1964 *Present :* **Weerasooriya, S.P.J., and Herat, J.**

COLOMBO COMMERCIAL CO. LTD., Petitioner, *and*
K. SHANMUGALINGAM *et al.*, Respondents

S. C. 202/1963—Application for a Writ of Certiorari

Certiorari—*Amenability of a statutory arbitrator to such writ—Industrial dispute—Reference for settlement by arbitration—Powers of arbitrator—Part of award made in excess of jurisdiction—Liability to be set aside—" Just and equitable "—Error of law on face of record—Industrial Disputes Act (Cap. 131), ss. 3 (1) (d), 16, 17.*

A writ of *certiorari* lies to quash the award of a statutory arbitrator on any of the grounds on which such a writ would issue. Accordingly, it lies against an arbitrator nominated under section 3 (1) (*d*) of the Industrial Disputes Act.

An industrial dispute between the petitioner-company and the 2nd respondent (a trade union) was referred under section 3 (1) (*d*) of the Industrial Disputes Act for settlement by arbitration. One of the terms of reference to which the parties agreed was that if the arbitrator held that certain letters of warning which had been sent by the Company to some of their workmen were justified, the letters should stand. The arbitrator, in his award, decided that the letters of warning were justified, but also held that a material paragraph (paragraph 2) in them should not have any effect.

Held, that that part of the award which declared that paragraph 2 of the letters of warning should not have any effect should be quashed by *certiorari* as being in excess of the jurisdiction conferred on the arbitrator by the provisions of section 16 of the Industrial Disputes Act. In the alternative, it was vitiated by error of law on the face of the record if the arbitrator had purported to act on the "just and equitable" ground in section 17 (1) of the Act.

APPLICATION for a writ of *certiorari* to quash an award, or certain portions thereof, made by an arbitrator upon a reference under section 3 (1) (*d*) of the Industrial Disputes Act.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *K. N. Choksy*, for the petitioner.

No appearance for the respondents.

Cur. adv. vult.

February 3, 1964. WEERASOORIYA, S.P.J.—

This is an application for a writ of certiorari to quash an award, or certain portions thereof, made by the 1st respondent in his capacity as an arbitrator nominated by the petitioner-company and the 2nd respondent, who were the parties to an industrial dispute referred by the Commissioner of Labour to the 1st respondent for settlement by arbitration. The reference was made under section 3 (1) (*d*) of the Industrial Disputes Act (Cap. 131) which provides, inter alia, for the Commissioner of Labour referring an industrial dispute, by consent of the parties, to an arbitrator jointly nominated by them.

The 2nd respondent is a registered trade union the members of which are workmen employed under the petitioner-company. The nomination of the 1st respondent as arbitrator by the petitioner and the 2nd respondent, and the formulation of the matter in dispute, were made in pursuance of an agreement arrived at between them on the 25th September, 1962, a copy of which marked "H" is annexed to the petitioner's application. The terms of the agreement are:

"It is hereby agreed between the Colombo Commercial Company, Colombo, and the Colombo Commercial Company Workers' Union as follows:—

(1) The workers who are at present on strike will call off the strike immediately, and will resume work on Thursday 27.9.62 at 8 a.m.

(2) That the letters of warning dated 12th September, 1962 addressed to the following workers :—

(1) 402 B. D. Vasthuhamy.
(2) 405 Lewis Singho
(3) 401 D. C. A. D. Karunapala
(4) 415 T. A. Garvin Peris
(5) 642 P. Piyasena
(6) 576 K. Lewis Mendis

by the Company, which were not accepted by them will be accepted by them on 27.9.62.

(3) If the terms of (1) and (2) are complied with the parties agree to the following issue being referred to arbitration under section 3 (1) (*d*) of the Industrial Disputes Act to Mr. Kanapathipillai Sanmugalingam 'Whether the warning issued by the Company to the workers mentioned in clause (2) by the letter of the Company dated 12.9.62 is justified or not'.

(4) It is further agreed that if the Arbitrator holds that the letters of warning were not justified, the letters will be withdrawn by the Company. If the Arbitrator holds that the warning was justified the letters will stand.

(5) It is further agreed that if the Arbitrator holds that the letters of warning were not justified, the Company will pay the six workers concerned wages for the one and half days they were on strike.

(6) It is further agreed that at the conclusion of the arbitration proceedings the Union may take up with the Company any other issues arising out of this dispute."

The petitioner-company's letter of the 12th September, 1962, referred to in clause (3) of the above agreement purported to be a letter of warning addressed to each of the six workmen specified in clause (2) stating that they, without valid excuse, were idling from 8.50 a.m. to 9 a.m. on the 6th September, 1962, during working hours, that the idling amounted to neglect of duty under the standing orders for the Engineering trade and informing them that in accordance with the said standing orders three letters of warning for neglect of duties or misconduct can result in dismissal.

Regarding the allegation of idling, the 1st respondent held in his award (paragraph 14) that Vasthuhamy, Lewis Singho and Lewis Mendis were not idling, while he held against the other three workmen, Karunapala, Garvin Peris and Piyasena, on the same point. He also held (paragraph 15) that the warning in the petitioner's letter dated the 12th September, 1962, to Vasthuhamy, Lewis Singho and Lewis Mendis was not justified while that issued to Karunapala, Garvin Peris and Piyasena was justified. But in regard to the letters of warning which he held were justified, he also held that they should stand *without paragraph 2 thereof having any effect.* It is this part of the award that Mr. H. V. Perera who

appeared for the petitioner particularly sought to have quashed by certiorari as being in excess of the 1st respondent's jurisdiction. Paragraph 2 of the letters issued to Karunapala and Piyasena is as follows :

> " Your behaviour on this occasion amounts to neglect of duties under the Engineering Trade. For your information, under the standing orders for the Engineering Trade, three letters of warning for neglect of duties, misconduct or any other misdemeanour can result in dismissal. This serves as your first letter of warning. "

Paragraph 2 of the letter to Garvin Peris is in the same terms except that the last sentence reads :—

> " We note from our records that you have been warned on the 17th May, 1959, and this serves as your second letter of warning. "

The reasons for the 1st respondent holding that paragraph 2 of the letters of warning to Karunapala, Garvin Peris and Piyasena should have no effect are to be found in paragraph 13 of the award which is in the following terms :—

> " 13. Therefore I hold that paragraph 2 of the letters of warning in respect of all these six workmen should be cancelled, and that three such letters of warning would not entitle the management to discontinue the services of these workmen. If the Company desires to utilise three such warning letters to discontinue the services of its workmen, it should charge-sheet them for idling and hold a full inquiry before issuing such letters of warning. Without that procedure these letters of warning would not entitle the Company to dispense with the services of its workmen after three such warnings."

Mr. H. V. Perera submitted that paragraph 13 of the award too should be quashed as being in excess of the 1st respondent's jurisdiction.

In the application filed by the petitioner it is further pleaded that the 1st respondent was wrong in law in holding that the warnings issued to the workmen Vasthuhamy, Lewis Singho and Lewis Mendis were not justified, and on that ground the petitioner asked that that finding also be quashed. It is not clear in what respects the 1st respondent committed an error of law in arriving at that finding, which appears to be one of fact and, presumably, is based on evidence. Moreover, the agreement " H " specifically provides that if the arbitrator holds that the letters of warning were not justified they will be withdrawn by the Company, and if he holds that the warnings were justified these letters will stand. This agreement implies that the arbitrator's finding whether the warnings were justified or not will be accepted by the parties without question. I do not think that it is now open to the petitioner to go back on this agreement and ask that the finding regarding the warnings given to Vasthuhamy, Lewis Singho and Lewis Mendis be quashed. This part of the petitioner's application was not pressed by Mr. Perera and must be refused.

There remains for consideration: (I) whether the 1st respondent's finding that paragraph 2 of the letters of warning issued to Karunapala, Garvin Peris and Piyasena should have no effect was given in excess of his jurisdiction, and (II) whether paragraph 13 of the award is affected by the same illegality.

The jurisdiction of the 1st respondent in regard to the dispute submitted to him for settlement by arbitration would necessarily be limited by the terms of reference made under section 3 (1) (*d*) of the Industrial Disputes Act. That jurisdiction may also be further modified, or even enlarged, by such of the other provisions of the Act as are applicable to the case. According to the terms of reference, the dispute submitted to the 1st respondent for settlement is whether the warning issued in the petitioner's letter of the 12th September, 1962, to the six workmen concerned was justified or not. This is the identical dispute which the parties agreed in clause (3) of the document " H " should be referred for arbitration. The parties further agreed in clause (4) of " H " that if "the Arbitrator holds that the warning was justified the letters will stand " (i.e. in their entirety). The finding of the 1st respondent that such of the letters of warning which he held were justified should stand without paragraph 2 thereof having any effect overrides the agreement in clause (4). It is clear that the parties never intended when they nominated the 1st respondent as arbitrator that he should have the power to alter or modify any of the terms embodied in " H ".

The statutory powers of an arbitrator to whom a dispute is referred under section 3 (1) (*d*) of the Industrial Disputes Act are to be found in sections 16, 17 and 33 of the Act. Of these provisions only sections 16 and 17 need be considered for the purposes of this case. The second paragraph of section 16 provides that nothing in the preceding provisions of the section shall be deemed to be in derogation of the power of an arbitrator " to admit, consider and decide any other matter which is shown to his satisfaction to have been a matter in dispute between the parties prior to the date of the aforesaid order, provided such matter arises out of, or is connected with a matter specified in the statement prepared by the Commissioner ". This part of section 16 does not apply since the question whether paragraph 2 of the letter of warning should stand if the warning is held to be justified was never in dispute.

Section 17 (1) provides that when " an industrial dispute has been referred under section 3 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 ". I have in my judgment in the case of *The Stratheden Tea Co. Ltd. v. R. R. Selvadurai and Others*[1], delivered recently, considered the effect of the phrase " just and equitable " in section 17 (1), and I do not think it necessary to add to what I stated there. In arriving at the finding that the letters of warning issued to Karunapala, Garvin Peris

[1] *(1963) 66 N. L. R. 6.*

and Piyasena should stand without paragraph 2 thereof having any effect, the 1st respondent did not purport to act on the " just and equitable " ground in section 17 (1). But even if he intended to base his finding on that ground I would, for reasons already given by me in the above-mentioned case, hold that the finding has proceeded from a misconstruction of the phrase, amounting to an error of law, for I do not see how, in respect of letters of warnings which are held to be justified, it can be " just and equitable " to make an order to the prejudice of the petitioner nullifying what appears to be the only purpose for which the letters were issued. In my opinion this part of the 1st respondent's award has been made in excess of jurisdiction. In the alternative it is vitiated by error of law on the face of the record.

In paragraph 13 of the award the 1st respondent has taken upon himself to give general directions as to the procedure to be followed in issuing letters of warning, and he has held that three such letters will not entitle the Company to discontinue any workman unless prior to the issue of each letter there has been a " full inquiry " (whatever that may mean) following on the serving of a charge sheet. I can understand the anxiety of the petitioner to have these directions rescinded, for, if allowed to stand, they may well affect the validity, not only of the letter of warning dated the 12th September, 1962, but also other letters of warning, past as well as future, issued to the petitioner's workmen. Assuming (without deciding) that the requirements of natural justice have to be observed at any inquiry held by the petitioner into a charge of idling against a workman for which, if established, a letter of warning may issue, the directions given by the 1st respondent go beyond those requirements, and, in my opinion, are unwarranted and in excess of his jurisdiction as arbitrator.

If, therefore, the 1st respondent, as arbitrator, is amenable to a writ of certiorari, the petitioner would appear to be entitled to an order quashing the finding of the 1st respondent that the letters of warning issued to Karunapala, Garvin Peris and Piyasena should stand without paragraph 2 thereof having any effect, and also to an order quashing paragraph 13 of the award. Mr. H. V. Perera submitted that the prerogative writs of prohibition and certiorari lie to quash the award of a statutory arbitrator. As, however, the respondents were not represented at the hearing of this application, we have not had the benefit of any argument *contra*. But Mr. Perera very properly brought to our notice the case of *Commercial Banks Association (Ceylon) v. D. E. Wijeyewardene and Others*[1], which came up before a Divisional Bench of this Court. In that case an application was made by the petitioner for writs of certiorari, prohibition and mandamus on the District Judge of Colombo to whom an industrial dispute had been referred under section 3 (1) (*d*) of the Industrial Disputes Act for settlement by arbitration. The reference was made to the District Judge as, although the parties consented to the reference to arbitration, they had not nominated an arbitrator. At the

[1] *(1959) 61 N. L. R. 196.*

hearing of the application, only the application for a writ of prohibition was pressed by petitioner's counsel. The footing on which the application for such a writ was made was that the District Judge had, for certain reasons that were advanced, no jurisdiction to arbitrate on the dispute which was referred to him. This Court held that as the parties (including the petitioner) had consented to the reference of the dispute to arbitration the application must fail, and it was accordingly refused. But on the general question whether a writ of prohibition or certiorari lies against an arbitrator nominated under section 3 (1) (*d*) of the Industrial Disputes Act, the following observations were made by my Lord the Chief Justice, who delivered the principal judgment in the case :—

> " The question whether prohibition lies was not argued before us. Counsel proceeded on the assumption that it does lie. Lest silence be misconstrued I wish to add that this judgment should not be taken as deciding that prohibition lies to the District Judge to whom a dispute under section 3 (1) (*d*) of the Industrial Disputes Act is referred, nor should it be regarded as a precedent for the proposition that certiorari and prohibition lie against an arbitrator appointed under section 3 (1) (*d*) of the Act. "

In view of these observations, I have considered the question whether a writ of certiorari lies against the 1st respondent as arbitrator nominated under section 3 (1) (*d*) of the Industrial Disputes Act. As in the case referred to above, the parties in the present case too consented to the reference to arbitration. They even went a step further and nominated the 1st respondent as arbitrator. But unlike in that case, the jurisdiction of the arbitrator to arbitrate on the particular dispute referred to him is not challenged. Here the challenge is to certain portions of the award which, it is submitted, have been made in excess of jurisdiction.

It is well settled law in England that the prerogative writs of prohibition and certiorari do not issue to a private arbitral body. See the *dicta* of Lord Goddard, C.J., in *Regina v. National Joint Council for the Craft of Dental Technicians (Disputes Committee) and Others : Ex parte Neate*[1]. But he also stated that the position is otherwise in the case of statutory arbitrators, the reason for the difference being that when Parliament has conferred statutory powers on such bodies which, when exercised, may lead to the detriment of subjects who have to submit to their jurisdiction, it is essential that the Courts should be able to control the exercise of such jurisdiction strictly within the limits which Parliament has conferred on them. In that case the Court declined to issue writs of prohibition and certiorari to a private arbitration body. *The King v Powell : Ex Parte The Marquis of Camden*[2] is an instance of a writ of prohibition issuing to a statutory arbitrator.

In the issue of these prerogative writs we follow the English law. I do not think that there can be any question that in the present case the 1st respondent, although nominated by the parties, is a statutory

[1] *L. R. (1953) 1 Q. B. D. 704.*

[2] *(1925) 1 K. B. D. 641.*

arbitrator who derives his jurisdiction and powers, not simply from the nomination, but also from the order of reference made under section 3 (1) (*d*) and from the other provisions of the Industrial Disputes Act.

I would hold, therefore, that a writ of certiorari lies to quash the award of the 1st respondent on any of the grounds on which such a writ would issue.

So much of the award of the 1st respondent as directs that the letters of warning issued to Karunapala, Garvin Peris and Piyasena should stand without paragraph 2 having effect is quashed. Paragraph 13 of the award is also quashed. As for costs, I take into account that the application made by the petitioner has failed in respect of the three workmen to whom the issue of the letter of warning was held by the 1st respondent not justified. I accordingly award the petitioner as costs a sum of Rs. 157/50, payable by the 2nd respondent.

HERAT, J.—I agree.

Application partly allowed.