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Court in 1982, the petitioner continued to pay a N.R.C.L.G. up to 1988 and that this payment constituted an implied term of the contract of employment. It was further submitted that the statement of the matter in dispute does not refer to clause 17 of the Collective Agreement and that the dispute before the arbitrator is whether the non-payment of what was paid earlier, for the year ending 31-08-1988 is justified. As regards the second ground it was submitted that the termination of employment, as far as the workmen are concerned, took place only on 10-04-1989, after the reference was made by the 1st Respondent and that the reference is not frustrated by the termination. In any event, it was submitted that the termination is contrary to the provisions of the Termination of Employment of Workmen (Special Provisions) Act and is null and void.

Learned Senior State Counsel appearing for the 1st and 2nd Respondents submitted that the reference to arbitration was made on the basis of the correspondence 2R1 to 2R9 and because the petitioner failed to make any endeavour to settle the industrial dispute that had arisen. It was further submitted that the order of the Minister refering the dispute to arbitration is not subject to review in an application for a Writ of Certiorari. That, in any event, the complaint of the petitioner is with regard to the contents of the statement of the matter in dispute (*b*) and that the reference itself could not be quashed as invalid.

The first ground of learned President's Counsel for the petitioner draws in issue the basis of the payment of a N.R.C.L.G. to workmen of the petitioner (including the 22 workmen named in "B") prior to 1988. It is not disputed that the payment of a N.R.C.L.G. by the petitioner commenced upon the purported extension of clause 17 of the Collective Agreement (e) by the order (d) of the Minister. It was the submission of learned President's Counsel that the concept of an N.R.C.L.G., the qualifying period of its payment and the formula of its computation are referable only to clause 17 and not to any other source such as the common law, statute law, custom or the contract of employment. Learned Counsel for the 3rd Respondent submitted that a N.R.C.L.G. was a known component of the emoluments of workmen even prior to Collective Agreement (*e*) and produced with his further written submission, Collective Agreement No. 5 of 1967 of which clause 15 provides for such a payment. It is Counsel's contention that after the Supreme Court declared that

a partial extension of a Collective Agreement is invalid in 1982 the petitioner continued to pay a N.R.C.L.G. to its workmen for five years upto 1987 and that the payment had become an implied term of contract. Learned President's Counsel replied that Collective Agreement No. 5 of 1967 referred above and Collective Agreement 3J of 1972 (*e*) relate to two different segments of workmen and submitted that the payment cannot become an implied term of contract since it was made upon a mistake of law.

As noted above it is common ground that the payment of a N.R.C.L.G. was not originally provided for in the contract of employment and that the petitioner commenced payment on the basis of order (d) extending clause 17 of Collective Agreement No. 5 (*E*). Therefore the reference to a N.R.C.L.G. in the provisions of Collective Agreement No. 5 of 1967 does not give this payment a different status or recognition. It is a payment due under Collective Agreements and no more.

The submission that the payment became an implied term of contract raises further issues as to the circumstances in which a term of contract may be implied. An implied term may be derived in one of three ways. They are by custom, statute law or inferences drawn by judges to reinforce the words of the contract in order to realise the manifest intention of the parties. (Law of Contract, by Cheshire and Fifoot 1986 11th Ed. p 126; Law of Contracts Vol. 11, Weeramantry, p 571-574). A term of contract cannot be implied on a mere assertion of one of the parties to the contract or on the conduct of the other. In the absence of custom or statute an implied term cannot be added merely on the ground of reasonableness but its existence must be a necessary implication from the circumstances of the case and language of the contract (Weeramantry p 572).

In the case of the *Ceylon Mercantile Union vs Aitken Spence & Co. Ltd.,* [2] a bench of two judges of this Court held that in calculating compensation payable to a workman upon a wrongful termination, the cost of living gratuity paid on the basis of an invalid partial extension of a Collective Agreement (as in this case) need not be taken into account. Anandacoomaraswamy, J. observed as follows :

" I see no reason why the workmen should be benefited by the Cost of Living Gratuity Allowance provided in the provisions of the Collective Agreement. It is common ground that the Respondent was not a party to the Collective Agreement. The mere fact that such an allowance had been paid by the employer and the workmen enjoyed that benefit does not mean that it is the workmen's right to receive compensation on that basis, if the workmen choose to take shelter not under the Collective Agreement but under the contract."

For the purposes of this case it is not necessary to decide whether a N.R.C.L.G. is payable as an implied term of contract as contended for by learned Counsel for the 3rd Respondent. The Court is concerned only with the validity of the reference to arbitration. As noted above a N.R.C.L.G. was paid to the workmen by the petitioner on the basis of a purported extension of clause 17 of the Collective Agreement to the industry of the petitioner. On the basis of the judgment of the Supreme Court in the case of *A. F. Jones (Exporters) Ceylon Ltd. vs Balasubramaniam* (Supra) followed by the Supreme Court in the case of *Ceylon Printers Ltd. vs Eksath Kamkaru Samithiya* [3], it is now settled law that a partial extension of a Collective Agreement by the Minister to any other industry is not permitted by section 10 (2) of the Industrial Disputes Act and is ultra vires and of no force or effect. This matter is conceded by learned Counsel for the petitioner. Therefore what has to be considered is whether the reference to arbitration proceeds on the assumption that a N.R.C.L.G. is payable. If so, whether that assumption results in the reference being ultra vires as contended for by learned President's Counsel or, whether the assumption is vaild on the basis that the payment of a N.R.C.L.G. had become an implied term of contract as contended for by learned Counsel for the 3rd Respondent.

The order of the Minister (a) refers to arbitration, the industrial dispute " in respect of the matter specified in the statement of the Commissioner of Labour which accompanies this order". Therefore the order of reference to arbitration (*a*) and the statement of the matter in dispute (*b*) are not severable as submitted by learned Senior State Counsel. They are necessarily inter-connected. They have to be taken together in considering the validity of the reference to arbitration.

The relevant portion of the statement of the matter in dispute (*b*) is as follows :

> " The matter in dispute between the aforesaid parties is whether the non payment of the balance non-recurring cost of living gratuity for the period from 01.09.87 to 31.08.88 to the following employees who are members of the Eksath Kamkaru Samithiya by the Management of Frewin and Co., Ltd., is justified and to what relief each of them is entitled. "

The words " whether the non payment of the balance non-recurring cost of living gratuity for the period from 01-09-1987 to 31-08-88 to the following employees..... " assume that a N.R.C.L.G. is payable to the named employees for the specified period. It is plain that a balance can be conceived of only in relation to an identifiable full or total amount. It is in this context that the submission of learned President's Counsel gains acceptance. His submission is that the phrase " non-recurring cost of living gratuity ", as the title of the payment, the period of one year specified and the implication that an whole amount is payable are all referable to clause 17 of the Collective Agreement.

As noted above, a payment characterised as a non-recurring cost of living gratuity was brought about by Collective agreements. It is not there in the ordinary contracts of employment of the workmen or in any other statute law. According to clause 17 of the Collective Agreement the consolidated wages as specified in the second schedule are fixed on the basis of the Colombo Consumers Price Index being 137.5. On that basis the clause provides a formula for the payment of a Non-recurring Cost of Living Gratuity for a qualifying period every year, from 1st September to 31st August. The payment is a sum of Rs. 2.00 in respect of each complete point the Price Index had gone up from the specified figure of 137.5. The annual payment is of the total sum due for each month calculated on the said formula. It is thus seen that the title of the payment, the period specified in the statement and the implication that an whole amount is due are necessarily referable to clause 17. Learned Counsel for the 3rd Respondent sought to explain these matters on the basis that the amount due could be calculated on the previous year's payment without reference to clause 17. It was in this connection that he submitted that payment had become an implied term of contract.

This submission raises the further question whether the Minister can assume that there is an implied term of contract when the parties are at issue as to whether any payment is due at all. It is the case of the petitioner that in the previous years, the Company made the payment on a mistake of law that clause 17 was binding on it by virtue of the purported extension of that clause to the industry of the petitioner by order (*d*) of the Minister. As noted above a term can be implied as being in a contract only on one of three grounds of statute, custom or a necessary inference drawn by a Court from the words of the contract and the circumstances of the case. It cannot be implied merely on the assertion of a party or the conduct of one of the parties. Certainly, the Minister is not clothed with any judicial power to enable him to assume that a term of contract is implied. In the circumstances I do not see any merit in the submission of learned Counsel for the 3rd Respondent. On the other hand the statement of the matter in dispute (*b*), comprehended in the only way it could possibly be done, is seen as proceeding on the assumption that a payment is due, as described in clause 17 of the Collective Agreement. Then, the subsmission of learned President's Counsel that the Minister is by the reference seeking to do indirectly what he cannot do directly in extending clause 17 to the industry of the petitioner as purported to be done by order (*d*), has to be accepted. The principle that an authority cannot do indirectly or circuitously what he cannot do directly, is settled law. In the case of *Kodakan Pillai vs Mudanayake* [4], the Privy Counsel observed that even the Parliament being the supreme legislative body, cannot do indirectly or circuitously what it cannot do directly. In the case of *Bandaranaike vs Weeraratne and Others* [5], Samarawickrama, J. delivering a judgment of a bench of three judges of the Supreme Court observed as follows :

> " There is a general rule in construction of statutes that what a Court or person is prohibited from doing directly it may not do indirectly or in a circuitous manner ".

This principle which is a limitation on the power or the authority of the supreme legislative body and the Courts, should surely be a limitation on the power of a member of the Executive such as the Minister. The petitioner is seriously affected by the reference to arbitration of the dispute in the manner described in the statement

(*b*). It precludes the petitioner from urging before the arbitrator that quite apart from the balance N.R.C.L.G. which has been referred to arbitration, no amount whatever is due as N.R.C.L.G. since the extension of clause 17 to the industry of the petitioner as purported to be done by order (*d*) of the Minister, is invalid and that payments were made on a mistake of law. Therefore in any event the reference to arbitration is bad in law since it is based on an irrelevant consideration that a N.R.C.L.G. is payable by the petitioner to the workmen concerned. The real dispute between the parties appears to be whether in the first instance a N.R.C.L.G. is payable by the petitioner to the workmen concerned and if so, the amount so payable. The reference has been made on this irrelevant consideration because the 2nd Respondent has failed to obtain the views of the parties with regard to the payment of a N.R.C.L.G. The claim for a " balance N.R.C.L.G. due in respect of the period 1st September 1987 to 31st August 1988 " is contained in the letter dated 10-10-1988 sent by the 3rd Respondent to the petitioner with copy to the 2nd Respondent. It appears from the correspondence filed (marked 2R1 to 2R9) that the 2nd Respondent did not seek the views of the petitioner as to this matter. The petitioner was requested to attend an interview with regard to the matter stated in the letter dated 20-10-1988 sent by the 3rd Respondent (2R2 and 2R3). These letters relate to an entirely different dispute with regard to intimidatory action by a director of the petitioner Company. The subsequent letters inviting the petitioner to attend an interview also relates to these matters and not to the matter of the N.R.C.L.G. Therefore, the response of the petitioner (2R7) does not contain any reference to the question of a N.R.C.L.G. In these circumstances I am of the view that the 2nd Respondent has failed to indentify the true matters in dispute between the parties with regard to the claim for a N.R.C.L.G. as contained in the letter dated 10-10-1988 (2R1) of the 3rd Respondent. I have to observe that the statement of the matter in dispute (*b*) is based almost entirely on paragraph (*a*) of 2R1.

Finally, I have to consider the submission of learned Senior State Counsel that the order of reference to arbitration made by the Minister is not in any event subject to review in an application for a Writ of Certiorari. Learned Senior State Counsel sought to support this submission on the judgment of Pathirana, J. in the case of *Aislaby Estates Ltd. vs Weerasekera*, [6]. In that case a reference

to arbitration was sought to be quashed on the basis *inter alia*, that the Minister had previously decided that the dispute should not be referred to arbitration.

Pathirana, J. characterised the act of the Minister in making an order of reference under section 4 (1) of the Industrial Disputes Act as an administrative act and observed that " the court cannot objectively review that decision ". (p250). At a later stage in the judgment (p254) the finding in the case is stated as follows :

> " I, therefore, hold that the Minister's decision under section 4 (1) in the circumstances of this case and his reference dated 15th April, 1968 to the Labour tribunal (*v*) for settlement by arbitration cannot be questioned by the Court, and is a valid decision. "

It is seen from this finding that the judgment in the case does not go so far as to hold that a reference made by the Minister under section 4 (1) is not subject to review even in a situation where the Minister has acted *ultra vires.* Furthermore, the finding is specifically that in the circumstances of that case the Minister's decision is valid. On the other hand, in the case of *Nadaraja Ltd. vs Krishnadasan,* [7] a bench of three judges of the Supreme Court issued a Writ of Certiorari quashing a second reference made by the Minister to another arbitrator, at a time when earlier reference made in respect of the same dispute was pending. Sharvananda, J. (as he then was) held that the second reference was " invalid in law as being in excess of the powers of the Minister." (p264). The description of the order of reference by the Minister as an administrative act by Pathirana, J. in the *Aislaby Estates* case (supra), does not have the effect of removing it altogether from the pale of judicial review. As noted by Sharvananda, J. in Krishnadasan's case " though the order of reference under section 4 (1) may be administrative in motivation, yet the order, according to the scheme of the Act, is designed to eventuate by a quasi-judicial process, in an award potent with consequences to the parties ". (p261). The decision in that case is authority for the proposition that an order of the Minister refering a dispute to arbitration, made under section 4 (1), is subject to judicial review on the ground that it is *ultra vires.* For the reasons stated above I hold that the order of reference of the Minister (*a*) and the statement of the matter in dispute (*b*), constituting the reference

to arbitration is *ultra vires* and of no force in law. In view of this finding it is unnecessary to consider the second ground urged by learned President's Counsel for the petitioner. The application is allowed and the petitioner is granted the relief prayed for in paragraphs (*c*) and (*d*) of the prayer to the petition. I make no order for cost in the circumstances of this case.

Application allowed.