JAYAWARDENA AND ANOTHER

v

PEGASUS HOTELS OF CEYLON LTD., AND OTHERS

COURT OF APPEAL
SALEEM MARSOOF PC, (P/CA) AND
SRIPAVAN, J.
C.A. 1871/2003
JUNE 8, 2004
JULY 5 AND 7, 2004

Termination of Employment of Workmen, (Special Provisions) Act, No. 45 of 1971, sections 2(2) (a–d) and 12 – Application to terminate services approved subject to payment of compensation – Commissioner acting arbitrarily-Computing compensation – Order unreasonable – No proper inquiry – Does writ lie? – Applicability of the preclusive clause read with section 22 of Interpretation Ordinance, No 10 of 1972 – Ceiling on Housing Property Law, No.1 of 1972, section 39(3) compared-Finality of order – Rules of Court of Appeal, 1990, Rule 3 – Applicability – Who is a necessary party?

The 1st petitioner (employee) and the 2nd petitioner (Union) sought to quash the order made by the Commissioner giving approval to terminate the services of 36 employees subject to payment of compensation. It was contended that the Commissioner failed to apply the law correctly in computing compensation, acted arbitrarily, did not make "all inquiries" and the order was unreasonable.

The 8th respondent opposed the application and contended that all the employees are not named, especially those 30 employees who have accepted compensation, and that the record has not been tendered to court.

Held :

Per Saleem Marsoof, J. P/CA.

"There is no doubt that the 30 employees who have accepted compensation will be affected *but* it appears that the majority of them were members of the 2nd petitioner Union, which is entitled to represent them."

(1) There is not only failure to produce the "record" on the face of which the petitioners claim there is an error of law, but also non-compliance with Rule 3(1)(a), which justifies dismissal *in limine.*

(ii) The preclusive clause in section 2(2)(f) has to be interpreted in the light of section 22 of the Interpretation Ordinance.

Per Saleem Marsoof, J. P/CA.

> "The petitioner has not shown that the impugned decision is *ex-facie* not within the power conferred with the Commissioner *or* that there has been any failure to conform to the rules of natural justice *or* any mandatory provision of any law which is a condition precedent to the making of the award.

Application for writs of *certiorari* and *mandamus.*

Cases referred to:

(1) *Sukumaran* v *The Maharaja Organisation and two others* CA No. 1684/2003 - of 30.08.2004.

(2) *Ramasamy* v *Ceylon State Mortgage Bank* – 78 NLR 510

(3) *Karunaratne* v *Commissioner of Co-operative Development* – 79(2) NLR 193

(4) *Abeyadeera and 162 others* v *Dr. Stanley Wijesundara – Vice Chancellor, University of Colombo and another* – (1983) 2 Sri LR 267

(5) *Ravaya Publishers and others* v *Wijedasa Rajapakse, Chairman Sri Lanka Press Council and others* – (2001) 3 Sri LR 213

(6) *Prabath Varma* v *State of Utara Pradesh* – AIR (1983) SC 167

(7) *Hewagam Korale East Multipurpose Co-operative Society Ltd., Hanwella* v *Hemawathie Perera and another* – (1986) 1 CALR 535

(8) *Virakesari Ltd.* v *Fernando* – 66 NLR 145

(9) *Baldwin & Francis Ltd.,* v *Patents Appeal Tribunal and others* - (1959) 2 A11 ER 433

(10) *Wijerama* v *Paul* – 76 NLR 241

(11) *Jayaweera* v *Asst: Commissioner of Agrarian Services, Ratnapura and another* – (1996) 2 SRI LR 70.

(12) *Brown & Co.Ltd., and others* v *Ratnayake, Arbitrator and others* – (1994) 3 SRI LR 91

(13) *Blanca Diamonds (Pvt)Ltd.,* v *Wilfred Van Else and others* – (1997) 1 SRI LR 360 at 362

(14) *Alphonso Appuhamy* v *Hettiarachchi* – 77 NLR 131

(15) *Manickam* v *Permanent Secretary, Ministry of Defence and External Affairs* – 62 NLR 204

(16) *Samalanka Ltd.,* v *Weerakoon, Commissioner of Labour and others*- (1994) 1 SRI LR 405

(17) *Moosajees Ltd.,* v *Arthur and others* – (2001) 2 SRI LR 401

(18) *Wijewardena* v *People's Bank*, SL Appeal 3/80 Scm 20.05.1981.

(19) *Perera* v *Lokuge* – (1996) 2 Sri LR 282

(20) *Sittamparanathan* v *Premaratne* – (1996) 2 SRI LR 202

(21) *Edmund* v *D.S. Fernando* – (1995) 1 SRI LR 407

(22) *Pure Beverages Company Executive Officers Association* v *Commissioner of Labour* – (2001) 2 SRI LR 258 (Distinguished)

(23) *Anisminic Ltd.,* v *Foreign Compensation Commission* – (1969) AC 147

(24) *Abeywickrema* v *Pathirana and others* – (1986) 1 SRI LR 120

N.D.R. Cassie Chetty for 1st and 2nd petitioners.

M.A. Sumanthiran with *Vijula Arulanatham* for 1st and 2nd respondents.

B.S. Mahendran State Counsel for 3rd respondent.

Cur.adv.vult

September 23, 2004

SALEEM MARSOOF, P.C.(P/CA)

The 1st petitioner to this application admittedly was an employee of the 1st respondent, Pegasus Hotels of Ceylon Ltd which is managed by the 2nd respondent, Carsons Management Services (Pvt) Ltd. The 2nd petitioner is a registered trade union which rep- 01

resented the 1st petitioner and 35 other workmen of the 1st respondent company at an inquiry conducted on the directions of the 3rd respondent, Commissioner of Labour with respect to the application dated 4th July 2002 (P1) made by the 2nd respondent in terms of section 2(a) of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, as subsequently amended. It is common ground, that the 2nd respondent, Carsons Management Services (Pvt) Ltd, managed the business of the 1st respondent Pegasus Hotels of Ceylon Ltd, and also made the aforesaid application for the approval of the 3rd respondent for the termination of the scheduled employment of 60 employees of the 1st respondent including the 1st petitioner. The said application was supported by the affidavit of Deannath Jehan Kulatunge, a Director of Carsons Management Services (Pvt) Ltd, a copy of which affidavit has been produced marked P2. It appears from the said affidavit that the termination of the services of the workmen in question was sought on the ground that the business of Pegasus Hotel of Ceylon Ltd had run at a loss mainly by reason of the destruction of the prime beach frontage of the Pegasus Reef Hotel due to sea erosion. The said affidavit also states that the problem was aggravated by the condition of the approach road to the Hotel and its surroundings. The accumulated loss of the Pegasus Hotels of Ceylon Ltd as at 30th June 2002 amounted to Rs. 69,684,246 which necessitated restructuring of the operations of the hotel. The termination of services of the said employees of the Pegasus Reef Hotel was sought to be justified by the 1st and 2nd respondents on the need to "downsize its operations to about 50 rooms".

The 3rd respondent noticed the 1st petitioner and the 59 other employees to appear before him for an inquiry. The inquiry into the said application was conducted by the Assistant Commissioner of Labour (Termination Unit) M.N.S. Fernando. The 2nd petitioner initially represented most of the affected workmen at the inquiry, but towards the end of the inquiry only 36 employees, including the 1st petitioner, were interested in the proceedings as the others had been either re-employed by the 2nd respondent or had died, retired from service or were dismissed for misconduct. In the course of the said inquiry a further affidavit from an Accountant employed by the 2nd respondent, Chaminda Shalike Karunasena

was tendered marked P4, and the said Karunasena gave evidence regarding the financial position of the 1st respondent. Although as stated in paragraph 6 of the 3rd respondent's affidavit filed in these proceedings, the said Accountant was "one among many other witnesses" called by the petitioners, only a copy of that part of the proceedings containing the evidence given by the said Accountant was produced marked P4A with the petition and affidavit of the petitioners. The entire record of proceedings containing all the evidence led at the inquiry and the recommendations made by the said M.N.S. Fernando to the 3rd respondent were not made available to Court by any of the parties. By the letter dated 31st July 2003 marked P8 the 3rd respondent gave his approval to the 1st and 2nd respondents for the termination of the services of the aforesaid 36 employees with effect from 15th August 2003 subject to payment of compensation. Annexed to the said letter was a separate schedule marked P8A indicating the compensation payable to the individual employees. The quantum of compensation was computed at the rate of 3 months salary for every completed year of service subject to a ceiling of 50 months salary. The total compensation package exceeded Rs.3 Million. The 3rd respondent has stated in his order his reasons for the said approval, one of which was the loss caused by sea erosion to the business of the 1st respondent.

The learned Counsel for the 1st and 2nd petitioners submitted that the petitioners are entitled to a mandate in the nature of *certiorari* to quash the impugned decision of the 3rd respondent contained in the letter marked P8 read with the schedule marked P8A, and an order in the nature of *mandamus* to compel the 3rd respondent to use the powers conferred by section 12 of the Termination of Employment of Workmen (Special Provisions) Act, and summon all witnesses and obtain all documents as may be necessary in order to arrive at a proper and reasonable decision and apply the law and the principles embodied in the said Act. The petitioners have alleged in their petition and affidavit that the evidence given by the said Accountant Karunasena and the Financial Statements produced at the said inquiry marked P5 did not bear out what the aforesaid affidavits of Kulatunge and Karunasena had stated, and the 3rd respondent failed to draw the necessary inferences from the testimony of the

Accountant of the 2nd respondent. Learned Counsel for the petitioners submitted that the document marked P8 shows that the 3rd respondent has failed to apply the law correctly in computing the compensation for the termination of employment of the employees affected. He submitted that evidence collected did not support the decision of the 3rd respondent and the decision is one, which no reasonable person could have made on the basis of the evidence that was led at the inquiry held by the 3rd respondent. The main submission of the petitioners is that the 3rd respondent has acted arbitrarily in arriving at the quantum of compensation payable to petitioners without inquiring into the prospects of future employment of the workman and the loss that would be sustained by the 1st petitioner and the 35 other employees.

Learned Counsel for the petitioners has further submitted that the 3rd respondent failed or refused to summon as witnesses any of the agents who managed the hotel up to the 30th September 2002, especially John Keels Hotel Management Ltd, whose contract was terminated on 30th September 2002 while the inquiry was in progress. It has also been contended on behalf of the petitioners that the 3rd respondent failed or refused to summon as witness an officer from Carson Cumberbatch & Co.Ltd, which is the owner and directing and controlling mind of the 1st respondent, especially after it was brought to the notice of the Commissioner that the said Carson Cumberbatch & Co Ltd had expressed its intention or desire to sell or dispose of the Hotel and in fact had taken steps to sell its controlling interest. The learned counsel for the petitioners also complained that the 2nd respondent failed or refused to ascertain whether in fact and in law the said Carson Cumberbatch & Co.Ltd was the employer of the 1st petitioner and the other employees whose services were sought to be terminated. In this context it is necessary to observe that the Commissioner of Labour is not bound in the course of an inquiry under the Termination of Employment (Special Provisions) Act to "make all such inquiries" like an Arbitrator to whom a dispute is referred under section 4(1) of the Industrial Disputes Act whose role was examined by this Court recently in *Sukumaran* v *The Maharaja Organisation and two others.*(1) The Commissioner of Labour has to act on the evidence presented to him in the course of the inquiry. The

grounds urged by the petitioners in their petition in support of the relief prayed for may be briefly summarized as follows:-

(a) The alleged failure of the 3rd respondent "to apply the law correctly in computing the compensation" (Paragraph 14 of the petition);

(b) "The 3rd respondent has acted arbitrarily in arriving at the compensation payable ..... without inquiring into the 1st petitioner's prospects of future employment, the loss that would be sustained by termination and other circumstances....." (Paragraph 16 of the petition);

(c) The alleged failure of "the evidence collected" to support the decision of the 3rd respondent (Paragraph 15 of the petition);

(d) The decision of the 3rd respondent "is one which no reasonable person could have made on the basis of the evidence adduced" (Paragraph 15 of the Petition); and

(e) "The alleged failure of the 3rd respondent to "exercise his discretion in determining whether the application dated 4.7.2002 made by the 2nd respondent was in good faith or genuine". (Paragraph 14 of the Petition).

Learned State Counsel appearing for the 3rd respondent Commissioner of Labour emphasized that as 30 of the 36 employees mentioned in P8A have without protest withdrawn the compensation awarded to them, a fact which at least the 2nd petitioner was bound to have disclosed in view of the discretionary nature of the relief prayed for by the petitioners, the petitioners are not entitled to maintain this application as the said 30 employees are not named as respondents to this application. Reference was made to the decisions in *Ramasamy* v *Ceylon State Mortgage Bank*[2], *Karunaratne* v *Commissioner of Co-operative Development*[3] and *Abayadeera and 162 others* v *Dr. Stanley Wijeysundera, Vice Chancellor, University of Colombo and another*[4] for the proposition that the non-citing of necessary parties was a fatal irregularity. In fact in the later decision of *Ravaya Publishers and other* v *Wijedasa Rajapaksha, Chairman, Sri Lanka Press Council and others* [5] J.A.N. de Silva J. observed at 216 that-

"In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings..... It has also been held that persons vitally affected by the writ petition are all necessary parties. If their number is very large, some of them could be made respondents in a representative capacity (*Vide Prabodh Verma* v *State of Uttara Pradesh*(6) also see Encyclopedia of Writ Law by B.M. Bakshi)".

There is no doubt that the 30 employees who have accepted the compensation will be vitally affected by the decision in these proceedings as the petitioners have prayed for the quashing of the order marked P8 and P8A whereby the compensation was awarded, but it appears that the majority of them were members of the 2nd respondent trade union, which is entitled to represent them. *Vide, Hewagam Korale East Multi-Purpose Co-operative Society Ltd, Hanwella v H.Hemawathie Perera and another* (7).

Learned Counsel for 1st and 2nd respondents submitted that as the petition and affidavit of the petitioners do not refer to any grounds that nullify the order made by the 3rd respondent, the petitioners cannot canvass the findings of the 3rd respondent unless they establish that the impugned order is vitiated by error of law on the face of the record. He further submitted that the petitioners have failed to place before this Court the impugned "record" in its entirety. Learned Counsel referred to the decision in *Virakesari Ltd* v *Fernando*(8) in which Weerasooriya, SPJ., having observed at page 150 of the judgement that the order of an inferior tribunal "is liable to be quashed by writ of *certiorari* for an error of law appearing on the face of the record" went on to quote with approval the *dicta* of Lord Denning in *Baldwin & Francis Ltd.* v *Patents Appeal Tribunal and others* (9) "there should be included in the record, not only the formal order, but all those documents which appear therefrom to be the basis of the decision - that on which it is grounded." In that case, Weerasooriya SPJ., went on to hold that "the evidence taken at the inquiry held by the Authorized Officer is a document forming part of the record, for the award on the first point in dispute refers to, and purports to be made on the basis of, such evidence".

Learned Counsel for the 1st and 2nd respondents also referred to the decision of the Court of Appeal in *Wijerama* v *Paul*[10] in which Fernando, J. commented at page 255 that "if absence of evidence to support the decision constitutes error of law, we find no little difficulty in imagining how error of law on that ground can ever be established if the supervising court cannot look at the evidence, even where it is available." Learned Counsel submitted that a similar position has arisen in this case too due to the failure of the petitioners to produce the original or a duly certified copy of the entire record of proceedings before the 3rd respondent.

It must be mentioned that learned Counsel for the 1st and 2nd respondents did not rely on Rule 3 (1) (a) of the Court of Appeal (Appellate Procedure) Rules, 1990 which requires that every application made to the Court of Appeal for prerogative relief under Article 140 of the Constitution (as in the instant case) shall be "by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits." However learned State Counsel appearing for the 3rd respondent relied heavily on Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rules, and referred to the decision of the Court of Appeal in the case of *Jayaweera* v *Asst. Commissioner of Agrarian Services Ratnapura and Another*[11] in the context of an application to quash an order on the ground that no notice of inquiry had been given, Jayasuriya, J. observed at pages 71 to 72 as follows:-

> "If actually no notice was.... served, it was open to the petitioner, to file a certified copy of the entire proceedings with the journal entries with a view to substantiate his assertion so that this court would be in a position to exercise its supervisory jurisdiction. It appears that the petitioner has with deliberate design and ingeniously resorted to the practice of not filing these exhibits which are necessary for the exercise of supervisory jurisdiction by this court."

Learned Counsel for the 1st and 2nd petitioners also referred to Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rules, 1990 and sought to compare it with Rule 3(1) (b) of these Rules which provide that every application by way of revision or *restitutio*

in integrum under Article 138 of the Constitution shall be made "in like manner together with copies of the relevant proceedings (including pleadings and documents produced)..... to which such application relates." It was the contention of the learned Counsel for the petitioners that with respect to an application for a mandate in the nature of a prerogative writ only originals or duly certified copies of documents material to such application need to be annexed to the petition and supporting affidavit of the petitioners, and the entire record need not be produced. He also submitted that P8 was a "speaking order" which can be challenged by itself.

In *Brown & Co Ltd and others* v *Ratnayake, Arbitrator and others* (12) which dealt with Rule 46 of the Supreme Court Rules of 1978, the forerunner to the Supreme Court Rules quoted above, in the context of an application for *certiorari*, a preliminary objection was initially taken in the Court of Appeal on the ground that a certified copy of the proceedings had not been filed as required by the said Rule. Counsel for the petitioner in that case (as did the learned Counsel for the petitioners in this case) insisted that certified copies of documents material to the case had been filed and that they would stand or fall by those exhibits. The Court took the view that it would become necessary for the Court to decide whether a particular document was material to the case or not and to decide that the court had to enquire into the application as it can be decided only in the course of the hearing. However, when the matter was taken up for argument on the merits, Counsel for the petitioner had sought to refer to contents of proceedings and documents not tendered and strenuously opposed by respondents. In those circumstances, the court dismissed the application for non-compliance with Rule 46. In affirming the decision of the Court of appeal, Bandaranayake, J. observed as follows at page 102 of the judgement-

> "In these circumstances the Court below was entitled to refuse to proceed further with the application. Appellant's present submission that he could proceed upon the 10 documents tendered is contradicted by the facts and circumstances placed before us. The order of dismissal was a proper order that the Court could fairly have made."

It has to be observed in this context that it is the view of this Court that none of the grounds of challenge taken up by the peti-

tioners in their pleadings can be established through the documents they have chosen to place before this Court, and there is not only a failure to produce the 'record' on the face of which the petitioners claim there is an error of law but also non-compliance with Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules, 1990 which justifies the dismissal of this application *in limine*. As has been emphasized over and over again by our Courts, prerogative writs are discretionary remedies which require full disclosure on the part of those seeking to invoke these remedies. As Jayasuriya, J. observed in *Blanca Diamonds (Pvt) Ltd* v *Wilfred Van Else & others* (13).

> "In filing the present application for discretionary relief in the Court of Appeal Registry, the petitioner company was under a duty to disclose (*uberrima fides*) all material facts to this Court for the purpose of this Court arriving at a correct adjudication of the issues arising upon this application. In the decision in *Alponso Appuhamy* v *Hettiarachchi* (14) Justice Pathirana, in an erudite judgement, considered the landmark decisions on this province in English Law, and cited the decisions which laid down the principle when that a party is seeking discretionary relief from the Court upon an application for a *writ of certiorari*, he enters into a contractual obligation with the Court when he files an application in the registry and in terms of that contractual obligation he is required to disclose *uberrima fides* and disclose all material facts fully and frankly to this Court....."

There remains the argument advanced on behalf of the petitioners that the impugned order marked P8 is a 'speaking order' which can be quashed on it being demonstrated that the purported reason on which it is based is erroneous in law. In *V. Manickam* v *The Permanent Secretary, Ministry of Defence and External Affairs* (15) the Supreme Court held that the order made by the prescribed officer was a 'speaking order' on the face of which appeared the ground in support of it. However, as the said ground was bad in law, the Court quashed the order for error of law on the face of the record. In the instant case, the 3rd respondent has set out in P8 several reasons for the decision to allow the application to terminate the services of the workmen in question on payment of compensation as *per* schedule in P8A. The main reason for approving

the application to terminate the services of the workmen, as stated in the said order was the financial crisis faced by the employer on account of the business of Pegasus Hotel of Ceylon Ltd running at a loss due to the destruction of the prime beach frontage of the hotel due to sea erosion and the general reduction in tourist arrivals from abroad. Learned Counsel for the 1st and 2nd petitioners has not been able to demonstrate that the said reasons set out in P8 are bad in law.

It is necessary to add that there is a much more fundamental flaw in the application of the petitioners to this Court. The impugned decision of the 3rd respondent contained in P8 and P8A was made under section 2(2)(a) to (d) of the Termination of Employment of Workmen (Special Provision) Act, Section 2(2)(f) of the said Act expressly provides that-

> "Any decision made by the Commissioner under the preceding provisions of this subsection shall be final and conclusive, and shall not be called in question whether by way of writ or otherwise:-
>
> (i) in any court, or
>
> (ii) in any court, tribunal or other institution established under the Industrial Dispute Act."

In view of the fact the petitioners have invoked the jurisdiction of this Court by way of a writ application, this Court will *prima facie* be precluded from reviewing the decision of the 3rd respondent Commissioner of Labour. However the aforesaid provision of law has to be interpreted in the light of section 22 of the Interpretation Ordinance, No. 21 of 1901, as amended by section 2 of Act, No. 18 of 1972. Section 22 of the Interpretation Ordinance provides as follows:-

> "Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court" or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue

under such enactment, no court shall in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal:

Provided, however, that the preceding provisions of this section shall not apply to the Supreme Court or the Court of Appeal, as the case may be, in the exercise of its powers under Article 140 of the Constitution of the Republic of Sri Lanka in respect of the following matters, and the following matters only, that is to say-

a) Where such order, decision, determination, direction or finding is *ex facie* not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and

b) Where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to confirm to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Supreme Court or the Court of Appeal, as the case may be, is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:

Provided further that the preceding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 141 of the Constitution of the Republic of Sri Lanka to issue mandates in the nature of *writs of habeas corpus*."

This provision has been interpreted in several decision of our Courts, but it would suffice if reference is made to the decision of the Supreme Court in *Samalanka Ltd* v *Weerakoon, Commissioner of Labour and others*(16) and two more recent decisions of the Court of Appeal. In the *Samalanka* case, an application was made for a writ of *certiorari* to quash the decision of the Commissioner of Labour under section 2(2) of the Termination of Employment of Workmen (Special Provisions) Act on the ground that the award of

15 months gross salary for each workman was unjustified as it was fixed arbitrarily and no reasons were given. The Supreme Court refused to go into the question whether there was any error on the face of the record in view of the finality clause in section 2(2)(e) of the Act. Kulatunga, J. observed as follows at pages 411 to 412 of the judgement-

> "I hold that the inquiry held by the 2nd respondent was under section 2(2). At the conclusion of the inquiry the 1st respondent by his letter dated 22.10.84 approved the termination of services with effect from 31.10.1984 subject to the payment of compensation, in addition to gratuity payable in terms of the law. In terms of S. 2(2)(e) such order is made by the Commissioner "in his absolute discretion" and section 2(2)(f) provides that such decision "shall be final and conclusive, and shall not be called in question whether by way of writ or otherwise." In view of this preclusive clause read with section 22 of the Interpretation Ordinance the appellant cannot impeach the decision on the ground of 'error of law on the face of the record".

In *Moosajees Ltd* v *Arthur and others*[17] Court of Appeal adopted the same approach in the context of the preclusive clause found in section 39(3) of the Ceiling on Housing Property Law, No.1 of 1973 read with section 22 of the Interpretation Ordinance. Upholding the argument that the Court had no jurisdiction to review the order of the Board of Review in the circumstances of that case, J.A.N. de Silva, J. made following pertinent observation at pages 105 to 107 of the judgement-

> Learned Counsel submitted without conceding that even if there is an error in the decision of the Board of Review it is an 'intra jurisdictional' error which precludes judicial review. Generally speaking preclusive clauses are strictly construed and there is a presumption in favour of judicial review. As Professor Wade in his book *Administrative Law* states, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the power of Court. Our Courts too have adopted this policy. In *Wjewardena* v *People's Bank*[18] Justice Sharvananda (as he was then) considered the scope of section 22 of the Interpretation Ordinance as amended and stated that "in my

view section 22 of the Interpretation Ordinance has no application when the question of jurisdiction to make the impugned order is in issue, when the order or determination is outside or in excess of jurisdiction of the tribunal." However a more liberal view has been expressed in *Perera* v *Lokuge*[19] and *Sittamparanathan* v *Premaratne* [20] where it had been stated that mere excess of jurisdiction is not sufficient to succeed but there must be patent lack of jurisdiction. Again in *Edmund* v *D.S. Fernando* [21] the Supreme Court at 413 held as follows "The Court of Appeal could have granted the writ only if it was permissible for that Court to act under the 1st Proviso to section 22 of the Interpretation Ordinance....." In the instant case it was not the contention of the Counsel for the petitioner that the determination of the Board of Review which was sought to be quashed was "ex facie" not within the power conferred on the Board of Review under section 39 of the said law nor did the petitioner contend that the Board of Review failed to conform to the rules of natural justice."

These decisions have to be contrasted with the decision of this court in *Pure Beverages Company Executive Officers Association* v *Commissioner of Labour* [22]. The Pure Beverages Company sought to terminate the services of its employees attached to the Kaduwela Factory. The petitioner had come to know that, a Deputy Commissioner of Labour, was inquiring into this matter and as some members of the Petitioners Association were named as persons whose employment was to be terminated, the Deputy Commissioner had noticed the Petitioners Association requesting it to participate, if so desired. The petitioner informed the Deputy Commissioner, that its members cannot participate without obtaining a legal opinion. However, the Commissioner of Labour had approved the termination of the services of all persons including the members of the Petitioners Association, although the Deputy Commissioner did not recommend the termination of the members of the Petitioners Association. It was contended on behalf of the Petitioners Association that the said decision is *ultra vires* and has been made in violation of the principles of natural justice. The respondent relied *inter alia* on the preclusive clause in section 2(2)(f) of the Termination of Employment of Workmen (Special

Provisions) Act. Rejecting this defence, Hector Yapa, J. observed at page 271 to 272 of the judgement that-

> "There is one other matter to be considered in this judgment. This arises from the submission of learned President's Counsel for the respondent Company that the decision of the Commissioner is final and conclusive having regard to section 2(2)(f) of the Termination of Employment of Workmen Act. Learned Counsel contended that the legislature has left the discretion of the Commissioner outside the jurisdiction of the Courts..... However it must be stated here that a decision made by the Commissioner without any regard to the available material and in violation of natural justice is a decision bad in law. Hence such a decision is in law a nullity and cannot stand. Therefore it is open to a court to declare such a wrong decision as void. In the case of *Anisminic Ltd.* v *Foreign Compensation Commission* (23) a majority of judges held that the wrong decision of the Commission on what they regarded as a "jurisdictional fact" vitiated the decision since the tribunal had exceeded its jurisdiction by this wrong decision. The ouster clause, therefore, was not applicable as there was no true determination by the tribunal as required by the statute." In the same case at page 170 Lord Reid stated as follows. "If you seek to show that a determination is a nullity, you are not questioning the purported determination – you are maintaining that it does not exist as a determination. It is one thing to question a determination which does exitst: it is quite another thing to say that there is nothing to be questioned." Also vide the case of *Abeywickrama* v *Pathirana and others* (24). Therefore this argument of learned President's Counsel has to fail."

The reasoning adopted by Yapa, J. cannot be followed in the present case as I find that the petitioners have not averred in their petition and affidavit, nor has their learned Counsel made any submissions to the effect, that the impugned decision is *ex facie* not within the power conferred on the Commissioner of Labour or that there has been any failure to conform to the rules of natural justice or any mandatory provisions of any law which is a condition precedent to the making of the said decision. Accordingly, the preclusive clause in section 2(2)(f) of the Termination of Employment of Workmen (Special Provisions) Act has to be applied in the present case with the consequence that the appli-

cation for *certiorari* has to be dismissed. In relation to the application for *mandamus* all that is necessary to say is that as upon making the impugned order P8 and P8A the 3rd respondent became *functus officio*, he cannot be compelled to make any further inquiries. For the foregoing reasons the Court dismisses the application filed by the petitioners with costs fixed at Rs.5,000/- payable by the 1st petitioner and Rs.12,500/- payable by the 2nd petitioner in equal shares to the 2nd and 3rd respondents. 500

SRIPAVAN, J. - I agree.

Application dismissed.