EQUIPMENT AND CONSTRUCTION CO., LTD.
v.
RANASINGHE

SUPREME COURT.
SHARVANANDA, C.J., WANASUNDERA, J. AND COLIN-THOMÉ, J.
S.C. APPEAL No. 28/84.
C.A.Nos. 1201, 1206 & 1034 OF 1979.
M.C. COLOMBO 82947/3, 83280/3 & 85259/3.
JANUARY 7, 1985.

Arbitration – Reference by Minister of Labour to arbitration – Validity of fresh reference – Can objection to jurisdiction be raised at late stage ?

The applicant on being dismissed from the post of Engineer in the service of the appellant-Company made representations to the authorities alleging wrongful termination. The Minister of Labour referred the dispute to the Labour Tribunal No. 1 for settlement by arbitration. When the arbitrator was about to make his award the Minister acting on representations of misconduct made to him revoked the reference and made a fresh reference to another arbitrator who made an award. The appellant-Company failed to comply and was prosecuted in the Magistrate's Court. Objection was taken by the Company that the award was a nullity but this was overruled. The Minister then proceeded to make a third reference to still another arbitrator who made an award similar to the one made on the second arbitration. Again the Company was prosecuted in the Magistrate's Court for failure to comply and again the objection was taken that the award was a nullity. This was overruled and the Company was convicted. The Company appealed to the Court of Appeal but the Appeal was dismissed. The Company appealed to the Supreme Court.

Held –
The second and third references are a nullity. Situations may arise which necessitate a second reference as where the arbitrator dies or leaves the island. But here the frustration of the first reference by the Minister was not brought about in this way but by the applicant and the second and third references were bad.

As in a criminal case, an objection to jurisdiction can be taken at any stage.

Case referred to :

(1) *Nadarajah Ltd. v. Krishnadasan (1975) 78 NLR 255.*

A. Mahendrarajah, P.C. with *S. Mahenthiran* and *B. Balaraman* for accused-appellant.
Hector Yapa, D.S.G. with *Mrs. S. Thilakawardana, S.C.* for complainant-respondent.

Cur. adv. vult.

January 22, 1985.

WANASUNDERA, J.

After over 20 years of protracted litigation, a determination in this matter is not yet in sight and what is most distressing is that the matter has to be referred back to its beginning for an inquiry *de novo*. This delay is due to mishandling of this case at various stages, and the applicant himself must share a large part of the blame for his present predicament.

The applicant was an engineer employed by the respondent Company. Upon a termination of his services, the applicant made representations to the authorities against the wrongful termination of his services. Thereupon, as far back as 1965, the Minister of Labour, as he lawfully may, by Gazette No. 14,323 of 19th February 1965, referred the dispute to the Labour Tribunal No. 1 for settlement by arbitration.

It would appear that the arbitration proceedings were brought to a halt in 1971, just before the arbitrator could make his award, by the Minister revoking the reference in view of certain representations made to him by the applicant. This, it has been stated before us, was in the nature of allegation of misconduct against the arbitrator, in that he was unduly delaying the proceedings.

Thereafter the Minister referred the dispute to Mr. Ivan Perera for settlement by arbitration. The arbitrator, after about 40 days of inquiry, made his award on 21st January 1975, awarding the applicant a sum of Rs. 89,500. He also ordered that this amount should be deposited with the Assistant Commissioner of Labour in the following manner :–

Rs. 25,000 within one month of the publication of the award.

Rs. 39,000 within three months of the publication of the award.

Rs. 25,000 within six months of the publication of the award.

Upon the employer Company failing to comply with this order, it was prosecuted in three cases before the Magistrate's Court for recovery of the amounts on the award. In the Magistrate's Court, objection was taken that the award was null and void in terms of the ruling in the case of *Nadarajah Ltd. v. Krishnadasan* (1) namely that once a reference has been made to an arbitrator, it is not competent for the Minister to frustrate the reference by divesting the arbitrator of his authority (except for certain specified reasons), and therefore the Minister had no jurisdiction to make a second reference. This plea was upheld and for these reasons the court held that the award was a nullity.

The Labour Department apparently chose to accept this ruling and did not prefer an appeal. What the authorities then did is inexplicable in view of the legal position laid down in that case, namely, that the Minister was not empowered to refer the dispute to another arbitrator while the first reference is considered to be pending. But that was precisely what was done here and the Minister proceeded to make a third reference of the dispute to another arbitrator. It is these proceedings that are now challenged before us.

Objections to the jurisdiction of the third arbitrator was taken, but were overruled. The arbitrator proceeded with the matter and made an award in favour of the applicant which is similar to the earlier order. Upon the Company once again failing to comply with the award, it was again prosecuted in three cases in the Magistrate's Court. In the Magistrate's Court, the same defence, that the award was a nullity, was taken but overruled. The accused Company was found guilty and ordered to pay the amounts on the award. The Company appealed from this conviction, but the Court of Appeal has dismissed the appeal.

While we agree with the statement of the Court of Appeal that, upon the declaration by the Magistrate's Court that the second reference was a nullity, the dispute was still pending, we find that the Court of Appeal has not sufficiently considered the question of the Minister's power to make a third reference in the light of the law as laid down in the decided cases.

Mr. Yapa, who presented his case very fairly, did not dispute the correctness of these decisions, but sought to bring his case within one

of the exceptions laid down in those judgments. He relied on the dictum of the present Chief Justice in *Nadarajah's case* which has been followed in later cases and is to the effect that –

> "Situations may however arise necessitating a second reference if the Arbitrator declines, resigns, dies or becomes incapable of performing his functions, or leaves Sri Lanka under circumstances showing that he will probably not return at an early date. Strictly speaking, in such an event there is no occasion to withdraw or supersede any reference from the first Arbitrator ; the first Arbitrator has ceased to function and there is a frustration of the reference, and so there is in existence no Arbitrator who could act on such reference."

Now the Deputy Solicitor General's submission is that the third reference is good because the first reference has been frustrated by reason of the removal of that arbitrator. If that is so, the same consideration should have applied to the second reference, but no such plea was found sufficient to ensure its validity. Apart from that, the reliance on the ground of frustration is in my view ill founded. If at all the first arbitration was frustrated, that result was brought about by an act on the part of the applicant himself – the Labour Tribunal being always ready and willing to conclude the arbitration according to the law. The conduct of the applicant and the consequent action of the Minister in this regard are not legally defensible. What the Minister had done – in so far as the material before us shows – was to act *ex parte* on allegations against the arbitrator made by one of the parties behind the back of the arbitrator, the respondent Company, and also the proper disciplinary authority. The law has provided fair and open procedures to deal with such situations, but the manner in which action was taken in this case is certainly not the way it should have been handled. In the result, we cannot but hold that the first reference continues to be valid notwithstanding the purported revocation and the two subsequent references.

We are also unable to agree with Mr. Yapa's last submission that the appellant has acquiesced in the proceedings before the final arbitrator and that he is now estopped from challenging that award. The proceeding before us is a criminal trial entailing punishment and the plea is one going to jurisdiction. We are of the view that it is always open to an aggrieved person in a criminal case to raise an issue going to jurisdiction even at a late stage of the proceedings. In this case,

however, it would appear that the question of jurisdiction was very much in issue in the proceedings and had in fact been raised more than once in the present proceedings.

For the above reasons we allow the appeal and acquit the accused. We declare the award made in the third arbitration proceedings null and void and we direct Labour Tribunal No. 1, which is still seized of this matter notwithstanding the purported revocation, to proceed with the inquiry de novo and conclude it as early as possible, giving it priority.

The appeal is allowed without costs.

SHARVANANDA, C. J. – I agree.

COLIN-THOMÉ, J. – I agree.

Appeal allowed.

Case sent back to Labour Tribunal No. 1.