1973 *Present :* **Deheragoda, J., Wimalaratne, J., and Sirimane, J.**

THE CEYLON MALAYAN RUBBER GOODS LTD., Petitioner, *and* DAHANAYAKE and others, Respondents

S. C. 646/69—Application for a Mandate in the nature of Writs of Certiorari and Mandamus

Labour Tribunal—Application by workman for Relief for wrongful termination of his services—Proceedings "postponed" with a view to settlement—Absence of employer on the postponed date—Ex parte order against him—Illegality—Remedy of the employer—Industrial Disputes Act (Cap. 131), ss. 31 B (2) (a), 31 D 2—Industrial Disputes Regulations 28, 29.

Where proceedings in an application to a labour tribunal are "postponed" to enable the applicant and his employer to have a discussion with a view to settlement of their dispute, the application cannot be heard and disposed of *ex parte* if, on the postponed date, the employer fails to be present or to be represented. In such a case, the procedure set out in section 31 B (2) (*a*) of the Industrial Disputes Act should be followed.

APPLICATION for writs of *certiorari* and *mandamus.*

Sam Silva, for the petitioner.

Peter Jayasekera, for the 2nd respondent.

Cur. adv. vult.

August 3, 1973. DEHERAGODA, J.—

This is an application by the Ceylon Malayan Rubber Goods Limited for a mandate in the nature of writs of certiorari and mandamus on the President, Labour Tribunal, Colombo, the 1st respondent (hereinafter referred to as the "President"), and on one S. M. Mohamed, the 3rd respondent, who had been employed by the petitioner company as a boilerman until 1968.09.13. The 2nd respondent is the registered trade union of which the 3rd respondent is a member.

The facts which gave rise to this application are, briefly, as follows :—The 2nd respondent acting on behalf of the 3rd respondent made an application to the Labour Tribunal under section 31B of the Industrial Disputes Act (Cap. 131 of the 1956 edition of the Legislative Enactments) as amended, alleging that the 3rd respondent's services had been terminated on September 20, 1968, without any reasonable cause, and praying for his reinstatement, the payment of his back wages from the date on such termination, and such other relief as the Tribunal thought fit to be given.

The petitioner filed answer before the Labour Tribunal denying that the 3rd respondent's services were discontinued, and asserting that the 3rd respondent left its services at his will and pleasure, and that there was nothing due and owing to him.

On 1969.05.05, the date for which the inquiry was fixed, the President has recorded as follows :—

> "For the purpose of holding discussions with a view to settlement, this case was postponed for July 3rd, 1969 with the concurrence of both parties."

On July 3rd, 1969, the 3rd respondent, who was the virtual applicant at the inquiry, was present and represented, but no one was present on behalf of the petitioner company which had been cited as the respondent at that inquiry. The inquiry was taken up and heard *ex parte* and at the end of the day's proceedings the President has recorded "Judgment later", presumably meaning that he had reserved his order. Order was made by the President on 1969.07.20 for reinstatement of the 3rd respondent as from 1st August 1969 on monthly pay, and in addition for the payment to him of Rs. 360 for three months at the rate of Rs. 120 per month. According to the petitioner company, it was unaware of the *ex parte* inquiry or the order made thereafter until it received a copy thereof on 1969.07.29.

On 1969.08.02 the proctor for the petitioner company filed petition and affidavit before the Tribunal and moved with notice to the 2nd respondent union to have the *ex parte* order (*sic*) dated 1969.07.03 vacated, and the case refixed for inquiry. In this petition and affidavit he stated *inter alia* that he had inadvertently taken down the date of inquiry as 1969.08.03 and was therefore absent at the inquiry held on 1969.07.03. He prayed that the petitioner company be given an opportunity to state its case as it contended that the 3rd respondent had vacated his post.

To this the petitioner company received a reply dated 1969.08.07 from the Secretary to the Tribunal to the effect that the President had directed him to inform it that it should seek its legal remedy.

Mr. Sam Silva appearing for the petitioner company referred me to section 31B (2) (*a*) which runs as follows :—

" (2) A labour tribunal shall—

(*a*) where it is satisfied after such inquiries as it may deem necessary that the matter to which an application under subsection (1) of this section relates is under discussion with the employer of the workman to whom that application relates by a trade union of which that workman is a member, make order suspending its proceedings upon that application until the conclusion of that discussion, and upon such conclusion shall resume the proceedings upon that application, and, if a settlement is reached in the course of that discussion, shall make Order according to the terms of such settlement."

He contended that the provisions of this section required the Tribunal to make an order suspending the proceedings where it was satisfied that the matter relating to the application was under discussion between the employer and the trade union, and that the order made on 1969.05.05 postponing the case for July 3rd, 1969, did not satisfy this requirement. He contended further that the order should have been one of suspending the proceedings and fixing a date to have the case called, in order to ascertain whether the discussions had been concluded, and that the President could have resumed the proceedings only upon being informed that the discussions had been concluded. At these resumed proceedings if a settlement had been reached, the terms of such settlement should have been recorded, but if he was informed by both parties that a settlement had not been reached, he would have had to take up the inquiry for hearing

thereafter. He therefore argued that the *ex parte* proceedings held on 1969.07.03 were a nullity, and invited me to quash the order of the President dated 20th July 1969 and direct that the inquiry be heard and determined following the procedure set out in section 31B (2) (*a*).

Mr. Peter Jayasekera sought to meet these arguments on three grounds. His first argument was that the obligation to act under section 31B (2) (*a*) arose only upon an application made to suspend proceedings by a party to the inquiry, and that there was no record of such an application having been made. This argument is without substance for the reason that when the President records that the case is postponed " for the purpose of holding discussions with a view to settlement ", it presupposes an application made by the parties, perhaps orally, inviting the Tribunal to hold its hand until the discussions were concluded. His second argument was that Regulation 28 made under the Act enables a Tribunal to hear a case *ex parte* if a party to any proceedings before it fails to attend or to be represented without sufficient cause being shown. Regulation 28 runs as follows :—

> " If without sufficient cause being shown, any party to any proceedings before an Industrial Court or an arbitrator or a Labour Tribunal fails to attend or to be represented, the Court or arbitrator or Labour Tribunal, as the case may be, may proceed with the matter notwithstanding the absence of such party or any representative of such party."

This regulation is obviously meant to cover a case where a party fails to attend or to be represented on a date on which he is bound to attend and take part in the inquiry, and not to a case where there is a failure to attend on a date when the Tribunal wrongly purports to resume the suspended proceedings. Mr. Peter Jayasekera also referred me to Regulation 29, which in my opinion has no bearing on this case. His third argument was that section 31D (2) gave a right of appeal to the Supreme Court on a question of law from an order of the Tribunal to any party who was dissatisfied with such an order, and that the petitioner company had not availed itself of this right. On this question it is now well settled that this Court will act in revision either upon an application made in that behalf or *ex mero motu* upon it being brought to its notice that there has been a violation of a fundamental rule of procedure to the detriment of a party, resulting in a miscarriage of justice, and will grant relief notwithstanding that party's failure to avail itself of a right of appeal. The order of the President has been brought to the notice of the petitioner company only on

1969.07.29 and the reply from the Secretary referring the petitioner company to its legal remedy is dated 1969.08.07. Since this application for a writ has been filed by the petitioner company on 26th September 1969, a little over one and a half months from the date of the reply, there has been no undue delay in making this application.

I am inclined to agree with the contention of the learned counsel for the petitioner that the order made by the President on 1969.05.05 for the postponement of the inquiry under the circumstances is wrong and that the correct order in terms of section 31B (2) (*a*) should have been one of suspending the proceedings and fixing a date to ascertain whether the discussions for a settlement had been concluded, and that the President should not have resumed the proceedings so suspended, whether it be for the purpose of recording a settlement or of holding the inquiry, until he was satisfied that the discussions were concluded. A possible argument against this view is that while section 31B (2) (*a*) provides for the suspension of proceedings for the purpose of holding discussions with a view to a settlement and for the recording of the terms of settlement, if a settlement is reached in the course of those discussions, there is no indication in that provision as to what should happen if no settlement has been reached. The simple answer to such a contention would be that the question whether a settlement has been reached or not can be determined only at the conclusion of discussions, and, therefore, resumption of proceedings, even for the purpose of taking up the inquiry for hearing after an unsuccessful attempt at a settlement, cannot take place except upon the conclusion of the discussions. The resulting position is that in either event the conclusion of the discussions is a condition precedent to the resumption of the inquiry.

I therefore quash all proceedings subsequent to the order of the President dated 1969.05.05, including the order of the President dated 1969.07.20, and send the case back for a fresh inquiry before another President. There will be no costs of this application.

WIMALARATNE, J.—I agree.

SIRIMANE, J.—I agree.

Case sent back for a fresh inquiry.