Moosajees Ltd V. Fernando, P. O.

414/1966

Present: Sansoni, C. J., H. N. G. Fernando, S. P. J., T. S. Fernando, J., Tambiah, J., and G. P. A. Silva, J.

MOOSAJEES, LTD., Petitioner, and P. O. FERNANDO and others, Respondents

S. C. Applications Nos. 144 and 158 of 1964 for Writs of Certiorari

ROCKLAND DISTILLERIES LTD., Petitioner, and S. A. WIJAYATILAKE and others, Respondents.

S. C. Application No. 37 of 1965 for a Writ of Certiorari

(i) Supreme Court—Power to alter or recall a judgment—Scope—Res judicata— Civil Procedure Code, ss. 207, 769, 776.

(ii) Industrial disputes—Industrial Courts and Arbitrators—Mode of their appointment —Validity of appointments made by Minister and Commissioner of Labour—Separation of legislative, executive and judicial powers in the Constitution—Industrial Disputes Act, ss. 3 (1) (d), 4 (2)—Ceylon (Constitution) Order in Council, 1946, s. 65.

(i) The Supreme Court has power to alter or recall its own judgment at a stage before a decree has been entered in accordance with the judgment.

The present applications for writs of certiorari were originally referred under section 51 of the Courts Ordinance for hearing before five Judges in regard mainly to the question whether the tribunal concerned in each application was a " judicial officer " within the meaning of that expression as used in the Ceylon (Constitution) Order in Council, and, if so, whether it was validly constituted inasmuch as it had not been appointed by the Judicial Service Commission. After expressing their views on the question, and

assuming that the tribunals had jurisdiction, the Judges directed that the applications be set down for further hearing before a Bench of two Judges upon other matters raised by the respective petitioners. As the two Judges before whom they were listed for further hearing were unable to agree in regard to the order they should make, the applications came to be listed before the present Collective Court.

After the earlier Collective Court had delivered its judgments, it was decided by the Privy Council in *Liyanage and others v. The Queen* (68 N. L. R. 265) that the Ceylon (Constitution) Order in Council recognised a separation of powers as between the Legislature, the Executive and the Judicature. In the light of that decision, the tribunals concerned in the present applications had no jurisdiction to entertain the references.

Held by SANSONI, C. J., H. N. G. FERNANDO, S. P. J., T. S. FERNANDO, J., and G. P. A. SILVA, J. (TAMBIAH, J., dissenting), that, inasmuch as the earlier Collective Court had not entered a decree finally disposing of the application , it was open to the present Collective Court to re-examine, in the light of the decision of the Privy Council, the question whether the tribunals had jurisdiction. It could not be contended that the question was *res adjudicata*.

(ii) Legislation by which the power to nominate judges is granted to a Minister or other member of the Executive is, by virtue of the separation of powers recognised in the Ceylon (Constitution) Order in Council, an infringement of the judicial power of the State which cannot be reposed in anyone outside the Judicature. There exists a separate power in the Judicature which, under the Constitution, cannot be usurped or infringed by the Executive or the Legislature. The decision of the Privy Council in *Liyanage and others v. The Queen* (68 N. L. R. 265) precludes officials whose powers and functions are mainly administrative from exercising judicial power.

An Industrial Court appointed by the Minister under section 4 (2) of the Industrial Disputes Act, or an Arbitrator appointed by the Commissioner of Labour under section 3 (1) (d) of the same Act, is

not entitled, by virtue of the separation of powers recognised in the Ceylon (Constitution) Order in Council, to exercise judicial power, and therefore has no jurisdiction to adjudicate upon existing rights of parties.

The facts in Application No. 144 were that the Minister, by order made under section 4 (2) of the Industrial Disputes Act, referred to an Industrial Court for settlement the following matters in dispute : —" (1) Whether the non-employment of 98 specified persons is justified, and to what relief they are entitled ; (2) Hacking workers should be paid wages at the rate specified in the Collective Agreement No. 2 of 1959, for such classes of workers."

In application No. 158 a similar reference was made to the same Industrial Court in respect of another dispute between the same parties. The matter in dispute was described in the reference as " the non-employment of 39 specified employees and the relief to which each of them was entitled ".

Application No. 37 related to a dispute which was referred by the Commissioner of Labour in terms of section 3 (1) (d) of the Industrial Disputes Act for settlement by arbitration ; the matter in dispute was stated to be : " Whether the termination of employment of Mr. H. M. Peiris is justified and to what relief he is entitled ". The arbitrator had been nominated jointly by the parties.

Held by SANSONI, C. J., H. N. G. FERNANDO, S. P. J.. T. S. FERNANDO, J., and G. P. A. SILVA, J. (TAMBIAH, J. dissenting), that all three references were invalid, and that certiorari was available to quash the awards made by the referees. As the disputes involved an adjudication on existing rights, the Industrial Court and the Arbitrator had no jurisdiction to entertain the references.

Liyanage and others v. The Queen (68 N. L. R. 265). applied.

APPLICATIONS for writs of certiorari.

S. C. Nos. 144 and 158—H. V. Perera, Q. C., with *L. Kadirgamar* and *Mark Fernando*, for the petitioner.

N. Senanayake, with *Bala Nadarajah* and *Miss A. P. Abeyratne*, for the 2nd respondent (Trade Union).

V. Tennekoon, Q. C., Solicitor-General, with *H. L. de Silva*, Crown Counsel, for the 3rd respondent (the Commissioner of Labour).

S. C. No. 37—H. W. Jayewardene, Q. C., with *G. T. Samerawickreme, Q. C.*, *N. R. M. Daluwatte* and *Mark Fernando*, for the petitioner.

G. E. Chitty, Q. C., with *V. Karalasingham*, for the 2nd respondent (Trade Union).

V. Tennekoon, Q. C., Solicitor-General, with *H. L. de Silva*, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

May 16, 1966. **SANSONI, C. J.**—

I have had the advantage of reading the judgment of T. S. Fernando, J. I agree with his reasons and the order he proposes. As the matters argued are important, and there is a conflict of views, I wish to add a few words myself.

I adhere to what I said in *Walker Sons & Co. Ltd. v. Fry* [1 (1964) 68 N. L. R. 73], viz. that Industrial Courts appointed under s. 4 (2) and an Arbitrator appointed under s. 3 (1) (d) of the Industrial Disputes Act (Cap. 131) were not intended to exercise judicial power, and therefore need not be appointed by the Judicial Service Commission. Those are the only points which were argued before the earlier Bench, and with respect I hold the view that nothing else could have been properly decided. I indicated, towards the end of my judgment, that the Industrial Courts had acted in excess of their jurisdiction, because instead of making arbitral awards they had in each case exercised judicial power. There was a similar usurpation

of judicial power by the Arbitrator. I think I am correct in saying that both H. N. G. Fernando, S. P. J. and T. S. Fernando, J. also thought that these Tribunals had exercised judicial power. So that is the majority view of the earlier Bench.

But my brother H. N. G. Fernando, as I understand his reasoning, thought that there was nothing wrong in officials whose powers and functions are mainly administrative exercising judicial power. With all respect, I do not think that this aspect of the question, which is analogous to the point which I reserved for further argument, could have been decided at that stage, for it was not argued at that stage. If I am wrong in this opinion, I would say with great respect that the judgment of the Privy Council in *Liyanage v. The Queen* [2 (1965) 68 N. L. R. 265 ; 70 C. L. W. 1.] is against the view expressed by him.

The position now is that these applications before us still await a final decision ; and we have the advantage, denied to the earlier Bench, of the Privy Council judgment to guide us in arriving at such a decision. It is true that there are what I may term interlocutory judgments expressing the views of five Judges on one or two preliminary questions which it was then thought could conveniently be decided first. The final decision would, undoubtedly, have proceeded on the basis of the majority judgments if the decision of the Privy Council had not intervened. But that decision has changed the situation. Though the majority views went against the present petitioners, are we now precluded from opening our eyes to a correct view of the law provided by the Privy Council ? Must we tell the petitioners that since the Court has set out on the wrong road it must continue on that road, and can on no account correct its initial error ? I reject such a suggestion outright. We must surely give a correct decision on the whole matter, even if it involves re-agitating a point already decided. If the correct view is that these Tribunals exercised judicial power in making the orders now under attack, it is, I think, wrong that a Bench of five Judges should decide these applications in a way which comes into conflict with the Privy Council decision. The irony of the situation becomes more conspicuous when it is remembered that these applications were

listed before the earlier Bench of five Judges in order that differences of opinion relating to judicial power might be finally dealt with by a binding and authoritative decision. It is more than a mere matter of the non-sealing of a decree which has not yet been entered. We shall be failing in the very essence of our judicial duty, and that is to say what the law is. The majority view of the earlier Bench was that these Tribunals exercised judicial power. The Privy Council judgment makes it clear that in that event they had no valid authority to do so, as they were not judicial officers. We should be slow to exclude this fresh light which has been brought to bear upon the subject. We should not now give a decision which would contravene the provisions of the Constitution, even if there is in existence a contrary earlier majority decision of this Court. The Constitution is the supreme law and must take precedence over any earlier judgment of this Court. We have also a decision of the supreme and ultimate appellate authority for Ceylon by which we are bound, and which we ought to follow.

H. N. G. FERNANDO, S. P. J.—

The judgment prepared by my brother Fernando relieves me of the need to refer to the circumstances in which these applications have been heard by the present Bench.

In view of the decision of the Privy Council in *Liyanage and others v. The Queen*, I now agree that the Tribunals in each of these cases had no jurisdiction to entertain the references made to them under the Industrial Disputes Act, and I agree also with the orders which my brother proposes. I wish only to add some observations concerning the competence of the present Bench to make those orders.

The circumstances of Harrison's Case are not on all fours with those of the cases we are considering. But it is clear that the Court of Appeal, in upholding the action taken in that case, applied a principle which is equally applicable in our Courts, namely, that an order which has not attained finality according to the law or practice obtaining in a Court can be revoked or re-called by the Judge who made the order, acting (in the language of the Court of Appeal) "

with his discretion exercised judicially and not capriciously ". In the case of Civil Appeals to this Court, the Civil Procedure Code draws a clear distinction between a judgment and a decree. Section 776 provides that, after judgment has been pronounced, a decree of the Supreme Court shall be passed in accordance with the judgment and sealed with the seal of the Court. It is that decree, which the Court of first instance "shall conform to and execute". Under our procedure, therefore, the *locus poenitentiae* (so termed in Harrison's case) during which the discretion to recall a judgment previously pronounced may be exercised, " judiciously and not capriciously", is the stage between judgment and the passing of a decree. In fact, there is statutory recognition of this power of the Court in Section 769 (2) of the Code under which an appeal dismissed for want of appearance may be re-instated. In practice, an application for re-instatement is usually accompanied by a request that, pending the disposal of such application, the passing of the decree of dismissal be stayed. I note in this connection that the power to reinstate a dismissed appeal under Section 769 of the Code is exercisable by the Court, and not necessarily by the same Bench which dismissed the appeal.

This Court has also exercised an inherent power to correct error in a judgment which has occurred *per incuriam*. I doubt whether this power is exercisable only by the Judge who has pronounced the judgment; for if so, there would be no means of connecting even a manifest clerical error discovered in a judgment after the death or retirement of the Judge who pronounced it.

It seems to me that these two familiar instances of the power to alter or recall a judgment, at the stage before a decree has been entered in accordance with it, depend upon the principle that no rights arise under a judgment unless and until the necessary decree is passed. This principle is recognised in the Code in the matter of *res judicata*. Under Section 207, a right becomes *res judicata* on the passing of the final decree in the action, and not upon the pronouncement of the judgment.

The judgments in *Walker Sons and Co. Ltd. v. Fry* of the former Bench of five judges, in so far as they held, in the cases of appeals Nos. 9 and 18 to 23 of 1962, that Labour Tribunals not appointed by the Judicial Service Commission had no power to entertain the applications under Section 31 B of the Industrial Disputes Act made in those cases, have to that extent been the subject of decrees. Those were not Civil Appeals preferred under the Civil Procedure Code, but it has long been the practice, in many other civil matters heard in this Court, to follow the procedure prescribed in Section 776, namely, that a decree is passed after judgment. Until the decree is passed therefore, the judgment in such a matter also cannot be regarded as determining rights or obligations, any more than do judgments in appeals preferred under the Code.

In regard to the applications now before us, the judgments of the majority of the former Bench (I was one member of that majority) held that the tribunal in each case had jurisdiction. Quite properly, however, no decree has been passed embodying any other of this Court upon those applications, for the reason that the judgments did not provide either for the grant or the dismissal of the applications, and did not pronounce on the rights or obligations of the parties. It was not claimed by Counsel for the respondents that any party will be unfairly prejudiced if the former majority opinion is now retracted. Prejudice in such matters as these can be averred only if the party has taken some action, by reason of, and on the faith of, a former judgment of the Court. Possible prejudice to any party does not in these circumstances fetter our discretion to now alter the former judgment.

In the interests of judicial comity, it would certainly have been preferable if the same five Judges who participated in the former hearings of these applications had also constituted the present Bench. That unfortunately was not conveniently possible. But even if my brother Sri Skanda Rajah had been a member of this Bench, his presence would have made no difference to the ultimate decision. Even on the assumption that he would have adhered to his former opinion, the majority decision of the Bench (the Chief Justice, my brother Fernando and myself) would be that the

tribunals in these cases had no jurisdiction, and that the relief sought by the Petitioners should be granted. That being so, the absence from this Bench of one member of the former Bench becomes a technical consideration only, and I doubt whether our revocation of the former orders will constitute a precedent inconsistent with the conventions of judicial comity. The circumstances of the revocation are probably unique, in that the error of a former judgment has been manifested in a decision of the Privy Council delivered before the former judgment had become effective by the passing of a decree determining the rights and obligations of the parties.

T. S. FERNANDO, J.—

These three applications for writs of certiorari (Applications Nos. 144 and 158 of 1964 and 37 of 1965) along with certain appeals from orders made by Labour Tribunals (Appeals Nos. 9 and 18 to 23 of 1962) and another application for a writ of certiorari (Application No. 319 of 1963) were originally referred by my Lord, the Chief Justice, under section 51 of the Courts Ordinance, for hearing before five judges named by him. They were accordingly listed before the bench of judges so named consisting of the Chief Justice, my brothers Fernando, Tambiah, Sri Skanda Rajah and me. Argument at the hearing before that bench was confined mainly to the question whether the tribunal concerned in the respective cases was a " judicial officer " within the meaning of that expression as used in the Ceylon (Constitution) Order in Council, 1946, and, if so, whether it was validly constituted inasmuch as it had not been appointed by the Judicial Service Commission. After argument lasting several days the Collective Court referred, to above delivered on November 30, 1965 the judgments reported under the title of *Walker Sons & Co. Ltd. v. Fry* and five other cases.[1 69 C. L. W. 65.] "The Court was divided in regard to its conclusions in respect of the appointment of Labour Tribunals. The Chief Justice, with whose views I agreed, concluded that a President of a Labour Tribunal, when he acts under Part IVA of the Industrial Disputes Act, is a judicial officer holding paid judicial office, and that orders made by him without receiving appointment from the Judicial Service

Commission are null and void. He therefore allowed the appeals Nos. 9 and 18 to 23 of 1962 and quashed the orders that had been made by the Labour Tribunals. Fernando S. P. J. reached a similar view that a Labour Tribunal hearing and determining an application made under Part IVA of the Act exercises judicial power, and agreed to the quashing of the orders. Tambiah J. (with Sri Skanda Rajah J. agreeing) was of opinion that a Labour Tribunal does not exercise judicial power and that the orders that were appealed against were not null and void. Three of the five judges, constituting therefore a majority of the Collective Court, made a binding and effective order allowing the appeals in S. C. Nos. 9 and 18 to 23 of 1962.

In regard to Industrial Courts, the Chief Justice held that, when an Industrial Court acts within the powers conferred upon it by the Industrial Disputes Act, it exercises only arbitral power and held further that an Industrial Court was never intended to exercise judicial power in the sense in which that expression has always been used. He concluded, therefore, that a member of an Industrial Court is not a ' judicial officer ' within the meaning of the Constitution Order in Council. I agreed with that conclusion. The Chief Justice went on to say that in S. C. Applications Nos. 144 and 158 of 1964 the Industrial Court, misapprehending its functions and powers and the nature of the duties it was authorised to perform under the Act, heard evidence and ultimately made orders which only a duly appointed judicial officer is entitled to make. In regard to these two applications, the Chief Justice stated that the petitioner in each case, subject to any arguments that may be urged against this view, would be entitled to the grant of certiorari to have the orders quashed on the ground that they had been made without jurisdiction. But as the only question argued before the Collective Court was whether an Industrial Court is under the Act authorised to exercise judicial power, and as the question of any other objection available against the issue of the writ was not argued, he directed these two applications to be set down for further hearing before a bench of two judges.

In regard to Applications Nos. 319 of 1963 and 37 of 1965, the Chief Justice stated that whether it is an Industrial Court or an

arbitrator acting under the Industrial Disputes Act that is concerned, the only power they are authorised to exercise is arbitral power, i.e., power to make an award which decides what the agreement between the parties should be in the future. He went on to say that what the arbitrators in these two cases have done amounted to an exercise by them of judicial power. He however directed these two applications also to be set down for further argument before a bench of two judges as the particular point was not argued before the Court. I agreed to these directions being made. Fernando S .P. J. held that the Industrial Court or arbitrator concerned in each of these four applications had jurisdiction to entertain the reference, but directed that they be set down for further hearing upon other matters raised by the respective petitioners. Tambiah J. (with Sri Skanda Rajah J. agreeing) also remitted the four applications for adjudication on the other points raised in the petitions.

After the judgments of the Collective Bench had been delivered and as directed by all five judges, the four applications were listed for further hearing before Sri Skanda Rajah J. and me. As the two of us were unable to agree in regard to the order we should make on these applications, the matter of our disagreement was brought to the attention of my Lord, the Chief Justice, who has directed that the three applications now before us be heard before a bench of five judges to which he named the five of us.

In the course of his judgment delivered after the argument addressed to the first Collective Court, Fernando S. P. J. observed that each of the four cases (to which the Applications Nos. 319 of 1963, 144 and 158 of 1964 and 37 of 1965 relate) called for the determination of contested questions of fact as to the conduct of workmen or employers or as to the terms and conditions of pre-existing contracts of service. He thought that the framers of our Constitution expected that determinations of that nature should ordinarily be made by judges of courts whose appointments should be made under section 55 of the Order in Council, but that that expectation had not been fully realised in the brief terms of section 55 ; and he saw in these four cases a practice whereby persons chosen by some authority other than the Judicial Service

Commission have functioned as substitutes for judges of ordinary courts. He went on to say that section 55 failed to preclude the possibility of the entrustment of judicial power to some authority *bonafide* established for administrative purposes. In his own words, " if administrative officials, the majority of whose powers and functions are administrative, are in addition entrusted on grounds of expediency with judicial power, there would not in my opinion be conflict with section 55. But if, under cover of expediency, judicial powers are vested in an office administrative only in name, then the principle that you cannot do indirectly that which you cannot do directly will apply ..... I do not hold that the practice of entrusting to Industrial Courts and to arbitrators the power to adjudicate in cases of termination of an individual's employment and upon rights alleged to arise on such termination calls for the application of that principle ".

After the Collective Court had delivered its judgments, an important judgment came to be delivered by the Privy Council in the case of *Liyanage and others v. The Queen* [1 (1965) 68 N. L. R, 265 ; 70 C. L. W. 1] which has, in my opinion, a material bearing on the view expressed by Fernando S. P. J. just referred to above. In expressing the opinion of Their Lordships of the Privy Council, Lord Pearce, refusing to accept an argument of the Solicitor-General that there was no separation of powers under our Constitution, stated that the decision of this Court in the interlocutory application—at an earlier stage of Liyanage's case—that legislation by which the power to nominate judges in that case granted to the Minister of Justice was an infringement of the judicial power of the State which cannot be reposed in anyone outside the judicature was a correct one. He went on to say that there exists a separate power in the judicature which under the Constitution as it stands (unamended) cannot be usurped or infringed by the executive or the legislature.

It will be recalled that on an earlier occasion the Privy Council—(in *Bribery Commissioner v. Ranasinghe* [2 (1964) 66 N L. R. 73.])—upholding the decision of this Court that a Bribery Tribunal was not validly constituted inasmuch as it had not been appointed by the Judicial Service Commission, had stated that to permit judicial

power to be exercised by persons not so appointed would be to erode unconstitutionally the jurisdiction of the courts. In Liyanage's case too, a similar reference was made by Their Lordships in the following words :—" If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges ..... What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution ".

It was suggested at one stage of the argument before us that this opinion expressed by the Privy Council was no more than an *obiter dictum*, and that it should not be considered as necessarily binding on us. An analysis of the reasons given by Their Lordships will however reveal that it was no mere *obiter dictum* but formed part of the *ratio decidendi* for the quashing of the convictions, and we have to take serious notice of it.

Had the decision of the Privy Council been delivered before the judgments of the Collective Court came to be delivered, I have good reason to think that Fernando S. P. J. himself would not have expressed the view that section 55 of the Constitution had failed to preclude the possibility of the entrustment of judicial power to some authority *bona fide* established for administrative purposes. However that may be, it seems to me that after this recent decision of the Privy Council it is no longer possible to maintain the argument that our Constitution does not recognise a separation of Powers. Accordingly, the view of Fernando S. P. J. on the point referred to above cannot, with respect, be held to be right.

Is it, however, open to us to reconsider the view that appears to have been expressed by three judges of the earlier Collective Court that the industrial courts and arbitrators concerned had jurisdiction to entertain the references made to them ? It was contended before us that the Industrial Court or arbitrator in the respective cases has been held by the majority of the bench of five judges to have had in each case jurisdiction to entertain the reference made to it. It was argued that the question of the validity of the jurisdiction to entertain

the reference is now *res adjudicata* and that it was not open to us now to reach a different conclusion. Alternatively, it was submitted that, if the question is to be reconsidered, such reconsideration should be undertaken by the same five judges who had formed the Collective Court on the previous occasion. I am unable to agree that this alternative submission is sound. These three applications have come before us now upon a new and separate direction made by the Chief Justice under section 51 of the Courts Ordinance after he became aware that Sri Skanda Rajah J. and I were unable to agree upon the order we should make on these applications. The constitution of a bench of the Court, whether Collective or otherwise, has by a long and unbroken convention been always determined by special or general directions given by the Chief Justice. Moreover, there are many reasons why it is often not practicable or expedient to convene a bench of five particular judges.

The other argument, viz., that founded upon *res adjudicata*, appears to me to be sufficiently met by the fact that no final order has yet been made disposing of any of these applications. Under section 51 of the Courts Ordinance the whole case is referred for hearing and decision, and notwithstanding the judgments of the Collective Court, no order or decree has yet been sealed by the Court. I would apply here the reasoning of the judgment of the Court of Appeal in *Re Harrison's Settlement* [1 (1955) 1 A. E. R. 185.] to which we were referred by counsel for the petitioner. There a certain order had been made by a judge in chambers approving a scheme varying the trusts of a settlement. In so approving the scheme the judge had followed a decision of the Court of Appeal in a similar case. After the order had been made out, but before it was drawn up and entered, the House of Lords held in a similar case that the court had no jurisdiction to make such an order. At the date of the decision by the House of Lords the order had not yet been entered, or, in other words, had not been perfected as a formal act of the court. Roxburgh J. held that he had power on his own initiative to recall the orders, adjourned the case into court for further argument and there dismissed the originating summons on which the order had been made. The Court of Appeal, affirming the

order of Roxburgh J., stated : "We reject the limitations sought to be placed on the power of a judge to recall his own order at any time before it has been perfected by entry ". It followed an earlier decision of the Court of Appeal in *Millnsted v. Grosvenor House (Park Lane) Ltd.* [2 (1937) 1 A, E. R. at 740.] where that Court stated :— "It is now well settled that, until an order made by a judge has been perfected, by being passed and entered, there is no final order, and, consequently, the judge may, at any time until the order is so perfected, vary or alter the order which he had intended to make."

I take the view that, inasmuch as no final decision has been reached on these applications and as no order or decree has yet been sealed or, in the words of the English judgment quoted from above, no order or decree has yet been " entered ", it is open to us to re-examine the validity of the reference of the questions submitted for settlement to the respective Industrial Courts or arbitrators. This is a situation where, in my opinion, in order to meet the ends of justice, the inherent powers of the Court might be invoked to give effect at this stage to a view that has now been upheld by the final appellate Court of this Country and which must now be regarded as the authoritative view on the question.

I would therefore respectfully adopt the following observations of Mahmood J. in *Narsingh Das v. Mangal Dubey* quoted by Tambiah J. in *Hewawitarana v. Themis de Silva* [1 (1961) 63 N. L. R. at 72.] —" Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed."

In reaching the view I have taken here I am encouraged by the argument of the learned Solicitor-General who appeared before us as well as before the earlier Collective Court where he had submitted arguments against the view that there is a separation of powers under our Constitution. Before us, the Solicitor-General felt compelled, in the light of the decision of the Privy Council in

Liyanage's case—he had taken part in the argument before Their Lordships as well—to submit that any erosion of the judicial power must not any longer be considered constitutional, and that what is essentially a justiciable dispute cannot be sent before an Industrial Court which hears what are substantially disputes in respect of alleged unfair labour practices and cannot adjudicate upon the legal rights of parties.

I can now turn to a consideration of the three applications before us in order to determine whether our interference is called for in any of them.

Application No. 144 of 1964 relates to a case where the Minister by order under Section 4 (2) of the Industrial Disputes Act referred to an Industrial Court consisting of one person for settlement the following matters in dispute :—

"(1) whether the non-employment of 98 specified persons is justified and to what relief they are entitled ;

(2) Hacking workers should be paid wages at the rate specified in the Collective Agreement, No. 2 of 1959, for such classes of workers."

Dispute No. (2) obviously involved an interpretation of an existing agreement and an adjudication upon alleged existing rights and fell outside the functions of an Industrial Court. Dispute No. (1) in essence also involves an adjudication on existing rights. To take a broad view of the functions of Industrial Courts or arbitrators vis-a-vis Labour Tribunals, the former may be resorted to where employers or workmen seek to obtain a change in the terms of employment, while to obtain relief or redress in individual cases of grievance application may be made to a Labour Tribunal as an alternative to going before an ordinary court of law. The Industrial Court to which application No. 144 relates was not in law competent to entertain the reference on the two matters in dispute submitted to it, and, in purporting to entertain it and to make an award thereon, it has exceeded its jurisdiction, and certiorari must issue to quash the

award. The petitioner is entitled to its costs from the 2nd respondent-Union.

In application No. 158 of 1964, the same petitioner as in No. 144 of 1964 seeks to obtain a quashing of an award made by the same Industrial Court on a reference by the Minister under section 4 (2) of a matter in dispute between the same Union and the petitioner. This matter in dispute was described in the reference as " the non-employment of 39 specified employees and the relief to which each of them was entitled". For reasons similar to those already stated in connection with application No. 144 of 1964, the award calls to be quashed, and I would accordingly quash it with costs payable to the petitioner by the 2nd respondent-Union.

The petitioner in application No. 37 of 1965 seeks a quashing of an award of an arbitrator to whom the matter in dispute had been referred by the Commissioner of Labour in terms of section 3 (1) (d) of the Act for settlement by arbitration. The matter in dispute was stated to be :— " Whether the termination of employment of Mr. H. M. Peiris is justified and to what relief he is entitled ". The arbitrator in this case had been nominated jointly by the parties. Notwithstanding such joint nomination, the arbitrator's appointment is effected in terms of the Act by an order in writing made by the Commissioner of Labour. In this connection I should mention that it has already been held by two judges of this Court in *Colombo Commercial Co. Ltd. v. Shanmugalingam* [1 (1964) 66 N. L. R. 26.] that certiorari lies to a statutory arbitrator notwithstanding his nomination by both parties to the dispute. In that case, Weerasooriya J. pointed out—(see pages 32, 33)—that the arbitrator derives his jurisdiction, not simply from the nomination, but also from the order of reference made under section 3 (1) (d) and from other provisions of the Industrial Disputes Act. Consent of parties cannot confer an unchallengeable jurisdiction, nor does acquiescence in the appointment of the arbitrator disentitle the petitioner to seek relief from an award made in excess of jurisdiction. No doubt, the writ applied for is not available as of right; the discretion to grant or refuse it exists in the Court. In the circumstances in which it comes to be applied for here, where all

concerned appear to have acted in the belief now held to be wrong that the reference was valid, I do not think the writ should be refused. I would therefore make order quashing the award, but without costs.

TAMBIAH, J.—

The contention raised in the applications before us is that the Industrial Courts and the arbitrators appointed in the cases referred to in these applications had no jurisdiction to try the cases before them since they exercised judicial power and they were not appointed by the Judicial Service Commission. The points raised before us were fully argued before a Bench of five Judges consisting of His Lordship the Chief Justice and my brothers H. N. G. Fernando J., T. S. Fernando J., Sri Skanda Rajah J., and myself. Application No. 319 of 1963 and appeals in S. C. No. 9 and 18 to 23 of 1962 were argued together. The appeals in those cases dealt with the question as to whether the Labour Tribunal exercised judicial power. The majority view was that the appeals in S. C. 9 and 18 to 23 of 1962 should be allowed and applications in S. C. Nos. 319/'63, 144/'64, 158/'64 and 37/'65 should be set down for further argument on the matters raised in the various petitions, save and except the question as to whether the tribunals in respect of which these applications are concerned exercised judicial power. Sri Skanda Rajah J. and I took the view that the Industrial Court and the arbitrator appointed in the cases referred to in application 37/'65 were not exercising judicial power of the State but performed arbitral functions. My brother H. N. G. Fernando J. also took the view that they exercised arbitral functions. Under section 51 of the Courts Ordinance the majority view is deemed to be the decision of the Supreme Court.

Even before section 51 was enacted the view had always been that where a collective Bench of Judges differ, the majority view would be regarded as the judgment of all the judges who sat and participated in the case. Therefore it seems to me that the question whether the Industrial Courts or arbitrator in the cases before this Bench had jurisdiction to entertain the cases before them had been,

decided by a Bench of five Judges. It is not permissible for another Bench of five Judges to review this matter. Mr. H. V. Perera, however, contended that the ruling of the Privy Council in *Queen v. Liyanage* (Privy Council Appeal No. 25 of 1965) [(1965) 68 N. L. R. 265] has authoritatively laid down the law on this topic and therefore this Bench should revise its views. He cited the case of *In re Harrison* [(1955) 1 A. E. R. 135] in support of the proposition that we could now revise our order. In that case an application was made to the Chancery Division of the High Court for approval of a scheme varying the trusts of settlements on behalf of infants unborn and unascertained persons. Following a decision of the Court of Appeal in a similar case, a Judge in Chambers made order approving the scheme. This order was made orally but before the order was perfected, the House of Lords reversed the decision of the Court of Appeal and held that the Court had no jurisdiction to make an order sanctioning variation of trusts in such cases. The Judge thereupon recalled the verbal order that he had made, adjourned the case for further argument and thereafter, following the decision of the House of Lords, dismissed the summons. In appeal it was held that the Judge was entitled to recall his order on his own initiative whether the order was originally made in chambers or in open court since his order had not been perfected. The present case is distinguishable. Mr. H. V. Perera contended that an order of the Supreme Court could only become perfected after the passing of the seal of the Supreme Court. It seems to me that the right to retract an order by a judge under these circumstances is one which is inherent in a judge and is a matter that is personal and should be exercised before the judgment is perfected. Under our procedure a judgment is perfected when it is reduced to writing and signed by the judge. It is a matter of common occurrence to deliver oral orders in court. Thereafter the orders are typed and the signature of the judge is obtained. In my view once the judge signs the order it becomes perfected and it is not open for a judge to retract his order unless he is of the view that it is an order made *per incuriam* and this could only be done before the seal of the court is affixed. In the present case, the order made by the Full Bench to the effect that the Industrial Court and the arbitrator in this application had jurisdiction to entertain the matters before them, was one which was

solemnly reduced to writing and delivered in Court. Thereafter the matter was referred to two judges in order to enable them to hear the other matters contained in the petition. If the petitioners are dissatisfied with the orders of this court they have a right of appeal to Her Majesty in Council.

A party who is dissatisfied with the decision of the Supreme Court is given the right to appeal to Her Majesty in Council as a matter of right in certain cases and in other cases he has to get special leave to appeal from the Supreme Court on matters specified in the Privy Council Appeal Ordinance. In either event the Privy Council Appeal Ordinance prescribes a time limit which is counted from the date the judgment of the Supreme Court is delivered. This computation proceeds on the footing that when the Supreme Court delivers a written judgment which is signed and dated by a judge, the judgment had been perfected. The dictum of Mahmood J. cited by me in *Hevavitharana v. Themis de Silva*1 has no application when a statute governs the matter. As stated earlier, the power to correct judgments before the decree passes the seal of the Supreme Court has hitherto been exercised only if the order is made *per incuriam* and has not been extended to other cases. It would be setting a bad precedent to retract an order which was solemnly made by a Bench of five Judges. If this procedure is permitted it will open the flood gate to a spate of applications of this nature in future and a party to the litigation will never know when a judgment has been finally entered. Unless the Privy Council reverses an order made by five Judges, it is my view that it operates as *res judicata* on the matter that was decided by a Bench of five Judges.

It was contended by Mr. H. V. Perera that under section 51 of the Courts Ordinance His Lordship the Chief Justice has only the power to refer the whole case for argument before a Bench of five Judges. This very point was raised by Mr. Chitty in the course of his argument and after careful consideration we took the view that since the greater includes the less, a Bench of five Judges can decide a particular question of law that was raised before them and refer the decision on other matters to a Bench of two Judges. The only point of importance arising out of this application is the

question whether these Tribunals had jurisdiction to entertain the application. We heard a very long and protracted argument on this question and made an order. It cannot be said that it was an order made *per incuriam*. If there had been an erroneous view of the law it is a matter for a higher tribunal to correct it. In my view it is a debatable question as to whether the ruling of the Privy Council in Liyanage's case does in any way affect the decision of the Bench of five Judges regarding the competency of these tribunals to hear these applications which are before them. In Liyanage's case the Privy Council was dealing with a special case where the legislature passed a legislative measure to apply only to a particular group of persons. The question whether judicial power was vested in the courts was no doubt considered by Their Lordships of the Privy Council. Their Lordships have followed the rule in *Bribery Commissioner v. Ranasinghe* 2, and taken the view that it was not permissible for the legislature to encroach into the sphere of the judiciary and secure a conviction of particular persons by a legislative measure. If this process is allowed

there would be the erosion of the powers of the Court. In that case Their Lordships were dealing with a criminal case which was entirely within the competence of the Courts of Law to hear and they expressed the view that under our constitution the Legislature had no power to encroach on the functions of the judiciary, by passing a law which was in the nature of a legislative direction to convict the accused in that case. In *Bribery Commissioner v. Ranasinghe* [1 (1965) Appeal Cases 172.], Their Lordships were again dealing with the attempt of the Executive to encroach into the strict judicial sphere of the Courts. The Privy Council has not decided the question whether after the Constitution came into existence it is not competent for the Legislature by a simple majority to appoint an arbitral administrative tribunal whose main functions are of an arbitral and administrative nature but who may incidentally have to perform some judicial functions. Even in the United States and Australia where judicial power is vested in Courts such an extreme view has not been taken. In my dissenting judgment I have referred to authorities which state that if such a view is taken no

constitution can be worked (vide Administrative Law by David, Vol. I, p. 64).

The majority view expressed in *Walker Sons & Co. Ltd. v. Fry* and five other cases [2 (1965) 68 N. L. R. 73; 69 C. L. W. 65.], has rendered nugatory a number of judgments in favour of poor persons belonging to the working class. If it is held that the Industrial Court and the arbitrator appointed under the provisions of the Industrial Disputes Act have judicial power, then some more of the decisions in favour of workers will be affected. Such a view would seriously affect the sovereignty of Parliament. Unless Their Lordships give a ruling to the effect that these Tribunals have no jurisdiction it would not be competent in my view to upset the ruling of the Bench of five Judges on this matter.

No other points were raised before us. For these reasons I dismiss the applications with costs.

G. P. A. SILVA, J.—

I have had the advantage of reading the judgment of my brother T. S. Fernando as well as those of my Lord the Chief Justice and my brother H. N. G. Fernando. I am in entire agreement with the views expressed by them and there is nothing substantial which I wish to add thereto. Suffice it to say that the situation which has arisen in this case since the order made by the previous Bench of five Judges is extraordinary and perhaps unique. One matter on which there can be little doubt is that, if the judgment of the Privy Council in *Liyanage v. The Queen* [3 (1965) 68 N. L. R. 265 ; 70 C. L. W. 1.] had been pronounced before the decision in *Walker Sons & Co. Ltd. v. Fry* by the previous Bench of five Judges, the latter decision would have been different so as to be in accord with the decision of the Privy Council by which our court would have been bound. In view of this supervening circumstance, I think this court has a duty, in the interests of justice, to overcome any procedural difficulties, even if such exist, and to make use of the opportunity that has now presented itself to state the correct law as it stands at present and not to confirm the law which this court now knows to be no longer tenable, particularly when this court is fortified by the consideration

that the principle involved has been recognised in England even though an exact parallel has not been discovered. To do otherwise and to permit the pronouncement of a wrong decision with the full awareness that it is wrong, thereby virtually compelling the party aggrieved to seek his remedy from the Privy Council merely because of the absence of a specific enabling procedural provision would be an unwarranted confession of powerlessness of this court, an attitude which is inconsistent with the responsibility that it should assume.

Applications allowed.