CEYLON PRINTERS LTD. AND ANOTHER
v.
WEERAKOON, COMMISSIONER OF LABOUR AND OTHERS

SUPREME COURT
G. P. S. DE SILVA, C.J.,
WIJETUNGA, J. AND
GUNASEKERA, J.
S.C APPEAL NO. 19/95 WITH 92/94
CA APPLICATION NOS. 601/91, 642/91
OCTOBER 27, NOVEMBER 28, 1997

Termination of Employment of Workmen (Special Provisions) Act – Complaint of Termination – Inquiry by an Assistant Commissioner – Variation of Assistant Commissioner's recommendation by the Commissioner of Labour – Decision based on new material without notice to the employer – Natural Justice.

Whilst a dispute between the appellant companies and a Trade Union representing the appellants' workmen was the subject of Arbitration under the Industrial Disputes Act, the workmen made a new demand coupled with a threat of strike action. The appellants informed the workmen that their conduct was unlawful and illegal and their services will be terminated if they failed to report for work on 20. 4. 1988. An attempt to settle the dispute with the intervention of the Commissioner of Labour was unsuccessful. Thereafter, the Union complained to the Commissioner under the Termination of Employment of Workmen (Special Provisions) Act that when the workmen reported for work after the strike, on 26. 7. 1988, they were refused work. An Assistant Commissioner of Labour after a prolonged inquiry decided that the termination of employment of the workmen had been for disciplinary reasons and recommended to the Commissioner that the application of the Union be dismissed. The Deputy Commissioner who considered the recommendation disagreed with it on the ground that the appellants had not resorted to disciplinary procedure in terms of a judgment of the Court of Appeal. The Commissioner of Labour agreed with the Deputy Commissioner and ordered the reinstatement of the workmen with back wages. Two questions arose at the hearing of the appeal;

(*a*) Whether there was a breach of the principles of Natural Justice by the Commissioner in departing from the determination of the Assistant Commissioner in favour of the appellants and acting purely on the recommendations of the Deputy Commissioner.

(*b*) Whether the Commissioner failed to address his mind at all to the issues involved.

The state counsel conceeded that at the point of departure the appellants should have been given an opportunity of challenging the new material on which the Commissioner acted.

Held :

1. It is apparent from the order of the Commissioner that he had failed to duly consider the material produced at the inquiry before the Assistant Commissioner or the recommendations made by the Assistant Commissioner and the Deputy Commissioner.

2. In view of the failure by the Commissioner to give the appellants an opportunity of challenging the new material on which he acted, the Commissioner was under a duty to give reasons for his decision, particularly in view of the fact that it was not he who held the inquiry and recorded the evidence. In the result, the order of the Commissioner was in breach of the principles of Natural Justice.

Cases referred to:

1. *Crofton Trust Investment Limited v. Greater London Rent Assessment Committee and Another* (1967) 2 All ER 1103, 1109.
2. *Karunadasa v. Unique Gem Stones Limited and other* (1997) 1 Sri L.R 256, 260.
3. *Ratnayake v. Fernando* SC 52/86 SCM 20.5.1991.
4. *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* 1947 AC 109 at 123.
5. *Rex v. Civil Service Appeal Board ex p. Cunningham* 1991 4 ALL E.R 310 at 543.
6. *R. v. Home Secretary ex p. Doody* 1993 WLR 154.
7. *Padfield v. Minister of Agriculture, Fisheries and Food* 1968 AC 997.

Faisz Musthapha, P.C with *S. Mahenthiran* and *A. R. Surenthran* for the appellants.

Uditha Egalahewa S.C for the 1st and 2nd respondents.

L. V. P. Wettasinghe for the 3rd respondent.

Cur. adv. vult.

May 6, 1998.

GUNASEKERA, J.

The employees of the two petitioner-appellant companies who were engaged in the Printing and Engineering Trades became entitled to enhanced salaries and other benefits consequent upon the extension of two Collective Agreements Nos. 3J & 3 marked 'X1' and 'X2'. Whilst the said Collective Agreements were in force the 3rd respondent Union (The Eksath Kamkaru Samithiya) on behalf of its members by a communication dated 7th January, 1983, marked 'X4' demanded *inter alia* that the monthly salaries of its members in the petitioner-appellant

companies be increased by the addition of a sum representing their monthly non recurring cost of living gratuity payments and that each member be given an annual increment of Rs. 210 in addition to the increments that were being paid to them. When the petitioner-appellant companies declined to accede to the said demands made by the 3rd respondent Union on the basis that the matter was adequately covered by the Collective Agreements a dispute arose between the parties and the said dispute was referred to Arbitration in terms of section 4 (1) of the Industrial Disputes Act and assigned No. 1996 A on 15th September, 1986. When the aforesaid Arbitration proceedings commenced a preliminary objection was taken in regard to the jurisdiction of the arbitrator and the decision of the arbitrator overruling the objection that he had no jurisdiction was challenged by the petitioners without success before the Court of Appeal in CA application No. 30/90 whereupon the Arbitration proceedings in A 1996 were resumed. During the pendency of the aforesaid Arbitration proceedings the 3rd respondent Union demanded a general increase of the salaries of its members by Rs. 1,000 per month by 'X7' dated 12th March, 1988. Thereafter by letter dated 23rd March, 1988 marked 'X8' the 3rd respondent Union notified the petitioner-appellant companies that their members would resort to strike action with effect from 25th March, 1998 till their demands were granted. By letter dated 14th April, 1988 ('X9') the petitioner-appellant companies informed the workmen that their conduct by going on strike was unlawful and illegal and that their services would be terminated if they failed to report for work by 20th April, 1988 and although the petitioner-appellant companies attempted to arrive at a settlement with assistance of the Commissioner of Labour the dispute could not be satisfactorily resolved. Thereupon the 3rd respondent Union made a complaint to the Commissioner of Labour under the Termination of Employment of Workmen (Special Provisions) Act alleging that its members were refused work when they returned after the strike on 26th July, 1988. This complaint was inquired into by the 2nd respondent Assistant Commissioner of Labour and during the course of the said inquiry the petitioner-appellant took a preliminary objection that the 2nd respondent had no jurisdiction to inquire into the complaint made by the 3rd respondent Union since the members of the 3rd respondent Union were barred from resorting to strike action during the pendency of arbitration proceedings. When this objection was overruled the petitioners sought to canvass the said Order in the Court of Appeal in application CA No. 45/89. The Court of Appeal after hearing submissions made on behalf of the parties dismissed the said application on 6th December, 1989. Special leave to Appeal

was sought by the petitioner-appellant companies against the Order of the Court of Appeal dismissing the application of the petitioner-appellant companies in SC Special Leave to Appeal application No. 27/90. This Court by its order dated 14th March, 1990 dismissed the application for Special Leave reserving the right of the petitioner-appellant companies to lead evidence at the inquiry to be held by the 2nd respondent Assistant Commissioner seeking to establish:

1. That the persons on whose behalf the application was made to the Commissioner of Labour were not workmen on 25th July, 1988, and

2. That their termination was by reason of punishment imposed by way of disciplinary action (vide X 15)

Consequent upon the said proceedings that commenced before the 2nd respondent Assistant Commissioner under the Provisions of the Termination of Workmen (Special Provisions) Act and after a prolonged inquiry before the 2nd respondent the 2nd respondent came to a decision on 30th March, 1991, that the termination of employment of the workmen concerned had been for disciplinary reasons and recommended to the 1st respondent that the applications made by the 3rd respondent on behalf of its members should be dismissed (vide X 24).

The recommendation of the 2nd respondent was submitted by the 1st respondent to his deputy for consideration and report. The Deputy Commissioner had by his recommendation (X 25) varied the recommendation of the 2nd respondent with which the 1st respondent had agreed and the 1st respondent had made order that the 22 workmen on whose behalf the 3d respondent had made the application be reinstated with back wages. Against the said findings the petitioners filed an application in the Court of Appeal (CA No. 601/91) in order to have it quashed by way of certiorari. After several dates of argument on 27th June, 1994 the said application was dismissed (vide 27). The petitioners sought Leave to Appeal against the said judgment on the following questions of law to the Court of Appeal.

1. (*a*) In view of section 11 (2) of the Termination of Employment of Workmen Act which empowers the 1st respondent to delegate to any officer of the Labour Department any power, function or duty conferred or imposed on him under the Act,

has the 1st respondent conveyed in an authorised form to the 2nd respondent, and identified sufficiently, the power, function or duty delegated to him in respect of the present dispute?

(*b*) If not, or in any event, is the 1st respondent empowered by law to reverse the findings and/or recommendations of the 2nd respondent?

2. (*a*) Are not the findings and recommendations of the 2nd respondent sound on the facts and in law?

(*b*) In any event, in the peculiar circumstances of this case, could the 1st respondent have reversed the findings of the 2nd respondent without assigning any reasons therefor?

3. (*a*) Should the 1st respondent and the Court of Appeal have acted, or relied, upon the judgment of the Court of Appeal in CA No. 45/89 in view of the judgment of the Supreme Court in SC special leave to appeal application No. 27/90.

(*b*) In any event should the 1st respondent, before acting on the recommendations of Mr. Dayaratne, Deputy Commissioner of Labour, have given an opportunity to the petitioner to be heard on matters vital to its case including the judgment of the Supreme Court in SC Special Leave to Appeal application No. 27/90 regarding the applicability of the judgment of the Court of Appeal in CA No. 45/89?

(*c*) Since the 1st respondent did not give the petitioner such an opportunity was there a failure of Natural Justice?

4. (*a*) In tems of section 40 (1) (*m*) of the Industrial Disputes Act, is it lawful for a workman to commence, continue or participate in a strike after an industrial dispute in that industry has been referred for settlement by Arbitration to an Arbitrator but before an award in respect of such dispute has been made?

(*b*) If not, was the strike commenced by the workmen in the present case, during the pendency of the Arbitration proceedings, an illegal strike punishable under section 40 (1) (*m*)?

(*c*) If the said strike was illegal and punishable was it misconduct warranting disciplinary action for the said workmen to participate in the said strike?

(*d*) Is it correct as a matter of law that an employer must hold a domestic inquiry before terminating the services of a workman on disciplinary grounds?

(*e*) Was the 1st respondent's prior permission required as a matter of law for the termination of a workman's services as a punishment by way of disciplinary action?

5. Did the 3rd respondent engage in a strike which warranted adverse findings against it by the 2nd respondent?

Having heard the submissions of counsel for the parties and after a consideration of the questions of law submitted, the Court of Appeal by its Order dated 15th July, 1994, granted leave to appeal to the Supreme Court on questions 1 (*a*) and 1 (*b*) and 4 (*d*) and 4 (*e*) only. Thereafter on 5th August, 1994 an application for Special Leave to the Supreme Court was filed and in the said application an Interim Order was sought to stay further proceedings and execution of the judgment of the Court of Appeal and the operation of the purported Orders contained in the determination made by the 1st respondent-respondent in his communication dated 24th May, 1991. This application for interim relief was supported on 8th September, 1994 and after hearing counsel this Court made Order staying the execution of the Order made by the 1st respondent-respondent till the application for Special Leave was supported (vide folio 27 of the record). On 3rd February, 1995 when the application for Special Leave was supported this Court having considered the submissions made on behalf of the petitioners granted leave on the following matters as well, in addition to the matters upon which the Court of Appeal had granted leave by its Order dated 15th July, 1994 namely :

1. (*a*) In terms of section 40 (1) (*m*) of the Industrial Disputes Act is it lawful for a workman to commence, continue or participate in a strike after an Industrial Dispute in that industry has been referred for settlement by Arbitration to an Arbitrator but before an award in respect of such dispute had been made?

(*b*) If not was the strike commenced by the workmen in the present case during the pendency of the Arbitration Proceedings an illegal strike punishable under section 40 (1) (*m*)?

(*c*) If the said strike was illegal and punishable was it misconduct warranting disciplinary action for the said workmen to participate in the said strike?

2. Did the 1st respondent and the Court of Appeal misdirect itself in law in applying the judgment of the Court of Appeal in application No. 45/89?

3. Did the 1st respondent act in breach of the rules of Natural Justice in acting on the recommendation of Dayaratne, Deputy Commissioner of Labour? (vide folio 58 – 60 of the record).

At the hearing of this appeal it was agreed by the counsel for the parties that the arguments and submissions would be confined to the following issues only :

(*a*) Whether there was a breach of the principles of Natural Justice by reason of the Commissioner departing from the findings of fact and the determination made in favour of the petitioner companies by the Inquiring Officer, i. e. the 2nd respondent, purely on the basis of an adverse recommendation made by the Deputy Commissioner of Labour.

(*b*) Whether there had been a failure on the part of the 1st respondent to address his mind at all to the issues involved.

It was contended by the learned President's Counsel appearing for the petitioner-appellants that the reversal of the 2nd respondent's recommendation made in favour of the petitioner-appellants by the 1st respondent Commissioner without hearing the petitioner is in violation of the principles of Natural Justice. It was submitted that even if the 1st respondent had the power of reviewing the recommendation of the 2nd respondent having regard to the very large volume of evidence and documents produced at the inquiry the question arises as to whether the 1st respondent could have reversed or departed from the said recommendation without hearing the petitioner-

appellants? It was contended that the answer to the above question should be in the negative, for Natural Justice demanded that the petitioner-appellants should have been given a fair hearing before reversing the recommendation which was in their favour. It was the case for the petitioner-appellants that the 2nd respondent Assistant Commissioner of Labour who held the inquiry after a consideration of the evidence led before him by his decision dated 3rd March, 1991, marked 'X24' had recommended that the applications made on behalf of the employees of the 3rd respondent Union to the 1st respondent be dismissed. However, Mr. Dayaratne the Deputy Commissioner of Labour when requested by the Commissioner to consider and report on the findings of the Assistant Commissioner who held the inquiry, had taken into account new material, namely the judgment of the Court of Appeal No. CA 45/89 in arriving at his conclusion that an employee can be dismissed on disciplinary grounds as a punishment after a disciplinary inquiry is held and as it appears that no such disciplinary procedure had been resorted to by petitioners that the petitioners be ordered to reinstate the workmen on whose behalf the application had been made with arrears of wages. Therefore it was submitted that the decision of the 1st respondent to vary the recommendation of the 2nd respondent who held the inquiry without affording an opportunity to the petitioners to canvass the new material that had been taken into account by the 1st respondent was bad. In this connection learned President's counsel cited *De Smith (Judicial Review of Administrative Action)* 4th edition page 211 which dealt with the subject of planning inquiries where Inspectors hold inquiries and report to the Minister who in turn makes the order. It states that: "if the Minister has it in mind to disagree with the Inspector's recommendation he must notify the main parties of this fact and the reason for its disagreement. If he differs from the Inspector on a finding of fact he must give the parties an opportunity of making further written representations. If the reason for his disagreement is that he has received new evidence or has taken into consideration new issues of fact which were not raised at the inquiry he must reopen the inquiry if any of the parties so requests". Learned counsel relied on the observations of Lord Parker in *Crofton Trust Investment Limited v. Greater London Rent Assessment Committee and another* [1] where he stated: "it is quite clear that whenever a new point emerges something, which might take a party by surprise, or something which the Committee has found out and of which parties would have no knowledge, fairness would clearly dictate that they should inform the parties and enable them to deal with the points".

Therefore it was submitted by learned counsel that when the Deputy Commissioner of Labour Mr. Dayaratne had considered the observations of Justice Anandacoomaraswamy at pages 4 & 5 of the judgment in CA No. 45/89 which took the petitioner-appellants by surprise and which were expressly excluded from being used to the prejudice of the petitioner-appellants that they should have been given an opportunity to meet the material which was taken into consideration. It was further contended that the Deputy Commissioner had taken into consideration extrinsic material to vary the recommendation of the 2nd respondent made in favour of the petitioner-appellants which he was not entitled to do. In this connection Wade – Administrative Law 6th edition page 983 observes: "that it is fully established that the principles of Natural Justice do not permit the Minister, any more than the Inspector, to receive evidence as to the local situation from one of the parties concerned in the inquiry, without disclosing it to the others and allowing them to comment. The Minister on his part must also act judicially. He must only consider the report and the material properly before him. He must not act on extrinsic information which the house owner has no opportunity of contradicting. It will be generally a denial of justice to fail to disclose to a party specific material relevant to a decision if he is thereby deprived of an opportunity to comment on it". Thus it was contended that the decision of the 1st respondent Commissioner to vary the recommendation of the 2nd respondent Assistant Commissioner made in favour of the petitioner-appellants without affording an opportunity to them to meet the new material that was taken into account was bad and is vitiated on account of an error of law.

A further submission made on behalf of the petitioner-appellants was that the Deputy Commissioner had taken into consideration the judgment of a court namely that of CA No. 45/89 to override the factual evidence that was placed before the Assistant Commissioner who held the inquiry and that where the knowledge of the Deputy Commissioner was to be used to override the factual evidence and to shape the final decision that the party affected ought to have been given notice of the proposed finding and an opportunity to submit further evidence or arguments. According to Whitmore (Review of Administrative Action 1978 page 120): "the rationale behind this requirement of hearing parties before considering new material is the necessity to impose effective procedural checks to guard against a tribunal acting upon inaccurate information within its knowledge or misapplying its

knowledge and to ensure that the parties are permitted to know and address submissions to all crucial issues".

Learned counsel for the petitioner-appellants contended that in any event that the 1st respondent's order is bad in law as he has accepted and adopted the Deputy Commissioner's recommendation without addressing his mind at all to the evidence on record and the reasons for the recommendation of the 2nd respondent and as such that the said Order is not an Order at all and was therefore totally void. It was contended that the 1st respondent had purported to grant relief to all the employees whose names appear in the Orders marked 'X17' & 'X18' which includes some of the employees who in fact and in truth had already accepted monetary payments from the petitioners and withdrawn their complaints having entered into fresh contracts of employment under the petitioner-appellant companies. An examination of the recommendation of the 2nd respondent who held the inquiry namely 'X24' clearly bears out that he had given his mind to the evidence that was led before him, for in paragraph 8 of 'X24' he observes thus: "another matter that transpired in the evidence of Kanagaratna who gave evidence on behalf of the companies was that some of the employees (K. J. Perera, M. P. Upali, W. T. Fonseka, Wasantha Athukorala, R. N. E. Nazar, A. S. Wasantha Kumara and Harischandra Athukorale) who had complained that their services had been terminated had applied to join the companies as new employees on fresh contracts of employment. Therefore they had accepted the position that their services had been terminated by letter R25 dated 14th April, 1988. Of them it appears that R. N. E. Nazar and S. Mohamed had accepted all monetary payments due to them for their service to the companies and are employed in the companies as new employees on fresh contracts of employees as evident from R122 A and R129".

In this state of the evidence I am unable to accept the contention of the 1st respondent that he had carefully considered the notes of the inquiry, the recommendations made by Mr. Wijeweera the Assistant Commissioner of Labour and of Mr. Dayaratne the Deputy Commissioner of Labour and made the Order dated 24th March, 1991 directing the petitioner to reinstate the workmen whose names appear in the Orders 'X17' & 'X18'. For had he done so, in my view, he could not have directed the reinstatement of R. N. E. Nazar and S. Mohamed who had withdrawn their complaints and secured re-employment in the petitioner-appellant companies under new contracts of employment.

Learned state counsel who appeared for the 1st & 2nd respondents during the course of his submissions conceded that at the point of departure the petitioner-appellants should have been given an opportunity of challenging the new material that was taken into consideration by the Commissioner when deviating from the recommendation made by the Assistant Commissioner who held the inquiry, but however, submitted that there was no duty on the Commissioner to have given reasons for his Order in the absence of a statutory requirement to do so.

I am unable to agree with this contention. This question was considered in the case of *Karunadasa v. Unique Gem Stones Limited and Others*[2] at 260 where attention was drawn to the following extracts from Wade – Administrative Law 7th edition dealing with reasons for decision:

> "The principles of Natural Justice have not in the past included any general rule that reasons should be given for decisions. Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural Justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others . . . (at 541–542 cited with approval in *Ratnayake v. Fernando*[3]).
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> Although there is no general rule of law requiring the giving of reasons, an administrative authority may be unable to show that it has acted lawfully unless it explains itself. . . Going still further the Privy Council held that a Minister who had failed to give reasons for a special tax assessment had not shown that it was correct and that the taxpayer's appeal must be allowed (citing *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*[4] An award of abnormally low compensation to an unfairly dismissed prison officer by the Civil Service Appeal Board, which made it a rule not to give reasons, was quashed by the Court of Appeal, holding that Natural Justice demanded the giving of reasons both in deciding whether the dismissal was unfair and in assessing compensation,

since other employees were entitled to appeal to industrial tribunals which were obliged by law to give reasons (*Rex v. Civil Service Appeal Board ex p. Cunningham*)[5] at 543.

In a series of cases it has been held that statutory tribunals must give satisfactory resons in order that the losing party may know whether he should exercise his right of appeal on a point of law . . . the House of Lords held that a life prisoner was entitled to be told the Home Secretary's reasons for rejecting the advice of the trial judge as to the penal element in the sentence (citing *R. v. Home Secretary ex p. Doody*)[6] the House of Lords has indicated that if a Minister fails to explain a decision satisfactorily, it may be condemned as arbitrary and unreasonable (citing *Padfield v. Minister of Agriculture, Fisheries and Food*[7]).

"Although the lack of a general duty to give reasons is recognised as an outstanding deficiency of administrative law, the judges have gone far towards finding a remedy by holding that reasons must be given where fairness so demands; and the decisions show that may now be the case more often than not. It has been held at first instance that English law has now arrived at the point where the duty to act fairly imparts at least a general duty to give reasons, subject to necessary exceptions, and this conclusion seems well justified. (at 544 – 545)".

The 1st respondent in his affidavit takes up the position that he is not required to give reasons for his order but having regard to the above citations I am unable to agree and I am of the view that giving reasons for his order becomes all the more important because it was not he who held the inquiry and recorded the evidence.

On a consideration of the submissions made and for the reasons stated I am of the view that this appeal should be allowed. Therefore I set aside the judgment of the Court of Appeal dated 27.6.94 and quash the orders of the 1st respondent marked 'X17' & 'X18' dated 24.5.91. There will be no costs.

G. P. S. DE SILVA, CJ. – I agree.

WIJETUNGA, J. – I agree.

Appeal allowed; Commissioner's order quashed.