COURT OF APPEAL

Piyadasa
V.
Bata Shoe Co.

C.A. 1529/79

Certiorari — substitution — arbitrator's duty — Revocation – appointment and re-reference – delay.

The Petitioner and five other workmen were employed by the 1st Respondent the Bata Shoe Company. The 1st R terminated the services of P and 5 others who were also members of a Branch Union, a Trade Union called All Ceylon Commercial and Industrial Workers' Union.

The dispute whether termination of services of the Petitioner and 5 others was justified was referred by the Minister to an Arbitrator under Section 4 of the Industrial Disputes Act. During the hearing of the dispute P and 5 others requested the Arbitrator to substitute them for the trade union abovenamed on the ground that the Trade Union had ceased to represent them. This request was refused. A short while later the Trade Union and the 1st R Bata Shoe Company asked the Arbitrator for permission to withdraw from the proceedings and requested the Arbitrator to return papers to Minister.

The Arbitrator refused these requests and made an award in which he held that the termination of P and 5 other workmen was justified.

Petitioner made application for a Writ of Certiorari quashing the award on the grounds that (1) on the withdrawal of the Union from the proceedings it ceased to be a party to the dispute (2) the P and 5 other workmen were not given an opportunity of being heard.

Held 1. There is no provision in the Industrial Disputes Act for substituting parties to an Industrial Dispute referred to an Arbitrator under Section 4.

2. Following Nadarajah V Krishnadasan that once the Minister has duly made an order referring an Industrial dispute for settlement by Arbitration he has no power to revoke the said order and re-refer it to another Arbitrator.

3. Under Regulations it was not incumbent on Arbitrator to ask for evidence of Petitioner before making award.

4. Conduct and inordinate delay of Petitioner disentitled him from asking for any relief.

APPLICATION for writ of certiorari.

Before: Tambiah, J. & Seneviratne, J.
Counsel: Prins Rajasooriya for the Petitioner
Mark Fernando for the 1st Respondent

Argued on: 15.12.1981
Decided on: **25.01.1982**

Cur. adv. vult.

TAMBIAH, J.

The petitioner has applied to quash by way of certiorari an Award dated 7.7.78 made by the 2nd respondent to whom was referred a dispute under s. 4 (1) of the Industrial Disputes Act by the Minister of Labour. The present application was made on 3.7.79. almost an year after the award was made.

The petitioner was employed as a workman under the 1st respondent company. He and certain other workmen were members of the 4th respondent-union. In August 1975, the Minister referred for arbitration to the 2nd respondent a dispute that had arisen between the 1st respondent-company and the 4th respondent-union. The dispute was whether the termination of the services of the petitioner, P.W.C. Perera, G.W. Aponso, J.E. Fernando, A. Somadasa and Fernando, who are members of the All Ceylon Commercial & Industrial Workers' Union, by the management of Messrs. Bata Shoe Co. of Ceylon Ltd., is justified and to what relief each of them is entitled.

According to the affidavit of the Personnel Manager of the 1st respondent-company, between September 1975, and July 1977, there were over 30 dates of inquiry into this matter. On 4 occasions, the inquiry was postponed at the request of the parties, with a view to settle the dispute between them. The evidence of the Personnel Manager of the 1st respondent-company was led on 30.3.76. The evidence of one Piyadasa, called on behalf of the 1st respondent-company was also recorded. According to the Personnel Manager's affidavit, on about 13 dates, the evidence of these 2 witnesses was recorded and of these 13 dates, about 10 days were taken up for cross-examination of the 2 witnesses. These are matters not controverted by the petitioner.

On 6.8.77, the Attorney-at-Law appearing for the 4th respondent union stated that there was an internal dispute between the parent-union and the branch-union, of which the petitioner and the said 5 workmen are members, and asked for a postponement. On 6.9.77, Mr. Vasudeva Nanayakkara appeared and stated that he was representing the petitioner and the other 5 workmen, that they wished to pursue their case against the employer, and asked that the petitioner and the said 5 workmen be substituted in place of the 4th respondent-union, as the latter no longer represented them. The application for substitution was opposed both by the 1st respondent-company and the 4th respondent-union. The application for substitution was refused by the arbitrator.

On 7.11.77, Mr. Oswin Fernando on behalf of the 4th respondent-union informed the arbitrator that a letter had been sent to the Registrar of the Industrial Court by the Secretary of the 4th respondent-union, requesting that the Union be permitted to withdraw from the proceedings and that as the dispute as regards the union had ceased to exist, the papers be returned to the Minister. A similar written request, signed by the 1st respondent-company had been sent to the Registrar. The arbitrator did not accede to this request but on the available proceedings, made his award wherein he held that the termination of the services of the petitioner and the other 5 workmen was justified.

The petitioner's Counsel based the application to quash the award on 2 grounds – (1) Once the union withdrew from the proceedings, it ceased to be a party to the dispute; the arbitrator was functus and had no jurisdiction to made an award. (2) The petitioner and the other workmen were not efforded an opportunity of being heard in their defence, before the award was made.

I think the arbitrator acted quite correctly in proceeeding to make his award, as he had no other option open to him.

The petitioner and the other workmen were members of the 4th respondent-union and the union had taken up, as their own, the cause of the workmen. The parties to the dispute were the 1st respondent-company and the 4th respondent-union though the matter in dispute was in relation to the workmen. As was observed by T.S. Fernando, J. in *South Ceylon Democratic Workers' Union V Selvadurai*

(71 NLR 244 at 246)" ..... in the definition of an 'industrial dispute' the expression 'workmen' includes a trade union consisting of workmen ..... The definition of 'Industrial dispute' in the Act appears to have been framed with the deliberate purpose of providing for trade unions to take up, as their own, the cause of the workmen belonging to their unions, and when a union has so taken up, as its own, the cause of one of its workmen, the cause for all formal purposes of the Act must be regarded as that of the Union and not that of the individual workman."

There does not appear to be any provision in the Industrial Disputes Act for substitution of parties, where an industrial dispute is referred to an arbitrator under s. 4 (1) of the Act. There is however provision for any person whose interests are affected by such dispute, to apply to the arbitrator to be joined as a party (Regulation 27 of the Industrial Disputes Regulations). There is also provision for the arbitrator, by written notice, to inform every person considered by the arbitrator as likely to be affected by such dispute, of the date, time and place of hearing (Regulation 25 (1) (b)). These provisions do not enable an arbitrator to substitute one party for another in an industrial dispute pending before him. (See S.R. de Silva's "Legal Framework of Industrial Relations in Ceylon, at p. 278).

Nor was it open to the arbitrator to refer the papers back to the Minister, once the 4th respondent-union withdrew from the proceedings, and ask the Minister for a fresh or an amended reference. Once the reference is made, the Minister in functus and in terms of s. 17, the arbitrator 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 to the dispute and thereafter make such award as may appear to him just and equitable". It was held in *Nadarajah Ltd. V. Krishanadasan* (78 NLR 255) that where the Minister has duly made an order under s. 4 (1) of the Industrial Disputes Act, referring an industrial dispute for settlement by arbitration, he has no power to revoke the said order of reference and re-refer the dispute to another arbitrator. It was further held that s. 18 of the Interpretation Ordinance which empowered an authority, on whom power was conferred to issue any order etc, to amend, vary, rescind or revoke such order, was not intended to apply to an order of reference made under s. 4 of the Act and cannot be invoked to amend, vary, rescind or revoke an order of reference made under s. 4 of the Act.

The first submission of learned Counsel, therefore, fails.

Was it incumbent on the arbitrator to have asked the petitioner for his defence before making his award? The other 5 workmen have not canvassed the award made by the arbitrator

Regulation 28 enables the arbitrator to proceed with the matter notwithstanding the absence of a party, if without sufficient cause being shown, a party to the proceedings fails to attend. An arbitrator, on a reference, is only required to hear such evidence as may be tendered by the parties to the dispute (s.17) unlike the Industrial Court which has to hear such evidence as it may consider necessary (s.24). It is not the petitioner's case that he wanted to give evidence and also call evidence on his behalf and that the arbitrator denied him this demand. However it seems to me that since the arbirtator is empowered by s. 36 (1) of the Act to require any person to furnish particulars, produce documents and give evidence, it would have been a very desirable thing if the arbitrator had asked the petitioner and the other workmen whether they wished to give evidence, and/or call evidence on their behalf, for, he must act judicially.

However, I am in agreement with the submission of learned Counsel for the 1st respondent, that the petitioner's conduct and the inordinate/ delay in coming to this Court, disentitles him to ask for relief. He could have applied to be joined as a party; he did not do so. If his application now is to quash on certiorari an award made without jurisdiction, it was equally open to him then, before the award was made, to have applied for a prohibition to prevent the arbitrator from continuing with the proceedings. The submission of the 1st respondent's Counsel that the petitioner awaited the award in order to see which way it would go and has now come to this Court for relief when the award went against him, is not without substance.

The award was made on 7.7.78 and has been published in the Gazette. The petitioner has come to this Court about a year later on 3.7.79. His explanation that the 4th respondent-union failed to bring to his notice the award made and that he was kept in ignorance of it for a considerable period of time, is not an acceptable one. There is no requirement that the award must be communicated to the parties to the dispute. The certified copy of the award (annexure 'C') filed by the petitioner bears the date 16.2.79; at least by February '79, therefore, he was aware of the award.

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I reject the application of the petitioner, but in all the circumstances of the case, I make no order in regard to costs.

SENEVIRATNE, J. — I agree.

Application rejected.