

PRADEEP
vs
SKYSPAN ASIA (PVT) LTD AND OTHERS

COURT OF APPEAL
IMAM, J. AND
SRISKANDARAJAH, J.
CA 2045/2003 (WRIT)
MAY 19, 2005

Writ of certiorari – Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971–Application under section 5 and 6 – Termination of employees while the application to terminate was pending before the Commissioner - Legality ? Employer terminating the services of the employee without permission from Commissioner of Labour –Could compensation be awarded ? – Difference between a section 5 order and a section 6 order – termination retrospectively.

The 1st respondent employer made an application seeking permission from the Commissioner to terminate the services of the employees ; while the inquiry was pending the wages of the employee were stopped. The employees complained that their services were terminated without permission of the Commissioner. This was inquired into and after inquiry, the Commissioner after holding that the services of the employees were terminated without consent of the employees and further as the employer had not obtained prior approval of the Commissioner, awarded compensation to the employees.

The petitioners sought to quash the said order and a direction to the Commissioner to make an order under section 6 against the 1st respondent employer.

HELD:

- (1) The Commissioner had held that the termination of the employment of the employees is null and void ; if so then the employees are deemed to be in service.
- (2) The Commissioner's power under section 6 is to specify a date for the employees to report for work and direct the employer to continue to employ the workmen with effect from that date in the same capacity in which the workmen were employed prior to such termination and to pay the workmen their wages and all other benefits which the workmen would have otherwise received if their services had not been so terminated.
- (3) Construction of section 6 read with section 5 does not empower the Commissioner to grant permission to the employer to terminate the services of the employee and to order compensation.
- (4) The Commissioner has no reason to order compensation in lieu of ordering the employer to continue to employ the workman.
- (5) The 1st respondent had made an application seeking permission to terminate the services of the employees under section 2 (b), and it appears that the Commissioner had amalgamated the section 2 (b) application and the complaint made by the employees under section 6 and had made the impugned order.

HELD FURTHER :

- (6) The Commissioner had by the impugned order granted approval to terminate the employment of the workmen petitioners retrospectively which the Commissioner is not empowered to do.
- (7) There is no provision in the Act to deal with a situation where the employee has become incapable of assuming duties due to various circumstances at the time of the determination of the Commissioner that the employer had terminated the services of the employee in contravention of the Act.

APPLICATION for writs in the nature of certiorari/mandamus.

Case referred to :

- (1) *Eksath Kamkaru Samithiya vs. Commissioner of Labour 2001 2 Sri LR 137 at 142 & 155.*
- (2) *Blanka Diamonds (Pvt.) Ltd. vs. Coeme 1996 1 Sri LR 200 at 2005*
- (3) *Lanka Multi Moulds (Pvt.) Ltd. vs. Wimalasena, Commissioner of Labour and others 2003 1 Sri LR 143*

*S. Sinnathamby with Jayanthy Ganashamoorthy for petitioners.
Gomin Dayasiri with S. Gamage for 1st respondent.
Sumathi Dharmawardane, State Counsel for 2nd and 3rd respondents.*

Cur. adv. vult.

June 22, 2005.

SRISKANDARAJAH, J.

The Petitioners in this application have sought a writ of certiorari to quash the Order of the 3rd Respondent dated 16.07.2003 and a mandamus directing the 3rd Respondent to make an order under section 6 against the 1st Respondent.

The Petitioners and the 4th and 5th Respondents (hereinafter referred to as employees) were employed by the 1st Respondent. The 1st Respondent made an application on 22.11.2002, seeking permission from the Commissioner of Labour to terminate the services of the employees. An inquiry was held by the Deputy Commissioner of Labour Daya Senaratne. While the inquiry was pending, the wages of the employees was stopped by the 1st Respondent from April 2001. The employees complained to the Commissioner of Labour by letter dated 22.05.2001 P2, that their services have been terminated without the permission of the Commissioner in contravention of the provisions of the Termination of Employment of Workmen (Special Provisions) Act. The Deputy Commissioner of Labour proceeded to inquire into the complaint of the employees. The Deputy Commissioner after a protracted inquiry on the aforesaid complaint of the employees made order on 16.07.2003 P11. In his order he has come to the conclusion that the 1st Respondent when terminating the services of the employees had neither obtained written consent of the workmen nor

obtained prior approval of the Commissioner of Labour ; therefore the 1st Respondent violated the provisions of the Termination of Employment of Workmen (Special Provisions) Act. Thereafter he has proceeded to award compensation to the employees calculated on the basis of two-month salary for each completed year of services.

Section 5 of the Termination of Employment of Workmen (Special Provision) Act, provides ; where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever. The Deputy Commissioner in his order P 11 has come to the conclusion that the 1st Respondent (Employer) has terminated the employment of the employees in contravention of the provisions of the said Act. Therefore the termination is illegal, null and void and of no effect whatsoever. If the termination of the employment of the employees is null and void then the employees are deemed to be in service. The Commissioners power under section 6 is to specify a date for the employees to report for work and to direct the employer to continue to employ the workmen, with effect from that date in the same capacity in which the workmen were employed prior to such termination, and to pay the workmen their wages and all other benefits which the workman would have otherwise received if his services had not been so terminated. The construction of section 6 read with section 5 does not empower the Commissioner to grant permission to the employer to terminate the services of the employee and to order for compensation. In *Eksath Kamkaru Samithiya vs. Commissioner of Labour*¹ U. de. Z. Gunawardane, J. observed :

“Section 5 renders any termination of employment in contravention of the relevant Act absolutely illegal. And section 6 states that the Commissioner “may order the employer to continue to employ the workmen” in case the termination was in breach of the provisions of the Act. Although the word “may” taken in isolation express permission or liberty, yet that term “may” acquires a compulsory force in circumstances where, a duty devolves on the authority to exercise that power which that authority was permitted or enabled by the statute to exercise”

U. de. Z. Gunawardane, J held :

“The Commissioner will bear in mind, as noted above, that the duty to reinstate the workmen, as are the other duties *i. e.* to pay

“wages and other benefits” imposed upon him under section 6 of the Act, is mandatory and compulsory and that there is no option in the matter”

However, there is no provision in the Act to deal with a situation where the employee has become incapable of assuming duties due to various circumstances at the time of the determination of the Commissioner that the employer had terminated the services of the employee in contravention of the Act. The Courts have interpreted the word “may order” in section 6 in these circumstances empowering the Commissioner to order compensation instead of ordering the employer to continue to employ the workman. In *Blanka Diamonds (Pvt) Ltd. vs Coeme*² at 2005 Senanayake J observed :

“The Commissioner in terms of section 6 of the T. E. Act has a discretion in view of the word used in section 6. The words used are ‘may order’ and not ‘shall order’. The Legislature in its wisdom had given the Commissioner a discretionary power as each case has to depend on various factors and circumstances. The word ‘may order’ was considered in an unreported case the *Ceylon Mercantile Union vs Messers Vinitha Limited and the Commissioner of Labour*, decided on 29th March, 1976. Tennakoon, C. J. observed “the words in the section are ‘may order’ and not ‘shall order’ the legislature obviously did not contemplate that in every case of Termination of Employment without the permission of the Commissioner of Labour, it would be mandatory on the Commissioner to order re-instatement or continuance of employment upon a complaint being made to him under section 6. “ I am bound by the interpretation given by the Bench of three Judges of the Supreme Court. **In the instant case the 1st Respondent was an expatriate and his visa was granted for a specific period.** Therefore, it is my view the circumstances and facts of each case have to be considered on its own merits and the Commissioner in those circumstances considering section 6 exercised his discretion without making an order for continuance of service. Therefore I am of the view that the submission of the learned Counsel for the Petitioner giving a restrictive interpretation to section 6 of the T. E. Act has no merit.” (Emphasis added)

*Lanka Multi Moulds (Pvt) Ltd. Vs. Wimalasena, Commissioner of Labour and others*³. In this case the 2nd Respondent (the workman) a British national was employed by the appellant company (the employer) on 01.09.1992 on contract for a period of 3 years. The employer terminated

the employment of the workman with effect from 30.07.1994. On 22.11.1995, the Commissioner ordered re-instatement of the workman with effect from 15.01.1996 with back wages for 17 1/2 months from 30.07.1994 to 15.01.1996 a sum of Rs. 3,533,750. The Court of Appeal affirmed the order that the termination of employment is illegal for want of prior consent of the workmen under section 2(1) (a) of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971. The court quashed the order for re-instatement and reduced back wages to 13 months (The balance period of the contract of three years).

Fernando, J. held in the above case :

“I hold that “may” in section 6 confers a discretion on the Commissioner ; that “and” must be interpreted disjunctively ; and that **the Commissioner had the power to order payment of wages and benefits for the balance period of the 2nd Respondents contract without making an order for re-instatement.** The Court of Appeal was therefore entitled to order such payments when setting aside the order for re-instatement.” (Emphasis added)

In the instant case, the Commissioner has no reason to order for compensation in lieu of ordering the employer to continue to employ the workmen. As the workmen are not incapacitated in any way that deprives the Commissioner to order for continuous employment, the Commissioner should have ordered for continuous employment with wages and other benefits which the workmen would have otherwise received if their services had not been so terminated.

It appears from the proceedings that the 1st Respondent had made an application dated 22.11.2002, seeking permission from the Commissioner of Labour to terminate the services of the employees under section 2 (b) of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971. An inquiry was commenced in respect of this application but in the meantime, the 1st Respondent terminated the services of the workmen. On the complaint of the workmen that their services has been terminated in violation of the said Act, the Commissioner proceeded to inquire into that complaint under section 6 and made the impugned order dated 16.07.2003. In this order he has observed “due to non availability of orders the company has reached a stage of running at a loss. Therefore without re-employing the workmen compensation has to be paid to them”. The Commissioner could have arrived at this conclusion when granting permission to terminate the employment of the workmen under section 2(b) of the said Act. Under section 2(b) the Commissioner could grant permission to terminate the services of workmen and the termination would

have to come into effect only after the date of that order (granting permission) and not retrospectively.

It appears that the Commissioner has amalgamated section 2(b) application made by the 1st Respondent on 22.11.2002 and the complaint made by the employees under section 6 on 22.05.2001 and had made an order dated 16.07.2003, P 11. By this order the Commissioner has granted approval to terminate the employment of the workmen (Petitioners) retrospectively which the Commissioner is not empowered to do.

Hence, this court issues a writ of certiorari to quash the order dated 16.07.2003 marked P11 and issues an order of mandamus directing the 2nd and 3rd Respondents to grant permission to the 1st Respondent to terminate the services of the petitioners from a prospective specified date and order the 1st respondent to pay wages and other benefits up to the said date and to pay compensation as determined by the Commissioner in respect of the termination. This Court allows this application with out costs.

IMAM, J. – I agree.

Application allowed.
