1975 *Present* : **Walgampaya, J., Sirimane, J., and Sharvananda, J.**

NADARAJA LIMITED (in Voluntary Liquidation) and 3 others, Petitioners, *and* N. KRISHNADASAN and 3 others, Respondents

S. C. 461/72—*Application for a Mandate in the nature of a Writ of Certiorari under Section* 42 *of the Courts Ordinance*

Industrial Disputes Act—Order made under Section 4—*Whether Minister has power to revoke such order, once duly made—Applicability of Section* 18 *of Interpretation Ordinance to such order—Sections* 16, 17, 18, 19, 20, 31, 36(5), 40(1)(*b*), 40(1)(*f*), 40(1)(*m*) *of said Act.*

(1) Where the Minister has duly made an order under Section 4(1) of the Industrial Disputes Act referring an industrial dispute for settlement by arbitration he has no power to revoke the said order of reference.

(2) The rule of construction embodied in Section 18 of the Interpretation Ordinance was not intended to apply to an order of reference made under Section 4 of the Industrial Disputes Act and cannot be invoked to revoke or rescind the order of reference made in terms of section 4 of the said Act.

APPLICATION for a *Writ of Certiorari.*

N. Satyendra, with *P. Suntharalingam* for the Petitioners.

S. W. B. Wadugodapitiya, Senior State Counsel, with *M. H. M. Ashroff,* State Counsel for the 3rd and 4th Respondents.

Cur. adv. vult.

December 4, 1975. SHARVANANDA, J.—

The question that arises on this application for a Mandate in the nature of a Writ of Certiorari is whether the Minister has express or implied power to cancel, withdraw, revoke or supersede an order of reference once he had referred an industrial dispute for adjudication under section 4(1) of the Industrial Disputes Act.

By order dated 13.6.70, published in the Government Gazette of 25th June, 1970, the Minister of Labour (hereinafter referred to as the Minister), acting in terms of section 4(1) of the Industrial Disputes Act, referred the industrial dispute that existed between the United Workers' Union and Messrs. Nadarajah Ltd., the proprietor of the Nadarajah Press, in respect of the matters specified in the statement of the Commissioner of Labour which accompained that order, to Mr. G. E. Amarasinghe for settlement by arbitration and appointed him the Arbitrator in terms of that section. The said order was in terms of section 16 of the Act, accompained by a statement prepared by the Commissioner of Labour setting out each of the matters which, to his knowledge, was in dispute between the parties.

The said Mr. Amarasinghe accepted this appointment as Arbitrator and commenced proceedings upon the aforesaid order of reference. The proceedings were assigned No. A 892 and the Arbitrator, in terms of Regulation 21 of the Industrial Disputes Regulations, called upon the parties to transmit their respective statements setting out their case in regard to the matters in dispute. After the parties had complied with this requirement, he fixed the hearing of the dispute for 28th July, 1970. On that day, the hearing was postponed for 15.8.70. When the matter was taken up for hearing on 15.8.70, the 2nd respondent Union applied for a postponement on the following ground, which is recorded as follows :—

Mr. Mallawaratchi (on behalf of the Union) :

> "I wish to bring to your notice that this matter is to be revoked. Already the order has been made and we were expecting the letter about three days ago. Actually, for this

reason, our Union did not make arrangements for this morning. Anyway, the letter should have come, and we expect it will come in a day or two, to revoke this. Order has been made. I think, therefore, if Your Honour could postpone this, it is alright."

The petitioner Company stated that it had no objection to a postponement if the Trade Union was not ready, but stated that it would not acquiesce in the position that the Minister had power to revoke the reference once proceedings had commenced. The Union's application for a postponement was allowed and the hearing was again postponed for 16.9.70.

In the meantime, the Minister, by further order dated 25.8.70 published in the Gazette of 4.9.70, revoked his earlier order dated 13.6.70, made under section 4(1) of the Industrial Disputes Act, referring the said dispute for settlement by arbitration by Mr. G. E. Amarasinghe. No reason for the purported revocation was given. All that the further order chose to clarify was :

> " And whereas it is now deemed that the said order (dated 13.6.70) be revoked, I....., Minister of Labour, do hereby revoke the said order and further make order that no proceedings be taken upon the said order dated 13.6.70 ".

Thereafter, the Minister, by order dated 24.9.70 published in the Gazette of 2nd October, 1970, purported to refer the same dispute to another Arbitrator, namely, the 1st respondent, Mr. N. Krishnadasan, and the latter proceeded to call upon the parties afresh to submit their respective statements. The fresh proceedings before the 1st respondent were assigned No. A. 918. When the matter was taken up for hearing on 11.11.70, the petitioner Company raised a preliminary objection to the hearing of the dispute by the 1st respondent on the ground that the Minister had no power to re-refer the dispute to the 1st respondent. Without making any order on the preliminary question as to his jurisdiction to hear the matter, the 1st respondent proceeded to hear the parties, not only on the matters in dispute between them as set out in the Commissioner's statement but also on additional matters raised by the Union, and finally made the award which has been challenged respecting its validity and regularity in these proceedings. The objection raised, in limine, before this Court by Counsel for the petitioner was that the 1st respondent had no power or jurisdiction to entertain, hear, determine or make an award in respect of the reference purported to be made to him by the Minister under section 4(1) of the Industrial Disputes Act. If the

reference to the 1st respondent is not warranted by law, the 1st respondent had no legal authority to determine the dispute and make the impugned award, and the award would be a nullity.

Mr. Satyendra, Counsel for the petitioner Company, submitted that it was not competent for the Minister to supersede the earlier order of reference dated 13.6.76 made to Mr. G. E. Amarasinghe, and, consequently, the second reference dated 24.9.70 made to Mr. Krishnadasan, the 1st respondent, was ultra vires the Minister and invalid in law. In this connection, he strongly relied upon the judgment of the Supreme Court of India in the case of *The State of Bihar v. D. N. Ganguli* (A.I.R. 1958, S.C. 1018).

The primary question is whether the Minister has any power to revoke a reference that he has, in terms of section 4 of the Industrial Disputes Act, duly made. The Act makes no express provision whatsoever in respect of revocation. Can such power of revocation be implied in the scheme of the Act? Counsel for the State contended that the power of revocation is in any event referable to section 18 of the Interpretation Ordinance.

Section 4 of the Act confers powers on the Minister to refer, by an order in writing, an industrial dispute, if he is of the opinion that the industrial dispute is a minor dispute, for settlement by arbitration to an Arbitrator appointed by him. The order of reference is an administrative act of the Minister who has to form an opinion as to the factual existence or apprehension of an industrial dispute.—*Aislaby Estate Ltd. v. Weerasekera* (77 N.L.R. 241 at 253). Once he has made the order of reference in terms of section 4, the Arbitrator appointed by him becomes seized of the dispute and he is charged by section 17 "to 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". This provision stresses that after the reference by the Minister, the Arbitrator alone can exercise the jurisdiction in respect of the dispute until the proceedings culminate in his award. The Minister, on making the reference, becomes functus. The Arbitrator takes over and continues to function for the purpose of making an award and is in control of the proceedings. In this connexion, section 16 authorises him 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 order of reference, provided that such matter arises out of or is connected with a matter specified in the statement prepared by the Commissioner. Section 36 (5) of the Act supplements this

power. The provisions of sections 16 and 17 of the Act cannot be reconciled with the power claimed by the Minister to supersede, cancel or withdraw the reference. There are other provisions which repel any such suggestion of such power being retained by the Minister. Sections 18, 19 and 20 deal with the award of the Arbitrator and speak of incidents, attributes and tenure of the award made by the Arbitrator. These sections read with section 17 can refer only to the award of the Arbitrator appointed in terms of section 4 of the Act. He alone is competent to make the award which can have legal consequences in relation to the industrial dispute that had been referred for arbitration.

Further, the provisions of section 31 of the Act militate against the contention of State Counsel. These provisions would be superfluous if the Minister is impliedly vested with the power to revoke any reference as and when he chooses. Express enactment of such provisions dealing with vacancies as they occur in the Industrial Court tend to show that the Minister is not vested with the inherent power to create vacancies and fill them up as and when he pleases. Section 31 contemplates actual instances of vacancies occuring in the Industrial Court by supervening events. That section does not provide for vacancies arising as a result of the Minister revoking, without reasonable cause, the appointment of any member of that Court.

Thus, according to the scheme of the Act, the Minister does not come into the picture once he had made a reference under section 4(1), and he cannot frustrate such reference on second thoughts. That Arbitrator proceeds with the reference without interference and directions from the Minister. Once he has acquired jurisdiction over the dispute between the parties, the Minister cannot divest him of that jurisdiction. Situations may however arise necessitating a second reference if the Arbitrator declines, resigns, dies or becomes incapable of performing his functions, or leaves Sri Lanka under circumstanies showing that he will probably not return at an early date. Strictly speaking, in such an event there is no occasion to withdraw or supersede any reference from the first Arbitrator; the first Arbitrator has ceased to function and there is a frustration of the reference, and so there is in existence no Arbitrator who could act on such reference.

The question of the State withdrawing or superseding a reference was raised in relation to similar provisions in the Industrial Disputes Act in India in the case of *The State of Bihar V. D. N. Ganguli* (1958 A.I.R. S.C. 1018). The Supreme Court of India, after examination of the provisions and

scheme of the Act, rejected the claim of the State. There also the State relied on section 21 of the General Clauses Act of 1897, corresponding to section 18 of our Interpretation Ordinance. In the course of a lucid judgment, Gajendragadhar J. stated: "It is well settled that this section (section 21 of the General Clauses Act) embodies a rule of construction, and the question whether or not it applies to the provisions of a particular statute would depend on the subject matter, context and the effect of the relevant provisions of the said statute. In other words, it would be necessary to examine carefully the scheme of the Act, its object and all its relevant and material provisions before deciding whether by the application of the rule of construction enunciated by section 21, the appellant's contention is justified that the power to cancel the reference..... can be said to vest in the appropriate Government by necessary implication. If we come to the conclusion that the context and effect of the relevant provisions is repugnant to the application of the said rule of construction, the appellant is not entitled to invoke the assistance of the said section. We must, therefore, proceed to examine the relevant provisions of the Act itself." After examining the relevant provisions, the Supreme Court held that during the continuance of the reference proceedings, it is the Tribunal which is seized of the dispute, and it is only the Tribunal which can exercise jurisdiction in respect of it. The Court further held that the scheme of the relevant provisions (corresponding to the provisions of our Act) would, prima facie, seem to be inconsistent with any power in the appropriate Government to cancel the reference and that section 21 of the General Clauses Act cannot be invoked. Following this judgment of the Supreme Court, the High Court of Calcutta held in *Shellac Industries Ltd. v. The Workmen* (A.I.R. 1966 Cal. 371) that the Industrial Tribunal continues to exist till an award is made and consequently there is no provision in the State Government to abolish a Tribunal when a dispute is referred to it till it makes its award.

In this connection, it is relevant to refer to certain other provisions of the Act which make it an offence: (a) for the parties, during the pendency of the reference proceedings, to commence, continue or participate in a lock-out or strike after an industrial dispute in that industry has been referred for settlement by arbitration to an Arbitrator, but before an award in respect of such dispute has been made (section 40(1) (b) (m)); or (b) for the employer, during the pendency of an arbitration but before an award is made, to terminate the services of, or punish in any other way, without the approval in writing of such Arbitrator, any workman concerned in such dispute, or alter, to the prejudice of any workman concerned

in such dispute, his conditions of service applicable to such workman immediately before the reference of such dispute to such Arbitrator (section 40 (1) (f)). These provisions are intended to preserve the status quo during the pendency of arbitration proceedings. If the power to cancel or supersede the reference made under section 4 is held to be implied, the proceedings before the Arbitrator can be terminated and superseded at any stage and obligations and liabilities incurred by the parties during the pendency of the proceedings would be materially affected and proceedings before the Arbitrator would be rendered wholly ineffective or nugatory by the exercise of such power by the Minister.

Apart from these provisions of the Act, on general principles it would appear that the order of reference made by the Minister under section 4 would not fall within the scope and ambit of 'orders' contemplated by section 18 of the Interpretation Ordinance. That section reads as follows :—

> "Where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to issue any proclamation, or make any order or notification, any proclamation, order, or notification so issued or made may be at any time amended, varied, rescinded or revoked by the same authority and in the same manner, and subject to the like consent and conditions, if any, by or in which or subject to which such proclamation, order, or notification may be issued or made."

Though the order of reference under section 4 may be administrative in motivation, yet the order, according to the scheme of the Act, is designed to eventuate by a quasi-judicial process, in an award potent with consequences to the parties. The Arbitrator has to act judicially in making the ultimate award which is binding on the parties. His function is judicial in the sense that he has to hear the parties, decide facts and apply rules with judicial impartiality. His decision is as objective as that of any Court of Law, though ultimately he makes such award as may appear to him just and equitable. In this context, it is necessary to remember that it is a cardinal principle of administration of justice that justice should not only be done but appear to be done and that the Judge should act without fear or favour. The contention that the Minister has an unfettered power to cancel his order of reference infringes this paramount principle and impairs judicial independence. It tends to make the Arbitrator a creature of the Minister or of interested parties. The statement made by the Union representative, quoted earlier in support of his application for a postponement of the proceedings before Mr. Amarasinghe on

15.8.70, is not only intriguing, but is also illustrative of the evil involved in the acceptance of the proposition that section 18 of the Interpretation Ordinance is available to the Minister. Behind the back of the employer and the Arbitrator, moves were going on for the revocation of the reference for no ostensible reason. Exercise of judicial functions impartially by an Arbitrator is rendered difficult on the rule of construction enunciated in section 18 of the Interpretation Ordinance. The hypothesis of an Arbitrator's tenure of his office under the reference of being dependent on the pleasure of the appointing authority is repugnant to all notions of justice. Such a situation is not conducive to the proper discharge of his judicial functions by the Arbitrator. Risk of interference is inherent in the construction contended for by the State. The power to revoke the reference claimed for the Minister is an absolute power. If permitted, it can be exercised at any stage of the arbitration proceedings so as to frustrate the proceedings. It is not as if the exercise of the power is subject to any condition. If the Legislature had intended to confer on the Minister the absolute power to revoke an order made under section 4, the Legislature would have made specific provision in that behalf and would have prescribed appropriate limitations to the exercise of such power. In my view, the rule of construction embodied in section 18 of the Interpretation Ordinance was not intended to apply to the order of reference made under section 4 of the Industrial Disputes Act and cannot be invoked to revoke or rescind the order of reference made in terms of the provisions of the said section 4. The context militates against such power and construction.

It is to be noted that the bona fides of the Minister in superseding the first reference and making the second reference is not canvassed, nor that of Mr. Krishnadasan, the second Arbitrator, in accepting the second reference. But, the bona fides of the Minister is not relevant for determining the ambit of the powers under section 4 of the Act. If, on a proper construction of the various provisions of the Industrial Disputes Act, the claim of the Minister is found to be inconsistent with the scheme of the Act, the bona fides of the Minister cannot validate the impugned revocation or supersession.

Senior State Counsel appearing for the Minister brought to the notice of Court the unreported judgment of the Supreme Court in the case of *Lever Brothers Ltd. v. Krishnadasan and others* (S.C. Appln. No. 166 of 1967. S.C. Min. dated 5.7.68) where the question arose as to whether the Minister's order of reference under section 4(2) of the Industrial Disputes Act had been validly revoked. The Court there said that though there is no particular section in the Industrial Disputes Act

which, in terms, empowers a revocation of an order of reference, there was nothing in the Act which prohibits the authority making the order from revoking it. The Court referred to section 18 of the Interpretation Ordinance and observed: "In our view, the word 'order' in section 18 includes an executive order, such as the one made under section 4(2) of Chap. 131, and not merely orders which have legislative effect." In that case, the Arbitrator had upheld a preliminary objection raised by the Employer, prior to the judgment of the Privy Council in *The United Engineering Workers' Union v. Devanayagam* (69 N.L.R. 289), that the reference made by the Minister under section 4(2) was bad in law. In view of the Arbitrator's order, the Minister revoked the order of reference made by him. After having induced the Arbitrator to uphold his tenuous objection that the reference was bad in law, the Employer, after the Privy Council judgment, sought a Writ of Mandamus against the Arbitrator directing him to proceed with the reference ignoring the Minister's order of revocation. It is to be noted that in the circumstances of that case, the revocation by the Minister had the effect of merely declaring the reference as non-existent as the order had been declared null and void by the Arbitrator. According to the then current conception of judicial powers, prior to the Privy Council judgment referred to above, it was thought that there was no valid reference by the Minister. Hence, on the facts of that case, the question whether the Minister was entitled to revoke a valid reference did not actually arise for decision. The granting of a writ of Mandamus being a discretionary remedy, the Court refused the application mainly on the ground of the petitioner's conduct. The observation made by the Court, in the course of its judgment on the present issue, was obiter only. The question was not fully examined in all its aspects.

Counsel for the petitioners cited the judgment of the Supreme Court in S.C. 291/63, S.C. Min. 23.7.64, where it held that a Minister having referred an industrial dispute for settlement under section 4(2) cannot thereafter refer the same industrial dispute to another Industrial Court for settlement. It reasoned that "where an industrial dispute arises, there is an occasion for the Minister to exercise his power under section 4(2) of the Industrial Disputes Act by referring that industrial dispute to an Industrial Court for settlement, and if such power is so exercised, the occasion for exercising such power in respect of that industrial dispute is exhausted, and the Minister cannot again exercise such power in respect of the industrial dispute" and held that the second Industrial Court had no

jurisdiction to inquire into the industrial dispute between the petitioner and the 4th respondent. This judgment did not consider the impact of section 18 of the Interpretation Ordinance on the question in issue and did not examine the various relevant provisions of the Industrial Disputes Act in order to arrive at a considered conclusion.

For the reasons set out above, I am of the opinion that the purported revocation of the original reference to Mr. G. E. Amarasinghe and the re-reference to Mr. N. Krishnadasan are invalid in law as being in excess of the powers of the Minister. The 1st respondent had no jurisdiction to inquire into the said reference and his award is null and void.

In view of my opinion on the question of jurisdiction of the Minister and of the 1st respondent, it is not necessary to consider the other grounds urged by Counsel for the petitioners for quashing the award made by the 1st respondent.

Accordingly, a Mandate in the nature of a Writ of Certiorari is issued quashing the proceedings held by the 1st respondent in A.918 and his award published in Gazette No. 10 dated 2nd June, 1972. The petitioners' application is allowed, but there will be no order for costs.

WALGAMPAYA, J.—I agree.

SIRIMANE, J.—I agree

Application allowed.