and by operation of Law certain consequences flow, i.e., in terms of section 31 B (2) (*b*) a proceeding pending before a Labour Tribunal has to be dismissed. The judgment in the *Estates and Agency Co. Ltd. v. Perera (supra)* is also an authority for the proposition that the Minister's reference of a dispute to arbitration whilst a Labour Tribunal Inquiry was pending is not interference with the judicial process. I am in agreement with the submissions of Mr. Ranganathan and I am of opinion that when the Minister referred the present dispute to arbitration it did not amount to an interference with a judicial proceeding.

For the above reasons I am of the view that the Order made by the 3rd respondent is not *ultra vires* the powers conferred on him and that it has been made *bona fide*. I would accordingly dismiss the application. There will be no order for costs.

ATUKORALE, J.—I agree.

Application dismissed.