1975 *Present :* **Weeraratne, J., Sharvananda, J., and Ratwatte, J.**

THE ESTATES AND AGENCY COMPANY LTD., Petitioner,
and P. J. S. A. PERERA and others, Respondents

S. C. 2/73—Applications for Mandates in the nature of writs of Certiorari and Prohibition under Section 42 of the Courts Ordinance.

Industrial Disputes Act—Sections 4 (1), 31B (1) (a), 31B (5), 31C (2), 31D (1)—Applications under Section 31B (1) (a) dismissed—No adjudication on the merits—Subsequent reference under Section 4 (1)—Applicability of doctrine of estoppel by res judicata.

The 2nd respondent trade union filed application No. L.T. 9/1105 in terms of Section 31B (1) (a) of the Industrial Disputes Act on behalf of the workman, 'M', claiming reinstatement and back wages. After the case of the workman was closed and the respondent company had led part of its evidence, the 2nd respondent union withdrew the application and consequently the application was dismissed. Thereafter a second application (No. 10/3423) was filed by the 2nd respondent union on behalf of the workman, 'M' under Section 31B (1) (a) of the said Act making precisely the same claim made in the earlier application No. 9/1105. On a preliminary objection being taken to the hearing of the second application, the said application was dismissed on the ground that the principle of "res judicata" applied.

Subsequent to the two aforesaid applications to the Labour Tribunal, the Minister acting under Section 4 (1) of the said Act referred the dispute between the petitioner and the 2nd respondent union arising from the dismissal of the workman 'M' to settlement by arbitration. A preliminary objection was then taken to the arbitration proceedings on the ground that the reference was bad in law inasmuch as there was no industrial dispute in existence at the time of the reference.

Held : that the reference under Section 4(1) of the Industrial Disputes Act was valid inasmuch as—

(a) there was no decision or adjudication on the merits and no finality in the proceedings relating to the two applications made to the Labour Tribunal ;

(b) the parties on the reference under Section 4(1) of the said Act and the parties in proceedings L.T. 9/1105 and L.T. 10/3423 are not the same ;

(c) 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.

APPLICATION for Writs of Certiorari and Prohibition.

R. A. Kannangara, with *Mark Fernando* and *Priya Amerasinghe,* for the Petitioner.

S. Mahenthiran for the 2nd respondent (the Union).

Priyantha Perera, Senior State Counsel, as Amicus Curiae.

Cur. adv. vult.

May 30, 1975. WEERARATNE, J.—

This is an application for the issue of Writs of Certiorari and Prohibition quashing the proceedings and order made by the President of the Labour Tribunal and directing him to refrain from taking any further action upon the reference purported to have been made by the Honourable Minister of Labour.

It is alleged by the petitioner, The Estates & Agency Co. Ltd., that the workman A. Masilamani who was employed on Dunsinane Estate, Punduloya, failed and neglected to report for work from and after 1st June, 1967 and abandoned his employment and thereby vacated his post.

On the 22nd August, 1967 the 2nd respondent (a trade union) filed an application No. LT 9/1105 in terms of Section 31B (1) (*a*) of the Industrial Disputes Act on behalf of the workman Masilamani in the Labour Tribunal, Nuwara Eliya, against the Superintendent of the said estate claiming reinstatement of the workman and back wages for him on the ground of unlawful termination of Masilamani's services.

Then according to the petitioner at a stage after the case on behalf of the workman was closed and the respondent Company had led a portion of its evidence the 2nd respondent union, as recorded by the President in his order dated 10.8.68, by letter dated 15.7.68 moved to withdraw the application on the advice of their Counsel Mr. Amirthalingam and consequently the application was dismissed.

Thereafter a second application No. 10/3423 was filed by the said 2nd respondent Union on behalf of the workman under section 31B (1) (*a*) of the Act making precisely the same claim made in the earlier application No.. 9/1105.

A preliminary objection was then taken by the petitioner to the hearing of the second application and the President made order on 31.3.71 dismissing the said application on the ground that the principle of *res judicata* applies.

On the 27th July, 1971 the Minister of Labour acting under Section 4 (1) of the Industrial Disputes Act referred the *dispute between the petitioner and the 2nd respondent Union,* arising from the said dismissal of the workman, to settlement by arbitration. The Commissioner of Labour thereafter "in a statement of the matter in dispute" sets out in his document "E" that:

> "The matter in dispute between the aforesaid parties is whether the dismissal of the watcher Mr. A. Masilamany, who is a member of the said Union, by the management of the said Estate is justified and to what relief he is entitled."

A preliminary objection was then taken to the arbitration proceedings on the ground that the said reference was bad in law and that consequently the 1st respondent, President of the Labour Tribunal, had no jurisdiction to entertain the reference.

On the 30th October, 1972 the 1st respondent overruled the objection of the petitioner. In his reasons he states that the order in the first case No. 9/1105 makes reference to the Union's letter " B " dated 15.7.68 which refers to the Union " seeking reference under section 4 (1) ".

Mr. R. A. Kannangara for the Petitioner argued that the reference of the Minister was bad in law because there was no industrial dispute in existence touching this matter. He submitted in this connection that the dispute was heard by two Tribunals and concluded. Counsel submitted that the first order was not subject to any conditions and was accordingly a final order. When the matter came up the second time there was no appeal from the order of the President dismissing the action on the preliminary objection taken. Consequently, it was again a final order.

Mr. Mahenthiran for the 2nd respondent argued that the principle of '*res judicata*' has no application in this matter. He further submitted that the order of the Minister under Section 4 (1) cannot be impeached. The second order, he submitted should have been decided upon merits. It was argued by Counsel that when no evidence was led there could not have been an adjudication. Consequently, there was no just and equitable order.

It would appear from the order made in Case No. 9/1105 that the President acting on the material contained in the 2nd respondent Union's letter of 15.7.68 dismissed the application. The said letter contains reasons as to why the application was sought to be withdrawn, namely, that the Union was intending to seek a reference, under Section 4 (1) of the Act, by the Minister as referred to by the President when he overruled the preliminary objection taken once the proceedings commenced in respect of the Minister's order under Section 4 (1) of the Act. If this be so there could be no finality in regard to the order made in Case No. 9/1105 and the principle of '*res judicata*' would not be applicable, since it was never intended by the Union that the dispute was at an end.

A statutory tribunal, for instance, a Labour Tribunal is vested with judicial authority to hear and determine disputes between employer and worker, and consequently is undoubtedly a judicial tribunal. In order that a decision can be regarded '*res judicata*' it must be established that it has been obtained from a judicial tribunal exercising judicial functions. All that the case of the

United English Workers' Union v. Devanayagam reported in 69 N. L. R. page 289, cited by Counsel held was that the Presidents of Labour Tribunals do not hold *judicial office* within the meaning of *Ceylon Constitution (Order-in-Council)* of 1946. The decision must be a judicial one as distinguished from a mere termination of proceedings otherwise than by judicial decision. *Spencer Bower and Turner* in their work on '*res judicata*', Second Edition, page 29 state :

> "There must have been both a judex and judicium which for purposes of estoppel means a decision or determination or adjudication of some question of law or fact, whether such decision takes the form of express judicial declaration or is necessarily involved in the command or prohibition which constitutes the judgment."

In the case of *Komprinz* reported in 1887 (12 Appeal Cases page 256), House of Lords, Lord Halsbury (at page 260), Lord Bromwell (at page 261), Lord Herchell (at page 262) express the view that a dismissal by consent can be considered a '*res judicata*', in the sense that the party relying on it has a power or opportunity to show by evidence that was available and admissible that the consent was the outcome of a deliberate bargain, compromise and release and an intention on both sides to put an end to litigation.

The Industrial Disputes Act is a piece of social legislation which requires that a just and equitable order should be made. The workman in this case was undoubtedly still awaiting such an order and the Union certainly had not decided to abandon his claim. In these circumstances could it be said that there was any decision on the merits ? If there was no decision on the merits then the order by the President made in the second case No. 10/3423 would indeed be unsustainable.

The fact that the Union decided to file the second application without pursuing the matter of an order by the Minister under Section 4 (1) set out in the letter dated 15.7.68, is immaterial. There could have been a different view taken in regard to that course when the Union decided to file a second application. In any event it is unnecessary for us to speculate on that aspect of the matter, for what concerns us is whether the first inquiry concluded the dispute. In my view the dispute was certainly not concluded and no final order was made. Consequently, the provisions of Section 31B (5) referred to by Counsel for the petitioner would not be applicable.

In this connection reference must be made to Mr. Kannangara's contention that there was no appeal by the 2nd respondent Union from the order of the President in the second application No. 10/3423. Counsel submitted that accordingly the dispute was concluded and the order of dismissal would be a final order in respect of which the provisions of Section 31A (5) apply. Hence it is submitted that there could not be a fresh reference to arbitration and that in the result the Minister would be acting without jurisdiction when he made the order for arbitration, in respect of the identical dispute under Section 4 (1) of the said Act.

I have already shown that the circumstances in which the application in case No. 9/1105 was made clearly do not disclose an intention on the part of the parties to the dispute to put an end to litigation and that there was no decision on the merits of the case. Even though an appeal was not taken the fact remains that there was no decision or adjudication on the merits and accordingly no termination of the proceedings. In this view of the matter the order of the President in case No. 10/3423 is insupportable.

In these circumstances the order of the Minister under Section 4 (1) of the Industrial Disputes Act must be regarded as valid since there was no final conclusion of the dispute in case No. 9/1105. The inquiry commenced on the said order of the Minister must proceed.

The petition is accordingly dismissed with costs fixed at Rs. 500 payable to the 2nd respondent by the Petitioner.

I wish to add that since writing this judgment I have perused the separate judgment of my brother Sharvananda, J., who has considered the question that arises in this appeal in a different light.. I am in agreement with the reasons given by him on the point of law discussed in his judgment which represents a collateral argument in support of the conclusion arrived by me.

SHARVANANDA, J.—

I agree with my brother Weeraratne, J., that since there was no decision on the merits on the dispute between the workman Masilamani and the petitioner the plea of res judicata raised by the petitioner against the Respondent Union in the present proceedings cannot be sustained.

Counsel for the petitioner submitted that the dispute arising from the alleged termination of the services of the worker Masilamani had been the subject of orders by the Labour Tribunal in terms of Section 31 (c) (2) of the Industrial Disputes Act in LT 9/1105 and 10/3423 and that the said orders, having

not been appealed against, were final within the meaning of Sections 31D (1) of the Act and operated as res judicata between the petitioner and the 2nd Respondent Union and accordingly no " industrial dispute " survived between the petitioner and the 2nd respondent Union within the meaning of the Act.

Mr. Mahenthiran for the 2nd respondent Union argued that the principle of res judicata had no application so as to debar the Minister from acting under Section 4 (1) of the Industrial Disputes Act and referring to arbitration an industrial dispute, when he is satisfied of the existence of such a one between the petitioner and the Union. He submitted that the Labour Tribunal had not adjudicated on the merits in the aforementioned applications LT 9/1105 and 10/3423 concerning the termination of the services of the workman Masilamani. He further contended that though the orders made therein might be final in terms of Section 31 D (1) between the petitioner and the workman Masilamani on whose behalf the applications were made by the 2nd respondent Union, they did not estop the Union from re-agitating the dispute as a dispute between the petitioner and itself. He stated that though the orders of dismissal of the applications made on behalf of the workman might give rise to the statutory bar under Section 31D (1) so as to preclude any further application being made by or on behalf of the workman, yet those orders did not operate as res judicata against the Union in its dispute with the employer. He referred to paragraph 232 at page 203 of Spencer Bower on Res Judicata (2nd ed.) where it is stated that:

> " A party who though identical in name litigates in different characters in the two proceedings is, in contemplation of law and in the correct sense of the civilian, two separate and distinct personae, so that a decision for, or against a man who appears in a representative character, is not conclusive in favour of, or (as the case may be) against the same man appearing in subsequent proceedings, as an individual, or in a different representative character. "

He distinguished the case of *Ceylon Workers' Congress* vs. *Subramaniam Pillai* 77 N. L. R. 335, relied on by the petitioner, on this basis. In that case, both the original application by the Socialist Workers' Congress and the subsequent application by the Ceylon Workers' Congress were made on behalf of the same 11 workers who had been dismissed by the respondent-employer; so that, when the earlier application was withdrawn and was dismissed the statutory bar under Section 31D (1) operated to preclude any further application being made by or on behalf of the same 11 workmen by the 1st union or by any other union on

their behalf. This distinction is fatal to petitioner's submission. In the instant case, there was no adjudication by the President on the *merits of the application made on behalf of the workman* Masilamani and there was no decision on the issues involved in the application that was withdrawn. That the decision of the issues raised in that application that was withdrawn would have been decisive, had it proceeded to judgment, in respect of certain questions that arise in the present proceedings between the petitioner and the Union, is not relevant since the parties on the reference under Section 4 (1) and the parties in proceedings in LT 9/1105 and 10/3423 are not the same. On the applications LT 9/1105 and 10/3423 the Union participated in a representative capacity. The applications were made in the Labour Tribunal by the Union on behalf of the workman Masilamani in terms of section 31B (1) but in the present arbitration proceedings initiated on the Minister's reference, the Union on its own status as principal is a party. The orders made in LT 9/1105 and 10/3423 do not bind the Union as principal and the Union is free to canvass the matters in dispute in proceedings, in which it is a party, concerned as a principal. The questions might be the same, or identical but the parties are different (Spencer Bower 2nd ed. at page 211) *De Zoysa v. Gunasekera,* 47 N. L. R. 439.

Counsel for the petitioner argued that on the making of the final order in LT 9/1105 and 10/3423 the industrial dispute between the parties had ceased to exist and hence the Minister had no jurisdiction to refer a "dead" dispute for arbitration under section 4 (1). Section 4 (1) of the Act provides that the Minister may, if he is of the opinion that an industrial dispute is a minor dispute, refer it, by order in writing, for the settlement by arbitration to a labour Tribunal notwithstanding that the parties to such dispute or their representatives do not consent to such reference. Estoppel cannot be raised to hinder the exercise of a statutory discretion conferred on a public authority —*Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.* (1961) 2 A. E. R. 46. 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. The relevant part of the statutory definition of "industrial dispute" runs as follows: "Industrial Dispute" means any dispute or difference between an employer and workman or between employer and workman..... connected with the employment or non-employment or.....the termination of the services or reinstatement in service of any person, and for the purposes of this definition "workman" includes a trade union consisting of workmen. In terms of this definition, it is conceivable that the dispute between the employer and workman can, at the same time, constitute an industrial dispute between an

employer and a trade union. So that, though the workman may be barred by Section 31D (1) from re-agitating the matter in dispute, the Minister may not be estopped from taking steps under Section 4 (1) where he is satisfied that the matter in dispute concerning the dismissal of the workman Masilamani is festering between the employer and the Union of which the workman Masilamani is a member, especially as there was no adjudication of the dispute on the merits. The Industrial Dispute between the employer and the trade union continued to be a live dispute despite the withdrawal of the application made on behalf of the workman Masilamani in LT 9/1105 and the orders of dismissal in LT 9/1105 and LT 10/3423 and despite Masilamani, on his own, being unable to re-agitate the matter.

The arbitration machinery, " may be seen to represent a social policy to which the Court must give effect in the interests of the public generally or some section of the public despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise "—per Lord Radcliffe in *Kog Hoong v. Leon Chen Mines* (1964) 1 A. E. R. 300 at 308. It has to be borne in mind that the Industrial Disputes Act is a piece of social legislation having for its object the prevention, investigation and settlement of the industrial disputes. Promotion of industrial peace cannot be achieved by the application of technical doctrines of estoppel by res judicata or otherwise. Such doctrines should be confined in their application to their strict limits and should not be extended to debar the making of just and equitable orders by statutory tribunals in the exercise of their just and equitable jurisdiction. The equitable jurisdiction of an industrial or labour tribunal is least conducive to the indiscriminate application of rules of estoppel. The invocation of the doctrine in such a forum should have statutory sanction.

In my view, for the reasons set out above the order of reference made by the Minister is a valid order and its propriety cannot be questioned in these proceedings. The application of the petitioner is refused with costs fixed at Rs. 500 payable to the 2nd respondent.

RATWATTE, J.—I agree.

Application dismissed.