1969 *Present :* **Samerawickrame, J., and Pandita-Gunawardene, J.**

THE EKSATH ENGINERU SAHA SAMANYA KAMKARU SAMITHIYA, Petitioner, *and* S. C. S. DE SILVA *et al.*, Respondents

S. C. 477/63—Application for a Mandate in the nature of a Writ of Mandamus

Industrial dispute—Award made by an Industrial Court—Quashing of it in Certiorari *proceedings—Power of Industrial Court to resume hearing of the dispute—Effect of expiry of period of appointment of a member of the Court—Industrial Disputes Act, ss. 22 (2), 31 (2).*

Where an order of an inferior tribunal is quashed by the Supreme Court in *Certiorari* proceedings on a ground which does not deal with the merits of the case, the inferior tribunal has jurisdiction to re-hear the case. But if the order was made by an Industrial Court, the proviso to section 22 (2) of the Industrial Disputes Act does not enable such re-hearing if the members of the panel from which the Industrial Court was constituted ceased to be members of the panel either during the pendency of the *Certiorari* proceedings or thereafter.

APPLICATION for a writ of *mandamus*.

Nimal Senanayake, with *Bala Nadarajah* and *Miss Adela P. Abeyratne*, for the petitioner (the union).

H. V. Perera, Q.C., with *Lakshman Kadirgamar*, for the 4th respondent (the employer).

Cur. adv. vult.

December 19, 1969. SAMERAWICKRAME, J.—

The petitioner makes this application for a writ of mandamus ordering the 1st, 2nd and 3rd respondents or in the alternative the 1st and 2nd respondents to function as an Industrial Court and to make an award or take a decision on matters referred to them by order of the Minister of Labour. The 1st, 2nd and 3rd respondents had made an award in respect of disputes between the employees of the 4th respondent who are members of the petitioner-union and the 4th respondent. Upon an application made by the 4th respondent this Court issued a writ of certiorari quashing the decision in the award on one dispute on the ground of an error of law in that there was a failure to consider and decide a crucial question that arose. Weerasooriya, S.P.J., who delivered the judgment proceeded to say, "For the reasons I have given, I quash the finding of the Industrial Court that the dismissals of the twenty-three workmen are unjustified, and so much of the award as directs the petitioner to give the dismissed workmen suitable employment, if they so desire, as from the date specified and to pay each of them a sum of Rs. 300 as

compensation. As the present application is only for a writ of certiorari and no application has been made for a writ of mandamus to the Industrial Court to determine afresh according to law the dispute relating to the disciplinary action taken against these workmen, I leave it to the respective parties to consider what further legal action, if any, should be taken in consequence of this order."

The petitioner thereafter applied to the 1st, 2nd and 3rd respondents to determine afresh the dispute in regard to the dismissals of the twenty-three workmen but they refused to do so on two grounds. They held that having made an award each of them was *functus officio*.

In their award they had made decisions on all the disputes referred to them though in respect of this dispute they had committed the error of failing to consider and determine a question the answer to which should have formed one of the bases of their decision. Assuming that there is a category of omissions or errors that may be corrected in an award by the person or persons making it, this was not such an error. If therefore an application had been made to them apart from any intervention by a higher court to correct this error in the award they would have been correct in holding that they were each of them *functus officio*. But where the decision was set aside on an application for a writ of certiorari on the ground on which it was so set aside a duty arose to them to re-hear the matter on the application by the petitioner. In *Sattar Sahib v. State of Madras* 1952 A.I.R. Madras 605 (cited in 72 C.L.W. at page 81), Rajamannar, C.J. said, "We have no doubt whatever in the matter that when an order of the inferior tribunal on an application properly made to them is quashed by this Court by a Writ of Certiorari, on any ground which does not deal with the merits of the case, it is not only permissible, but it is also incumbent on the inferior tribunal to take up the application and re-hear the same." The first ground on which the 1st, 2nd and 3rd respondents declined jurisdiction is not, in my view, valid.

The 1st, 2nd and 3rd respondents also held that they were prevented from exercising jurisdiction by reason of the fact that the 3rd respondent had ceased to be a member of the panel from which Industrial Courts may be constituted. It was the position of the petitioner that the 3rd respondent continued to hold office by reason of the proviso to section 22 (2). The proviso states :—

> "Provided that where any such person is on the date of expiry of his period of appointment functioning as a member of an industrial court which is conducting an inquiry under this Act, he shall continue to hold office until that inquiry is concluded and a decision taken or an award is made."

The award was made by these respondents on 17th November, 1960. The 3rd respondent's period of appointment expired on 3rd March, 1962, and the award of these respondents was quashed on 30th March, 1962. While I am of the view that upon the quashing of the award a duty would

have devolved on the 3rd respondent along with the 1st and 2nd respondents to re-hear the matter if he was qualified to do so, I am unable to take the view that after these respondents had made their award on the 17th of November 1960, they continued to conduct an inquiry into this matter until the 3rd of March 1962. I think that the provision in the proviso contemplates the factual conducting of an inquiry and the 3rd respondent was not doing that at the expiry of his period of appointment. The 3rd respondent did not, therefore, in my view, continue to hold office by reason of the proviso to s. 22 (2).

It was the further contention of the petitioner that even if the 3rd respondent had ceased to be qualified to be a member of the Court there was a duty on the 1st and 2nd respondents to re-hear the matter and reliance was made on s. 31 (1) which empowers a court to act notwithstanding a vacancy. It is unnecessary to decide the validity of this contention for the petitioner has a more serious difficulty in its way. Learned counsel for the respondent brought to our notice the fact that about six months before the hearing of the present application the 1st and 2nd respondents too ceased to be on the panel. He submitted therefore that mandamus should not therefore issue ordering them to function as an Industrial Court as they were now not qualified to do so. I think there is substance in this submission. Parties obviously cannot be ordered to do what they are not qualified to do and are therefore unable to do. *Lex non cogit ad impossibilia.* The application is therefore dismissed but without costs.

PANDITA-GUNAWARDENE, J.—I agree.

Application dismissed.