1967 *Present :* **T. S. Fernando, J., and Tennekoon, J.**

THE SHELL COMPANY OF CEYLON LTD., Petitioner,
and H. D. PERERA and 5 others, Respondents

S. C. 527 of 1966—Application for the issue of a Mandate in the nature of a Writ of Certiorari

Industrial dispute—Intended retrenchment of a workman—Reference to an Industrial Court for settlement of proposed retrenchment—Time within which such reference should be made—Misdirection on this point—Effect—Award wrongly invalidating retrenchment of workman—Liability of award to be set aside in certiorari *proceedings—" Error of law on the face of the record "—Retrenchment of workman pending inquiry—Award of compensation on that basis—Invalidity—Time within which an award should be made—Court acting in excess of jurisdiction—Effect—Industrial Disputes Act (Cap. 131), ss. 4 (2), 16, 23, 24, 31 F, 31 G, 31 H, 33 (1) (b), 33 (1) (d), 36 (5), 36 (6).*

(i) Section 31 H of the Industrial Disputes Act enacts that where, before the expiry of two months after the date of notice given by an employer to a workman as required by section 31 F, an industrial dispute arising out of the intended retrenchment of the workman is referred for settlement, the employer shall not effect the retrenchment within a period of two months after the date of reference of such dispute for settlement. Therefore, if the reference for settlement is made after and not before the expiry of the two months after the date of notice given to the workman under section 31 F, section 31 H does not operate so as to prohibit the employer effecting retrenchment of the workman

within two months after the reference for settlement. If, on account of misdirection on this point by an Industrial Court to which the reference for settlement is made in terms of section 4 (2) of the Industrial Disputes Act, the retrenchment of the workman is wrongly held in the award of the court to have been invalid, the award is liable to be quashed by way of *certiorari* on the ground of error of law on the face of the record, if such error goes to the very root of the determination of the court.

(ii) Where the Minister, acting under sections 31 H and 4 (2) of the Industrial Disputes Act, refers to an industrial court for settlement an intended retrenchment of a workman by his employer, and the only question for determination is whether the proposed retrenchment is justified and to what relief the workman is entitled, the court would be acting in excess of its jurisdiction if it awards relief by way of compensation to the workman on the basis of his actual retrenchment, if such retrenchment is effected during the pendency of the inquiry. In such a case, the award is not one in respect of any " other matter " as contemplated in section 24. The actual retrenchment of the workman after the commencement of the inquiry is an entirely new industrial dispute and is not a matter relating to the original dispute over the proposed retrenchment. The actual retrenchment is not a " fresh matter relating to the dispute " within the meaning of that expression in section 36 (5) of the Industrial Disputes Act.

Obiter : " The inference is somewhat strong that, where a reference of an industrial dispute for settlement as contemplated in section 31 H of the Act has been made, the award must itself be made before the expiry of the two months specified in the said section which is the period of time during which the employer's common law right to retrench is suspended."

APPLICATION for a writ of *certiorari* to quash the award made by an Industrial Court.

E. F. N. Gratiaen, Q.C., with *C. Ranganathan, Q.C.*, *L. Kadirgamar*, *D. C. Amarasinghe* and *A. Paranavitane*, for the petitioner.

N. Satyendra, with *R. L. Jayasuriya*, for the 4th and 5th respondents.

Cur. adv. vult.

September 13, 1967.

The following is the judgment of the Court :—

The petitioner company (hereinafter referred to as the company) seeks in this proceeding an order from this Court quashing an award dated September 25, 1966 made by an Industrial Court composed of the 1st to the 3rd respondents awarding to the 4th and 5th respondents, employees of the company, the sums of Rs. 87,337/50 and Rs. 74,906/25 respectively to be paid by the company by way of compensation under section 33 (1) (*d*) of the Industrial Disputes Act (Cap. 131), together with a further sum of Rs. 5,000 to each of them as costs of the inquiry before the court. The award is one purporting to have been made in respect of an industrial dispute which had arisen between the company and the said 4th and 5th respondents, two of its employees, and which was referred

to the court for settlement by an order dated November 5, 1962 made by the Minister in terms of section 4 (2) of the said Industrial Disputes Act. The matter in dispute was described in the statement that accompanied the Minister's order as being " whether the proposed retrenchment of the 4th and 5th respondents is justified and to what relief each of them is entitled ".—Documents A 22 and A 23.

An Industrial Court is required by section 24 of the Act to make after inquiry, such award as may appear to it just and equitable. Although this dispute was referred to the Court, as indicated above, on November 5, 1962, the award was made nearly four years later, on September 25, 1966. We were surprised to learn from counsel who appeared before us that there were as many as 180 days of inquiry, an expenditure of time and presumably also of money which appears to be out of all proportion to the demands of the actual dispute. The award eventually made is now attacked in this proceeding on several grounds specified in the petition, but learned counsel for the company confined himself to two of these grounds, viz. (1) error of law on the face of the award and (2) want or excess of jurisdiction.

It does not appear necessary to set down in any detail the facts as found by the industrial court. The 4th and 5th respondents were senior executives in the employment of the company and at the time of the dispute were holding high executive positions in it. The enactment by Parliament in May 1961 of the Ceylon Petroleum Corporation Act, No. 28 of 1961, resulted in the compulsory acquisition of some of the assets of the company, and the establishment of the Petroleum Corporation entailed a considerable reduction in the volume of business handled by the company. This reduction of business necessitated a reduction of the company's staff. That some reduction of staff became inevitable was not disputed by the 4th and 5th respondents, the dispute raised by them being that the company's proposal to retrench their services was not in conformity with accepted principles of industrial law and practice and constituted an unfair labour practice.

The industrial court found that the proposed retrenchment of the 4th and 5th respondents is not justified and amounts to an unfair labour practice and set down in its award three reasons for that finding. These were :

(*a*) that the principle of " last come, first go " and the criterion of seniority in service implicit in that principle have not been followed by the company in choosing which of the executives to retain in the re-organised set up and which of them to retrench ; that the company has failed to satisfy the court that its departure from the said principle is justified, and that this failure has resulted in the 4th and 5th respondents, two senior executives, being retrenched, while many who were junior to them were retained ;

(*b*) that the company, in deciding whom to retrench and whom to retain, did not take the cases of all the executives, whether regionals or expatriates, together, but first decided on the selection and reduction of the expatriate executives ;

(*c*) that the company by effecting the retrenchment of the 4th and 5th respondents within two months of the date of reference of the dispute to the industrial court acted in contravention of section 31 H of the Act ; that this contravention constitutes a punishable offence and establishes the company's lack of good faith ; and that the purported retrenchment, being one prohibited by statute, is illegal and void.

Counsel tor the company based his contention that there is here error of law on the face of the record mainly on the existence of reason (*c*) set out above. Section 31 F of the Act requires an employer who intends to effect retrenchment in respect of any workman to give (except in certain specified cases) to that workman at least one month's notice in writing of such intention. By two letters (A 17 and A 18), each dated August 28, 1962, the company gave to the 4th and 5th respondents notice under the said section 31 F of intention to terminate their respective services, the notice to expire on September 30, 1962. Each notice contained a statement that at the end of September, 1962 three months' notice (in accordance with the contract of service) will be given terminating the respective respondent's employment, this latter notice to expire on December 31, 1962. Section 31 G enacts that, subject to the provisions of section 31 H, no employer shall effect retrenchment in respect of any workman to whom he has given notice (under section 31 F) of intention to do so until after the expiry of two months after the date of such notice. In the case of the 4th and 5th respondents retrenchment was effected only after December 31, 1962, and it is apparent that there has been no contravention of the provisions of section 31 G.

Section 31 H enacts that where, before the expiry of two months after the date of the notice referred to in section 31 F, any industrial dispute which exists or is apprehended in consequence of the retrenchment intended in that notice is referred by the Commissioner or Minister for settlement (including a settlement by an industrial court), the employer giving such notice is prohibited from effecting the intended retrenchment within a period of two months after the date of reference of such dispute for settlement. The reference under section 4 (2) in this case was made by the Minister only on November 5, 1962 which is after and not before the expiry of the two months after the date of notice (August 28, 1962) stipulated in section 31 H. This section therefore did not operate so as to prohibit the company effecting retrenchment of the services of the 4th and 5th respondents on December 31, 1962. The award itself (see paragraph 5) recites that the company gave by letters dated August 28, 1962 one month's notice of intention to terminate the services of the 4th and 5th respondents. Counsel for the latter sought to argue that there is no

finding that the notice was received by the respondents on that day or at any rate before September 5, 1962, but this argument overlooked the statements A 25 and A 26 dated November 26, 1962 made by the respondents to the Industrial Court to which statements they attached copies of their letters of September 4, 1962 addressed to the company accepting the position that they had duly received the company's notices dated August 28, 1962. It follows, therefore, that reason (c) given by the industrial court (in support of its finding that the proposed retrenchment is not justified) that the company effected retrenchment in violation of section 31 H is clearly erroneous. The error appears to have arisen out of the court misdirecting itself as to the nature of the prohibition contemplated by that section. For the prohibition to attach the reference for settlement should itself have been made within the time specified in that very section. The industrial court has wrongly assumed that for the prohibition to attach the industrial dispute must have come into existence or have been apprehended within the time specified in that section.

Error of law on the face of the award itself being thus established, is the award liable to be quashed by way of *certiorari* ? There can be little doubt that the error of law was on a point deemed material by the industrial court itself. To quote the award " the purported retrenchment is illegal and void, since it is made an offence and thus prohibited by the statute " ; and again, " we can hold that since the purported retrenchment is no retrenchment in law, the two employees are to be treated as being still in service " ; Counsel for the 4th and 5th respondents contended that, even if reason (c) constitutes an error on the face, two other reasons have been given by the court for its finding that the proposed retrenchment is not justified and that these reasons are valid and not open to criticism on the ground of error. Reason (b) was not the subject of any serious criticism by learned counsel for the company, and he stated expressly that the company had nothing to allege against the 4th and 5th respondents. Reason (a) was questioned by counsel as embodying an alleged rule or principle of industrial law which is not valid at any rate in the case of higher executive staff. Learned counsel for the 4th and 5th respondents, relying on a decision of the Supreme Court of India, however, argued that there is an ordinary industrial rule of retrenchment embodied in the principle " last come, first go " to be observed by the employer in the normal case. In this situation, had the court made an award of relief in respect of its finding that the proposed retrenchment is not justified, we would have felt compelled to consider whether the error (c) on the face of the record went to the very root of the determination of the industrial court or whether, this error notwithstanding, the award made by the court remained unaffected. Even where a retrenchment is effected or proposed to be effected in a perfectly lawful way, it is legally competent for the Minister to refer an industrial dispute arising from such a lawful retrenchment or proposed retrenchment to an industrial court for settlement. The court, however, refrained from making an award of relief in

respect of the proposed retrenchment which it had found was not justified. On the finding reached by it, the court rightly apprehended that the only award it could make was to declare that the company was not entitled to retrench the services of the 4th and 5th respondents. It did not, however, make that award because at the time it reached the finding four years had passed after the date of the making of the reference and retrenchment had already been effected. It could not *at that stage*, while holding that the intended retrenchment was unjustified, make any determination as to the terms subject to which the employer *may* retrench because, the retrenchment having already been effected, it was no longer possible to give the employer the choice between changing his mind about retrenching and of retrenching subject to terms. The inference is somewhat strong that, where a reference of an industrial dispute for settlement as contemplated in section 31 H of the Act has been made, the award must itself be made before the expiry of the two months specified in the said section which is the period of time during which the employer's common law right to retrench is suspended. Instead, the court went on to consider a fresh matter which, by an order made on February 8, 1964, it permitted the 4th and 5th respondents to raise. Notwithstanding objection on behalf of the company, this permission was granted in purported exercise of the discretion vested in an industrial court by section 36 (5) of the Industrial Disputes Act. The fresh matter so raised was " whether the termination of the services of the 4th and 5th respondents by the company is lawful and/or justified and to what relief, if any, they are entitled ".

On the strength of its finding that the proposed retrenchment was not justified, the court went on to hold that the actual retrenchment was also not justified and has stated in the course of its written award that on this latter finding it could have either (a) held that the 4th and 5th respondents should be treated as being still in service, given their arrears of salary and continued in employment or (b) made an order for their re-instatement under section 33 (1) (b) of the Act. It, however, expressly refrained from making an award giving either of these two reliefs. Taking note of the situation created by the enactment of the amendment to the Ceylon Petroleum Corporation Act by Act No. 5 of 1963 and decisions of the Government in respect of the distribution of petroleum and petroleum products, it considered that an order for re-instatement or an order treating the 4th and 5th respondents as being still in service would not be just and equitable. Holding that the actual retrenchment was not justified, it awarded compensation to the two respondents in the sums already specified at the beginning of this judgment. Assuming, without deciding (since the matter was not argued) that compensation under section 33 (1) (d) can be awarded otherwise than as an alternative to reinstatement, it would be correct to assume that the court awarded compensation because it found the company guilty of wrongdoing and that its quantification of the compensation has some relation to the nature of the wrongdoing. Having found the company guilty of wrongdoing on three

grounds—two in the field of labour practices and one in the field of law—it is difficult to exclude the probability that the findings of wrongdoing in all these three respects did affect the quantification of the compensation. In that event the error of law made by the court would appear to be of a fundamental nature.

The company has contended before us that in permitting this fresh matter to be raised, and thereafter in making an award thereon, the industrial court acted without jurisdiction or in excess of its jurisdiction. In respect of this contention, after oral argument had been concluded on this application and we had taken time for consideration of our judgment, we received from counsel for the contending parties certain additional arguments in writing. It is true that the company did not initiate any proceedings to have the order of February 8, 1964 quashed when it was made, but this omission does not have the effect of an acquiescence in that order which, we have already noted, was made despite the company's objection to the application on behalf of the 4th and 5th respondents.

It has been submitted on behalf of the respondents that it would have been competent to the industrial court on the original reference as to the proposed retrenchment to have awarded the very relief that has now been awarded, and that the question of lack of jurisdiction in the court to make an award on the basis of actual retrenchment cannot depend on the point of time at which the award is made. Apart from observing that the point of time at which the award is made does seem to us to affect the question of the nature of the relief that can be awarded, we do not think it is a profitable exercise to go on to consider what hypothetical awards an industrial court would have had jurisdiction to make on the original matter in dispute, *viz.* the justifiability of the proposed retrenchment, where, as here, the court has expressly refrained from making an award thereon. The award in fact made was not in respect of the dispute as to the proposed retrenchment but on " the fresh matter " as to the actual retrenchment. The jurisdiction to grant relief in respect of the dispute referred to the court by the Minister was, as counsel for the company submitted, manifestly not exercised for the reason that the court felt that the only relief it could award in September 1966 was an order that the company was not entitled to retrench at the end of December 1962. We were impressed also by the argument on behalf of the company that, at the stage when there is yet only a proposal to retrench, an award of compensation or of gratuity as a relief in respect of that proposal cannot be said to be a " just and equitable " award. Such an award anticipates an uncertain future event. Compensation as if an actual retrenchment had been effected does not appear to us to be capable of being construed as an award in terms of section 24 of the Act in respect of the dispute as to the proposed retrenchment which was the only dispute referred to the court.

It remains for us to turn to a consideration of the question whether the award was one that the court had jurisdiction to make in respect of any

" other matter . . . . . made under this Act " as contemplated in section 24. This involves two other questions, (i) whether in terms of section 36 (5) the fresh matter as to actual termination permitted to be raised was one " relating to the dispute ", and (ii) whether this fresh matter was one that could not have been raised at the commencement of the proceedings.

We would here like to make some reference to the second of these questions before dealing with the first. In paragraph 11 of the court's award there is a statement to the effect that " on the 17th December 1962 written notice of this (the fresh matter) was given to the company under section 36 (6). We were also satisfied that this matter could not have been raised at the commencement of the proceedings by the two employees because their services were terminated after commencement of the proceedings ". It is difficult to understand how, if it was not possible for the employees to raise this matter at the commencement of the proceedings for the reason that their services were terminated after commencement of proceedings, they could have given notice of this matter on the 17th December 1962, also at a time when their services had not yet been terminated. In paragraph 4 of the award there is a statement to the effect that " proceedings commenced on 27th November 1962 ". The notices terminating the services of the employees with effect from 31st December 1962 (documents A19 and A20) are dated 27th September 1962. These notices had been given and were in existence prior to the Minister making his Order of reference on 5th November 1962, and also prior to the giving by the employees on 17th December 1962 of the written notice of the fresh matter they intended to raise under section 36 (5). It seems to us that if the employees were in a position to give notice of the fresh matter on 17th December 1962 there was nothing to prevent their having raised that fresh matter on or about the 27th November 1962 at the commencement of the proceedings because all the facts necessary to raise that matter were in existence on the 27th November 1962 just as much as they were in existence on the 17th December 1962. The fresh matter was permitted to be raised only on 8th February 1964. It seems to us that the industrial court has by a wrong decision on a collateral question given itself a jurisdiction which it would not otherwise have had. While we have made reference in this way to this matter, we must state that learned counsel for the company did not on this ground challenge the jurisdiction of the industrial court to decide this fresh matter, and, in deciding the application before us, we accordingly refrain from taking into consideration the industrial court's lack of jurisdiction for the reason above indicated.

In regard to the first question referred to in the above paragraph " the dispute " there contemplated is none other than the dispute referred to by the Minister in his order A22 of November 5, 1962. While it may be correct to say that section 36 (5) permits an industrial court to decide fresh matters, the section itself limits them to such fresh matters as are

related to the dispute already referred for settlement. It is useful to contrast this with the power of an industrial court as indicated by the terms of the proviso to section 23. That proviso recognises the power of such a court to admit and decide " any other matter which is shown to the satisfaction of the court to have been a matter in dispute between the parties prior to the date of the order of reference ". Such other matter is not limited to a matter relating to the referred dispute. It may be noted in passing that the proviso to section 16 recognises a power even in an arbitrator to admit and decide other matters in dispute between the parties prior to an order of reference, but, unlike the power of an industrial court indicated in section 23, this power is limited to deciding matters arising out of or connected with the referred dispute. It will thus be seen that the power or jurisdiction of the arbitrator or of an industrial court recognised in the various sections of the Act is not a uniform one. Sections 16 and 23 do not themselves confer a power on the arbitrator and industrial court respectively ; rather do they recognise the existence of such a power. In regard to section 36 (5), we are inclined to agree with the contention put forward on behalf of the company that this provision is intended for the purpose of dealing with procedure rather than to confer jurisdiction for the admission and decision of fresh disputes that emerge and are raised after proceedings have commenced.

In any event, jurisdiction to decide the fresh matter raised must be derived by the industrial court from section 36(5) and from no other provision of the Act. We agree with the submission made by the learned counsel for the respondents that the fresh matter that can be permitted would at least include a contentious matter between the parties and that the question whether it relates to the original dispute must be judged objectively. He submitted further that the fresh matter permitted in this case is connected with, arises from and is closely related to the dispute as to the proposed retrenchment and no relationship could indeed be closer. But there is much force in the contention on behalf of the company that the fresh matters that can be permitted under section 36(5) must at least be involved in the original dispute. Counsel on its behalf has pointed to the fact, as indicated already, that section 36 deals largely with matters relating to evidence etc. that can be introduced at an inquiry, indicating that sub-section (5) is intended for the purpose of dealing with a procedural matter rather than to confer jurisdiction for the decision of all fresh matters that may be in dispute after the proceedings have commenced. He contended that the actual retrenchment is an entirely new industrial dispute and different to the proposed retrenchment. While there may be a connection between the two disputes in that the actual retrenchment may be a consequence of the proposed retrenchment, we agree that the two disputes, as contended for the company, create different problems as to justifiability, relief and choice of forum. For the respondents it was suggested that section 36 (5) is intended, *inter alia*, to avoid the necessity of a multiplicity of references. It must, however, not be assumed that in so far as the Minister is

concerned, a reference is a mere formality. The desirability of making a particular reference, we venture to think, is carefully considered by a Minister having regard to such things like the demands of industrial peace and the availability of other remedies. If the Minister's concurrence could have been obtained, we apprehend there would have been no difficulty experienced in having this new dispute referred to the same industrial court before it considered the question of making an award on the original reference. The " fresh matter " admitted being that of the actual retrenchment was not, in our opinion, a matter relating to the original dispute which was over the proposal to retrench with effect from the end of December 1962, and therefore in making the award expressly on this fresh matter the industrial court acted in excess of its jurisdiction under the Industrial Disputes Act.

For the reasons we have set out above in this judgment, the award of September 25, 1966 is hereby quashed. Having regard to the most unfortunate course taken on this dispute over long years, and bearing in mind the relative capacities of the contending parties to incur further expenditure, we would make no order as to the costs of the application to this Court. Counsel for the company stated to us at the commencement of the argument that, whatever be the result of this proceeding, the company intends to abide by the offer originally made to the 4th and 5th respondents to pay a terminal benefit of twelve months' gross salary, which is itself an offer of a kind that has the approval of the Commissioner of Labour. We trust it is not in vain that we hope the 4th and 5th respondents will even at this somewhat late stage avail themselves of this offer and thereby put an end to a singularly unfortunate dispute.

(Sgd.) T. S. FERNANDO,
Puisne Justice.

(Sgd.) V. TENNEKOON,
Puisne Justice.

Application allowed.