

1962

Present : Weerasooriya, S.P.J.

NEW DIMBULA CO. LTD. and another, and R. L. BROHIER and others,
Respondents

S. C. 584 and 31—Applications for Writs of Certiorari and Mandamus

Industrial dispute—Unreasonable transfer of employee from one sphere of work to another—Relief which arbitrator may award—Misdirection—Certiorari—Industrial Disputes Act (Cap. 131), as amended by Act No. 62 of 1957, ss. 4 (1), 17 (1), 33 (1).

Section 33 (1) (b) of the Industrial Disputes Act (as amended by Act No. 62 of 1957) must be read as subject to the provisions of section 17 (1), which empowers an arbitrator to make such award as may appear to him just and equitable. Accordingly, where, in an industrial dispute referred to arbitration, the only question is whether an employee has been transferred unreasonably and without sufficient cause by his employer from one sphere of work to another, it is open to the arbitrator, if he finds that the employee was improperly transferred, to order discontinuance of the employee's services with compensation.

Where an arbitrator, when giving his award, misdirects himself in interpreting a previous award in a different case, the misdirection would be an error of law on the face of the award and would render such part of the award as is affected by the error liable to be quashed by *certiorari*.

APPPLICATIONS for *certiorari* and *mandamus*.

H. V. Perera, Q.C., with *R. A. Kannangara* and *L. Kadirgamar*, for petitioner in Application No. 584 and the 3rd respondent in Application No. 31.

S. Nadesan, Q.C., with *G. D. C. Weerasinghe*, for the 2nd respondent in Application No. 584 and the petitioner in Application No. 31.

No appearance for the other respondents in both applications.

Cur. adv. vult.

July 31, 1962. WEERASOORIYA, S.P.J.—

These two applications relate to an award made by an arbitrator (who is the 1st respondent in both applications) to whom an industrial dispute was referred for compulsory arbitration under the provisions of section 4 (1) of the Industrial Disputes Act (Cap. 131) as amended by the Industrial Disputes (Amendment) Act, No. 62 of 1957.

The parties to the dispute were the Ceylon Plantation Workers' Union (the petitioner in application No. 584 and the 2nd respondent in application No. 31) and the then Superintendent of Diyagama East Estate,

Agrapadna. The matter in dispute was whether the transfer of S. Ramasamy, an employee on the estate, from the power house to another division of the estate in a different capacity was justified and to what relief he was entitled.

Upon this reference there ensued a prolonged inquiry before the arbitrator, who cannot, however, be held in any way responsible for the undue length of it. If I may say so with respect to the parties concerned, both the time taken and the expense incurred over what appears to have been a minor labour dispute (and it was on this basis that the provisions of section 4 (1) were availed of by the Minister) are out of all proportion to the issues involved in it. The arbitrator by his award dated the 11th November, 1961, held that the transfer of Ramasamy from the power house to the field was unreasonable and without sufficient cause. He accordingly granted relief to Ramasamy in the following terms contained in paragraph 11 of the award :

“ I direct that S. Ramasamy be given a clear discharge from the date this award is published in the *Government Gazette*, and that he be paid the salary and allowance hitherto paid to him as an attendant in the power house up to the date of his discharge, together with an additional payment of 3 months' salary, calculated on the same basis, by way of compensation. I further direct that in recognition of his long and good record of service, which has been broken through no fault of his, Ramasamy be given further compensation by payment of a month's wages for every full year of service from the date of his registration on Diyagama (2nd) East Division to the date of his discharge. The payment will be calculated on a hypothetical figure of 30 days per month and rated on the wage and allowances he drew on the date of his discharge”

The petitioner in application No. 584 is the New Dimbula Company Limited, being the owner of the estate on which Ramasamy is employed. The substantial prayer in this application is for a writ of *certiorari* quashing the award of the arbitrator. This would include even the arbitrator's finding that the transfer of Ramasamy from the power house to the field was unreasonable and without sufficient cause. Mr. H. V. Perera who appeared for the petitioner did not, however, challenge that finding, but he asked that the part of the award directing the termination of Ramasamy's employment with compensation as contained in paragraph 11 be quashed on the ground that it is in excess of the jurisdiction of the arbitrator. That this part of the award be quashed is also the prayer in application No. 31. There is a further prayer in it for a writ of mandamus to compel the arbitrator to order a re-transfer of Ramasamy to the power house with back pay from the date of the original transfer.

Under section 17 (1) of the Industrial Disputes Act an arbitrator to whom an industrial dispute has been referred for settlement by arbitration is required to “ make all such inquiries into the dispute as he may consider

necessary, hear such evidence as may be tendered by the parties and thereafter make such award as may appear to him just and equitable.” Mr. Nadesan, who appeared in support of application No. 31; submitted that once the arbitrator held that the transfer of Ramasamy from the power house to the field was unreasonable and without sufficient cause the relief that should have been granted was an order directing the re-transfer of Ramasamy to the power house with back pay. He conceded, however, that no mandamus would lie to compel the arbitrator to give this or any other specific form of relief.

In ordering that Ramasamy be given the relief set out in paragraph 11 of the award, the arbitrator purported to follow a previous award the material part of which is quoted in paragraph 10 of the award. Paragraph 10 reads—

“10. I come now to the latter part of my directive: to what relief is Ramasamy entitled. In this connection I would quote from the award in I. D. 97 published in *Government Gazette* No. 11,633 of 2nd January, 1959:

‘It is a well-recognized principle of industrial law that the normal remedy for wrongful dismissal is reinstatement. It is also clear from the Act itself that in the industrial sphere, such an order cannot with impunity be made in all cases, regardless of the particular set of circumstances concerning each case, and the type of work the employees are engaged in. What is contemplated by the Legislature is that compensation as an alternative to reinstatement, is both expedient and desirable when either party is averse to the proposition of reinstatement. It is not conducive to the maintenance of cordial employer-employee relations and the preservation of industrial peace to order reinstatement indiscriminately.’”

Then he went on to say: “It transpired in evidence that the Superintendent had recently moved to a new charge. Taking all the circumstances highlighted in this arbitration into consideration, I do not feel that it will be in the interests of either employee (Ramasamy) or the employer, who has since taken over the charge, for me to order reinstatement.”

But that award dealt with the question of the relief that should be granted in a case of wrongful dismissal, and it was held there that although the normal remedy for wrongful dismissal is reinstatement, compensation may in an exceptional case be ordered in lieu of reinstatement. In the present case, however, the question of reinstatement does not arise for consideration. It would seem, therefore, that there was misdirection on the part of the arbitrator in regarding the two cases as comparable and in stating that he did not feel it would be in the interests of the employee or the employer to order reinstatement in the present case. A misdirection such as this would be an error of law on the face of the award which renders such part of the award as is affected by the

error liable to be quashed. The misdirection appears to have led the arbitrator to make the order that the services of Ramasamy be terminated with compensation as the appropriate relief to be granted in this case. Both Mr. Perera and Mr. Nadesan urged as an additional ground for quashing this part of the award that it is in excess of the arbitrator's jurisdiction.

Section 33 (1) of the Industrial Disputes Act sets out certain decisions which may be embodied in the award of an arbitrator. Although these provisions are not exhaustive it is relevant to note that under section 33 (1) (b) an award may contain decisions "as to the reinstatement in service, or the discontinuance from service, of any workman whose dismissal or continuance in service is a matter in dispute, or who was dismissed or ceased to be in service at the commencement or in the course of any strike or lock-out arising out of the industrial dispute."

The question that arises, therefore, is whether in a case like this, where the only dispute is in regard to the propriety of the order of the Superintendent transferring the employee from one sphere of work to another, it is open to the arbitrator to order discontinuance of the employee's services. Clearly, the present case does not come within the terms of section 33 (1) (b). The provisions of section 33 (1) are, however, expressly stated to be without prejudice to the generality of the matters that may be specified in an award. An indication of the generality of the matters that may be specified in an award is to be found in section 17 (1), which empowers an arbitrator to make such award as may appear to him just and equitable. His power to include in an award a decision as to the discontinuance of a workman from service cannot, therefore, be limited to the instances mentioned in section 33 (1) (b), and I am unable to hold that so much of the award as directs the termination of Ramasamy's employment with compensation is in excess of the arbitrator's jurisdiction. But as this part of the award is affected by the arbitrator having misdirected himself in the manner indicated earlier, I am of the view that an order quashing it should issue in this case.

The further question then arises as to what other order should be made by me in regard to the action which may be taken by the arbitrator consequent on his finding that the transfer of Ramasamy from the power house to the field was unreasonable and without sufficient cause. Mr. Nadesan submitted that any order proceeding from this Court quashing the part of the award referred to should be accompanied by an order of mandamus directing the arbitrator to decide what relief Ramasamy should get. Mr. Perera was, however, strongly opposed to any order being made which would leave it open to the arbitrator to consider the giving of relief in the form of a direction that Ramasamy should be re-transferred to the power house. Mr. Perera submitted that the arbitrator has already considered this form of relief and decided against it. I do not think, however, that it is correct to say that the arbitrator considered this question and came to a decision regarding it. What

he considered was whether he should order the "reinstatement" of Ramasamy, and he held that to do so would not be in the interests of Ramasamy or the new Superintendent. As pointed out, the question of "reinstatement" does not arise in the present case, but even if, in refusing to order "reinstatement", the arbitrator is to be regarded as having, in effect, decided not to order a re-transfer of Ramasamy to the power house, such decision should not, for the reasons already given, be allowed to stand.

So much of the award of the arbitrator as relates to the relief to be given to Ramasamy is quashed, and the record of the proceedings before him will be returned with a directive that he should, after hearing further representations, if any, that the parties may wish to place before him, consider afresh what relief Ramasamy is entitled to consequent on the finding that his transfer from the power house to the field was unreasonable and without sufficient cause.

I make no order as to the costs of these applications.

Award of arbitrator partly quashed.

