

**SUPREME COURT****British Ceylon Corporation****V.****C.J. Weerasekera & Others***S.C. 34/81 & S.C. 35/81 — C.A. 90/77 & C.A. 91/77*

*Industrial Disputes Act. Section 4(1) Validity of Minister's order challenged. Necessity of making Minister party to proceedings. Business Undertaking (Acquisition) Act Section 4(1) – Vesting of Rights and Liabilities of the Company in the Government.*

2nd and 3rd Respondents were employees of the Appellant. Their services were terminated on 30.9.63. They sought relief under Industrial Disputes Act. The Minister referred matter to Arbitration under S.4 (1) , but for various reasons had to make a number of revocations and fresh references. Ultimately 1st R as arbitrator made award stating that termination of services was not justified. However, before award was made the business of the company together with its rights and liabilities under subsisting contracts and agreements vested in the Government in terms of S.4 (1) of the Business Undertakings (Acquisition) Act. on 25.2.73. Appellants having failed to obtain Writ of Certiorari in Court of Appeal appealed to Supreme Court.

*Held* (1) that the Minister should have been made a party to the proceedings since it was his orders that were being challenged.

(2) that as the contracts of employment of the Respondents were terminated on 30.9.63 there was no subsisting contract or agreement with any rights or liabilities on 25.2.73 (date of vesting) and the Company was liable to pay the damages awarded.

**APPEAL** from a judgment of the Court of Appeal

**Before:** Samarakoon, C.J., Wanasundera, J. &  
Victor Perera, J.  
**Counsel:** Desmond Fernando with  
S.H.M. Reeza for the Petitioners-Appellants in  
S.C. 34/81 and S.C. 35/81

S. Mahenthiran for 2nd respondent in S.C. 34/81, and

A. Mahendrarajah with S. Mahenthiran and  
A. Kirupaidasan for the 2nd respondent in  
S.C. 35/81.

H.L. de Silva with A. Mahendrarajah and  
R. Surendran for the 3rd respondent in S.C. 35/81.

**Argued on:** 03.02.1982.

*Cur. adv. vult.*

**Decided on:** 10.03.1982

**VICTOR PERERA, J.**

These two appeals are from an order of the Court of Appeal dismissing the petitions filed by the appellant-Company bearing Nos. C.A. 90/77 and C.A. 91/77 for mandates in the nature of writs of Certiorari to quash the award dated 23rd November 1976 made by the 1st respondent on a reference to him of the dispute by the Minister of Labour in terms of Section 4(1) of the Industrial Disputes Act No. 43 of 1950. By his award the 1st respondent had ordered the appellant-Company to pay the 2nd respondent in case No.90/77 and the 2nd and 3rd respondents in case No.91/77 compensation for unjustified termination of their services and costs.

The facts that were not disputed are that the appellant was a Limited Liability Company, that the said respondents had been employees of the Company and that their services were terminated on 30th September 1963 by letters of termination dated 27th September 1963. The respondents sought relief under the provisions of the Industrial Disputes Act No. 43 of 1950. The Minister of Labour has purported to act under the powers vested in him under Section 4(1) of this Act. It reads as follows:-

“4(1). The Minister may, if he is of opinion that an industrial dispute is a minor dispute, refer it, by an order in writing for settlement by arbitration to an arbitrator appointed by the Minister or to a Labour Tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference.”

He first referred the dispute for settlement to Mr. S. A. Wijeyatilaka in 1963 itself. It is clear that the Minister in exercising this purely administrative power took the preliminary step to enable the adjudication of a minor dispute speedily by settlement by an Arbitrator. In 1963 Mr. S. A. Wijeyetilaka commenced proceedings but as a result of an appeal filed by the Company to the then Supreme Court on a preliminary matter in S.C. Application 340/64, the proceedings were stalled. The appeal was dismissed by the Supreme Court on 28th August 1968 (71 NLR 337) and the proceedings were resumed in October 1968 before Mr. Wijeyetilaka. After the evidence was concluded Mr. Wijeyetilaka fell ill in 1969 and tendered his resignation to the Minister. No award was made by him. In 1970 the Minister made order revoking the reference to Mr. Wijeyetilaka and a fresh reference was issued to the Labour Tribunal XV which was presided over by the 1st respondent. When proceedings commenced before this Tribunal, the 2nd and 3rd respondents in case No. 90/77 consented to the adoption of the evidence already led before Mr. Wijeyetilaka, but the 3rd respondent the party in case No. 91/77 objected. The Minister thereupon revoked this reference and made two separate references to the same Tribunal for settlement. When both matters came up for disposal before this Tribunal, all the respondents agreed to the adoption of the evidence recorded before Mr. Wijeyetilaka. After submissions on behalf of all the parties were entertained the proceedings were adjourned for the making of the award. But before the award could be made the 1st respondent was appointed Assistant Secretary to the Ministry of Housing and Construction and therefore ceased to function as the President of the Tribunal XV.

In the meantime, the Minister of Finance acting under the provisions of Section 2 of the Business Undertakings (Acquisition) Act No. 35 of 1971, made a vesting order in respect of the business undertaking of the appellant Company on 25th February 1972 and the business undertaking became vested in the Government and was thereafter managed by a Competent Authority.

In view of the incapacity of the 1st respondent to continue to function as the President of the Labour Tribunal XV the proceedings were brought to a temporary halt. The Minister of Labour thereupon by order dated 8th October 1973, revoked these references to Labour Tribunal XV and made a fresh order of reference of the dispute to Mr. G. W. Ediriweera. Mr. Ediriweera did not commence any proceedings under this reference. The Minister then revoked this reference and by order dated 17th December 1973 referred the dispute once again to the 1st respondent by name and not with reference to the Tribunal. All the parties appeared before the 1st respondent without any objection or challenge to his right to take proceedings under this final reference. They acquiesced in the procedure adopted by him to read the earlier evidence and submitted their written submissions. The only objection taken by the appellant-Company before the Arbitrator was that in view of the business undertaking being vested in the government under the Business Undertakings (Acquisition) Act No. 35 of 1971, by virtue of Section 4(1) of that Act no award could be made against the Company. It would appear that the proceedings were concluded in 1974, but after a long lapse of over 2 years the 1st respondent made the award on 23rd November 1976. The 1st respondent in his award held that the termination of their services was not justified. He did not order re-instatement as in his words "the Company is no longer manning the business" and awarded compensation and costs.

On the 17th February 1977, the appellant-Company filed two petitions in the former Supreme Court for mandates in the nature of writs of Certiorari to have the award quashed. The matter came up for argument of the 23rd June 1980 before the Court of Appeal and after several dates of hearing the petitions were dismissed on the 28th November 1980. In the petitions filed in that Court the appellant-Company relied on several grounds to challenge the legality or validity of the award but the principal grounds were:-

- (1) the reference made by the Minister of Labour followed by subsequent revocations and fresh references culminating in the eventual appointment of the 1st respondent as arbitrator in 1973, were in excess of the Minister's powers and jurisdiction and/or contrary to equity and justice and bad in law and operated to vitiate the appointment of the 1st respondent and that

- (2) by reason of the business undertaking being vested in the Government by virtue of the vesting order made under the Business Undertakings (Acquisition) Act No. 5 of 1971, the rights and obligations under the contract of employment of the three respondents vested in the Government and consequently the award against the Company was illegal or void.

In their written objections filed in the Court of Appeal the contesting respondents specifically took up the position that the petitioner-Company could not maintain this application for writ, as the Minister of Labour the legality or validity of whose official acts were being challenged or questioned had not been made a party to the proceedings.

At the outset of the argument before us, Messrs A. Mahendrarajah and S. Mahenthiran, Attorneys-at-law, who had personally appeared at the hearing before the Court of Appeal stated that in terms of their written objections they had raised and argued this question that the Company was not entitled to maintain their petitions for relief as the Minister of Labour had not been made a party to the proceedings. Mr. Desmond Fernando, Attorney-at-law, who had himself appeared for the appellant-Company agreed that this question was raised and argued before the Court of Appeal, but that unfortunately the Court of Appeal had lost sight of this matter and had proceeded to consider the other arguments that were adduced before it and had come to a finding against the appellant-Company on those matters. In view of these statements we decided to consider submissions on this matter.

It is clear that the appellant-Company in the petitions before the Court of Appeal and in the appeal filed before us in questioning the legality or validity of every order, of reference or revocation made by the Minister of Labour. Under the provisions of Section 4(1) of the Industrial Disputes Act No. 43 of 1950, the Minister of Labour is not called upon to exercise any judicial function in regard to the actual industrial dispute. He has merely to form an opinion whether the dispute was a minor dispute that could be settled by compulsory arbitration. Once he forms that view he is only concerned with taking the preliminary step of ordering a reference to have the dispute settled by arbitration. The power he exercises is of a purely administrative nature and it is his duty to see that there is industrial peace in the country. There is nothing in the Act itself to indicate that once he makes an order his powers are exhausted nor are there any expressed prohibitions on the exercise of that power. As the exercise of

the powers of the Minister of Labour were being questioned he should properly have been made a party to the petition before the Court of Appeal from the very outset. A similar situation arising under the Finance Act No. 33 of 1968 was considered by the former Supreme Court in the case of *Ramasamy v. Ceylon State Mortgage Bank* (78 NLR 510) and the Supreme Court held that though the Bank made a determination which was followed by a vesting order made by the Minister and the attack was made on the determination of the Bank alone, still the Minister was a necessary party to the application for relief. In the present case, however, the presence of the Minister is absolutely necessary as the very orders of the Minister initiating the proceedings resulting in the award were being challenged in order to disturb the award.

In the case of *Nadarajah v. Krishnadasan & others* (78 NLR 255) which was relied on before the Court of Appeal at the hearing on the question of the legality of revocation of orders made by the Minister under Section 4(1) of the Industrial Disputes Act, the Minister had been made a party and Senior State Counsel had appeared for the Minister. Similarly in the case of *Aislaby Estates Ltd. v. Weerasekera* (77 NLR 241) where the legality or validity of the order of reference under Section 4(1) was considered, the Minister was a party respondent.

Without proceeding to examine the findings of the Court of Appeal in regard to the orders of reference and the orders of revocation, it will be sufficient for the purpose of this appeal to hold that appellant having failed to make the Minister a party to the proceedings was not entitled to challenge the Minister's order and the petition should accordingly have been dismissed in the Court of Appeal.

The next matter raised in the petition of Appeal and argued on behalf of the appellant-Company was that liability arising from the contract of employment was one that was vested in the government by reason of Section 4(1) of the Business Undertakings (Acquisition) Act No. 35 of 1971. On the facts proved in this case the three employee-respondents had been dismissed from service on 13th August 1963. Instead of approaching the Courts for alleged illegal termination of their employment they opted to have their disputes investigated and settled under the Industrial Disputes Act. While such proceedings were pending a vesting order dated 25th February 1972 under Act No. 35 of 1971 was made thereby vesting the business undertaking in the Government. Section 4(1) of this Act provides that all rights and liabilities under any contract or agreement

which relates to the purposes of that undertaking and which subsists on the date of the vesting shall vest in the Government. In this case the employees were dismissed in 1963 and there was a termination of their contracts of employment. The Company itself had repudiated the contract of employment and the employees were entitled to claim contractual damages if they had gone to the Courts. Therefore at the date of the vesting there was no subsisting contract but there remained only a right or liability to be determined. By resorting to arbitration under the Industrial Disputes Act, they could have obtained reliefs on equitable grounds outside the contract such as re-instatement if the termination was held to be unjustified. However, the contract stands terminated in law as far as the appellant-Company is concerned from the date of the dismissal and therefore does not subsist within the meaning of section 4(1) aforesaid. In this case the Arbitrator by his award, though he found that the termination was not justified, did not even order re-instatement but awarded only compensation. The liability to pay this compensation relates back to the termination of the contract and continued to be the liability of the Company. Therefore the award cannot be disturbed on this ground as urged by the appellant-Company.

The petitions for writ to the Court of Appeal and the appeals to this Court are hereby dismissed with costs.

SAMARAKOON, C.J. — I agree.

WANASUNDERA, J. — I agree.

*Appeals dismissed*