BROWNS ENGINEERING (PVT) LTD.
v.
COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
JAYASURIYA, J.
C.A. 628/96
TEU/A/45/94
TEU/A/46/94
TEU/A/43/94
TEU/A/44/94
TEU/A/57/94
FEBRUARY 7, 10 AND
MARCH 25, 1997

Writ of Certiorari – Termination of Employment of Workmen (Special Provisions) Act 45 of 1971 – Closure of business – Employees Petition the Commissioner of Labour – Compensation payable – Assessment.

The petitioner-company closed its business on 23. 11. 94 and informed the Commissioner of Labour (TEU) on 24. 11. 94 about the said closure. The employees petitioned the Commissioner of Labour that their services have been terminated without valid, lawful cause and without lawful justification. The Commissioner after inquiry awarded compensation.

Held:

(1) The petitioner-company was under legal liability to pay compensation to the displaced workmen.

(2) The employers' financial position is a relevant factor to be considered in the computation of the award of compensation and that an award becomes just and equitable only if such consideration is given effect to.

(3) As a result of the decision to effect such a closure without seeking the permission and approval of the Commissioner of Labour, the petitioner-company was under a legal liability, to pay compensation to the displaced workmen.

(4) Relief by way of certiorari in relation to award of compensation pronounced by the Commissioner of Labour will be available to quash such an award of compensation only if the Commissioner of Labour wholly or in part

assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of Natural Justice or pronounces an award which is eminently unreasonable or irrational or is guilty of a substantial error of law. The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order and if the Commissioner's award of compensation was not set aside in whole or in part it had to be allowed to stand unreversed.

"On an appeal the question is right or wrong? On review the question is lawful or unlawful."

APPLICATION for a Writ of Certiorari.

Cases referred to:

1. *Ceylon Tobacco Company Ltd., v. J. Illangasinghe* 1986 (1) Sri. L.L.R. 1 at page 4.
2. *Associated Newspapers of Ceylon Ltd. v. Jayasinghe* – 1982 – (2) Sri. L.L.R. 595 at 600.
3. *Jayasuriya v. Sri Lanka State Plantations Corporation* 1995 (2) Sri. L.L.R. 379.
4. *Ceylon Transport Board v. Wijeratne* – (1975) 77 NLR 481 at 496 and 498.
5. *Henderson & Co. v. Wijetunge* – SC 33/73, S.C. Minutes 21.3.75.
6. *Caledonian Ceylon Tea & Rubber Estates Ltd. v. Hillman* – 79 (1) NLR 421.
7. *Governing Body of Educational Institutes managed by the CMS in Ceylon – Ladies College v. Panutheran Thuraimugam* – SC 222/73, S.C. Minutes 22. 1. 76.
8. *Associated Newspapers of Ceylon Ltd., v. Mervyn Perera* CA Nos. 391–393/79 – CA Minutes 25. 9. 81.
9. *Karthigesu v. Sri Lanka Sugar Corporation* – 3 Sri. L.L.R. – page 42.
10. *Cyril Anthony v. Ceylon Fisheries Corporation* – S.C. 57/85 – SC Minutes 6. 3. 86.
11. *Silva v. Kuruppu* – SC 182/69 – S.C. Minutes 14.10.71.
12. *Saleem v. Hatton National Bank Ltd.,* 1994 3 Sri. L.L.R. 409.
13. *Independent Industrial and Commercial Employees Union v. Board of Directors of CWE* – 74 NLR page 344 at 350 – 353.
14. *The National Union of Workers v. The Scottish Ceylon Tea Company Ltd., and another* – 78 NLR 233 at 150 and 151.
15. *Colombo Paints Ltd., v. de Mel* (1) 76 NLR 381.
16. *Colombo Paints Ltd., v. de Mel* (2) 76 NLR 409.

R. K. W. Goonesekera with *J. C. Weliamune* for petitioner-company.

Daya Guruge with *Thusitha Guruge* for the 3rd respondent and the workmen 4th to 262nd respondents who are members of the 3rd respondent union.

Adrian Perera, SSC with *Allan Thambinayagam* S.C., for 1st and 2nd respondents.

Cur. adv. vult.

May 2, 1997

JAYASURIYA, J.

The petitioner-employer company has preferred this application seeking a writ of certiorari to quash the order of the first respondent dated 31st January, 1996 which has been produced marked as P14. The petitioner-company avers that it was compelled to close its business with effect from 23. 11. 94 and that the petitioner-compnay by its letter dated 24. 11. 94 informed the Commissioner of Labour (Termination of Employment Unit) about the said closure. The aforesaid letter has been produced marked as P6. Upon such closure, several workmen who were previously employed by the petitioner-company, petitioned the first respondent seeking reinstatement or compensation in lieu of reinstatement and these workmen alleged that their services have been terminated without valid and lawful cause and without lawful justification.

Upon the filing of such petitions, the second respondent to the application commenced an inquiry under the provisions of the Termination of Employment of Workmen (special provisions) Act No. 45 of 1971 (as amended). Although the services of 364 employees were terminated on account of the closure, 259 of such employees appeared before the second respondent in connection with the aforesaid inquiry and these employees were members of the third respondent-trade union. At the inquiry which commenced on 16. 12. 94, on behalf of the complainant-petitioners, workmen Yaddehi Aratchige Lalith Premalal, W. D. Fernando, S. T. M. N. Perera and B. A. D. Gaminiratne gave evidence and produced several documents marked as A1 to A15. Suresh Kumar Gunasingham, the Managing Director of the petitioner-company and who was also a director, Project Engineering Services Ltd. and R. Sharma, an accountant from Messrs. Ford Rhodes and Thornton, testified on behalf of the employer-company and produced several documents marked as R1 to R12. The parties to this inquiry also filed written submissions before the second respondent.

The first respondent, having considered the findings and recommendations of the second respondent, the proceedings, the documents produced at the inquiry and the written submissions filed by both parties, made his order on the 31st of January, 1996, which has been produced marked P14. In that order, the first respondent has ordered the petitioner-company to pay to the workmen who were represented by the third respondent trade union and who were referred to in the said order, the sums specified in the order in respect of each such workman who aggregated to 259 such employees.

It was conceded at the hearing and argument of this application that the petitioner-company had not made an application to the Commissioner of Labour seeking written permission from and approval of the Commissioner to effect the aforesaid closure. Had such an application been made, the Commissioner of Labour would undoubtedly have had the opportunity to inquire and investigate into the actual necessity for closure and also the opportunity to regulate and supervise the process of closure according to the attendant circumstances relating to the desired closure. That opportunity was denied due to the hasty and sudden decision of the petitioner-company to effect a closure without seeking such permission and approval. The petitioner-company in law had the right to take the aforesaid decision but when such a decision is taken, they are liable in law to pay compensation to the employees in terms of the provisions of section 6 (A) (1) of the Termination of Employment of Workmen (special provisions) Act. Learned counsel appearing for the petitioner conceded and acknowledged that as a result of such decision to effect such a closure without seeking the aforesaid permission and approval, the petitioner-company was under a legal liability to pay compensation to the displaced workmen. Therefore, in the course of his argument, learned senior counsel did not impugn the liability to pay compensation as determined by the first respondent but he assailed the order of the first respondent only in regard to the assessment of compensation and the quantum of compensation decreed in favour of the workmen.

In the matter of the assessment of compensation and the ascertainment of the quantum of compensation payable, the Commissioner of Labour has no doubt approached the problem before him in very much the same manner as a labour tribunal which is called upon to award compensation upon an application for unjust termination of services. Justice G. P. S. de Silva in *Ceylon Tobacco Company Ltd. v. J. Ilangasinghe*[1] at page 4 observed : "The powers conferred on the Commissioner of Labour under the aforesaid Act No. 45 of 1971 and the just and equitable jurisdiction of the labour tribunal are very similar . . . Thus, it is seen . . . that the Commissioner of Labour is empowered to make an order which is in many ways similar to the award that could be made by the labour tribunal". The petitioner closed its business and thereafter terminated the services of its workmen on 23. 11. 94. The order of the Commissioner of Labour was pronounced on 31. 1. 96. At the inquiry held by the second respondent, no blameworthiness or any form of fault or misconduct

whatsoever was ever imputed or alleged by the petitioner-company as against the employees. Thus, the closure of the business had no reference whatsoever to any blameworthiness, fault or misconduct on the part of the workmen. In such an eventuality, in the award of compensation, as *a mere item* in the award of compensation, the workmen are entitled in law, to the wages and salaries which they would have been entitled to but for the wrongful or unjust termination from the date of termination (which is 23. 11. 94) till the pronouncement of the order of this court. Vide the prudent observations laying down this proposition expressed by Justice Soza in *Associated Newspapers of Ceylon Ltd. v. Jayasinghe,*[2] at 600 and by Justice Amerasinghe in *Jayasuriya v. Sri Lanka State Plantations Corporation.*[3] Thus, *as a mere item* to be considered in the award of compensation, these workmen/employees are entitled to wages for a period of approximately 2 1/2 years as salary which they would have earned but for the wrongful termination from the date of termination till the pronouncement of the judgment of this court upon this application for the issue of a writ of certiorari where the award in their favour is still being impugned by the petitioner.

In the course of the argument, learned counsel for the petitioner suggested an award which fell far below the aggregate of the wages for a period of 2 1/2 years. The judicial precedents laid down by the Court of Appeal in regard to the quantum of compensation to be awarded to an employee in labour tribunal proceedings would be helpful to this court in considering the contention of learned counsel for the petitioner that the award of compensation in the instant case is excessive.These precedents reflect awards of compensation ranging from three years to seven years salary. An illuminating decision is the judgment of Justice Vaithyalingam in *Ceylon Transport Board v. Wijeratne,*[4] at pages 496 and 498 where His Lordship observed: "The Labour Tribunal should normally be concerned to compensate the employee for the damages he has suffered in the loss of his employment and legitimate expectations for the future in that employment, in the injury caused to his reputation, in the prejudicing of further opportunities. Punitive considerations should not enter into its assessment except, perhaps, in those rare cases where very serious acts of discrimination are clearly proved . . . Account should be taken of such circumstances as the *nature* of the employer's business and *its capacity to pay,* the employee's age, the nature of his employment. *length of service,* seniority, *present salary,* future prospects, opportunities for obtaining similar *alternative* employment, *his past conduct,*

the circumstances and the manner of the dismissal including the nature of the charge levelled against the workman, *the extent to which the employee's actions were blameworthy* and the effect of the dismissal on future pension rights and any other relevant considerations. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place. The amount, however, should not be *mechanically calculated* on the basis of the salary he would have earned till he reached the age of superannuation and should seldom if not never exceed a maximum of three years' salary". (at page 498)

The first respondent in his order has emphasised that the petitioner-company has suddenly closed its business and terminated the services of its employees without seeking prior written approval and permission and that as a result of that sudden closure and termination, the employees have been put to considerable detriment and irretrievable loss. He has referred to the ages of the workmen and the repercussions of the termination on their family responsibilities and the difficulty of obtaining alternative employment. These are matters which have been emphasised by Justice Vaithyalingam in his aforesaid judgment.

In the decision in *Henderson & Co. v, Wijetunge,*[5] – the services of an employee who was 50 years of age was terminated by the succeeding employer and the labour tribunal had awarded as compensation the salary which the applicant would have earned until retirement. Justice Vaithyalingam, delivering the judgment in appeal laid stress on the following consideration, to wit–" the haste with which the termination of the employee's services had been effected; the fact that upto the date of inquiry the employee had been unable to secure alternative employment; and the nature of the charges levied particularly against a professional" and finally held that this was a fit and proper case in which the three years yardstick should be departed from and His Lordship awarded the employee five years salary as compensation.

In *Caledonian Ceylon Tea and Rubber Estates Ltd. v. Hillman,*[6] Justice Sharvananda dealt with a termination which was *lawful* but nevertheless on a consideration of the relevant factors established on that application, he awarded the applicant as compensation seven years salary. Justice Sharvananda indulged in an exhaustive analysis in the course of which he referred to the judgments pronounced by

Justice Vaithyalingam in *Ceylon Transport Board v. Wijeratne (supra)* and in *Henderson & Co. Ltd. v. Wijetunge (supra)* and remarked thus: I agree with Justice Vaithyalingam that the amount should not be mechanically calculated on the basis of the salary he (the applicant) should have earned till he reached the age of superannuation but I cannot subscribe to the proposition that the amount should seldom, if not never, exceed a maximum of three years salary".

In the decision in the governing body of educational institutes managed by the Church Missionary Society in Ceylon *Ladies' College v. Panuthevan Thuraimugam*[7], the Supreme Court, approved and endorsed an award decreed by the Labour Tribunal of five years' salary as compensation to a teacher whose services were *legally* and *lawfully* terminated in terms of the provisions of the Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960. The Supreme Court in its judgment commented on the decision in *Ceylon Transport Board v. Wijeratne* as follows : "Whilst accepting that this decision is a useful guideline, we are of the view that in the present case however the applicant was employed in a pensionable post and the quantum awarded by the Labour Tribunal which amounts to about five years salary does not shock the conscience of this court and we are unable to find any sound legal ground to reduce the compensation so awarded in the circumstances of this case". Vide also the instructive judgment of the Court of Appeal in *Associated Newspapers Ceylon Ltd. v. Mervyn Perera,*[8] where the applicant was awarded six years salary as compensation.

Another noteworthy factor which should enter into the computation and assessment of compensation is the delay and the protracted nature of the proceedings. Delay in obtaining relief and the award of compensation by an employee on account of the protracted nature of the proceedings of the inquiry and the subsequent invocation of appellate and writ jurisdiction by the employer, is another factor to be taken into account in the assessment of compensation. Vide *Karthigesu v. Sri Lanka Sugar Corporation,*[9] *Cyril Anthony v. Ceylon Fisheries Corporation,*[10] *Associated Newspapers of Ceylon Ltd. v. Jayasinghe (supra). Jayasuriya v. Sri Lanka State Plantations Corporation (supra)* Justice Samarawickrema *laid down* very relevant principles and propositions to guide the Court of Appeal in reviewing an order for assessment of compensation made by the labour tribunal and other authorities playing the role of a tribunal of first instance.

In *Silva v. Kuruppu*,[11] Justice Samarawickrema remarked: "The amount awarded by the President appears to me to be on the ***high side*** but I am unable to take the view that he has acted ***on wrong principles*** or that it is ***so excessive*** that interference by this court is called for. The assessment of compensation ***is eminently a matter*** within the province of the President of the Labour Tribunal". Vide also the judgment pronounced by Justice Kulatunga in *Saleem v. Hatton National Bank Ltd.*[12]

Guided by the aforesaid principles and legal propositions I proceed to consider the order of the Commissioner of Labour awarding compensation which has been produced marked P14 and the recommendations made by the second respondent in his capacity as Assistant Commissioner of Labour, to the Deputy Commissioner of Labour and the Commissioner of Labour in regard to the award of compensation. This recommendation bearing the reference TEF/57/94 made by P. Navaratne, the Assistant Commissioner of Labour to the Commissioner of Labour has been produced by the second respondent and the first respondent with their objections marked as 2R1. It is a matter of deep regret that the petitioner-company failed and omitted to produce this memorandum of findings and recommendation marked as 2RI as an exhibit annexed to its original application. The instructing attorney of the petitioner-company ought to have been conversant and quite aware of the numbers assigned to the complaints of the workmen which have been registered under the following reference numbers: TEU/A/45/94. TEU/A/46/94, TEU/A/43/94 and TEU/A/44/94 which were all subsequently consolidated and amalgamated in the main file maintained by the Commissioner of Labour under reference number TE/57/94. The proceedings and the correspondence between the petitioner's attorney-at-law, the Assistant Commissioner, the Deputy Commissioner and the Commissioner of Labour disclose these reference numbers and if the registered attorney-at-law for the petitioner-company made an application for inspection of the relevant file maintained by the Assistant Commissioner of Labour bearing No. TE/57/94, the registered attorney would have become conversant and aware of the contents of the document marked as 2R1 and produced by the second respondent with his objections. Unfortunatley, the present application of the petitioner has been prepared ***without perusing document 2RI.*** The petitioner-company is in an unfortunate position due to the remissness on the part of its registered attorney in failing to peruse document 2R1 before the present application was

settled. In 2R1, the second respondent has set out the basis for the compensation awarded which he has described under the title "Compensation Package" for the purpose of computing the quantum of compensation". The second respondent has relied on document marked as 2R2 which is a document tendered by the petitioner-company and its agents to the second respondent for the purpose of computing the quantum of compensation to be decreed. 2R2 is headed with the title Manual Workers BEL. It sets out the names of the workers, the dates on which they joined Brown and Company Ltd., the workmen's service under Brown and Company Ltd., the workmen's service under Browns Engineering Ltd., and also the aggregated service of the workmen under both companies. It also sets out the dates on which each employee joined the employer's service, the present ages of the workmen together with their dates of birth and the monthly basic salary of each workman. The award of compensation has been calculated on the basis of information supplied by the petitioner- company which is reflected in the document marked 2R2. In the compensation package embodied in document marked 2R1, a workman with 25 years of service or, more has been granted four years salary as compensation. Workmen with 10-24 years of service have been granted three years salary as compensation. An employee with 5-9 years of service has been granted two years salary as compensation. An employee with 1-4 years of service has been granted one years salary as compensation. I wish to emphasise that in this matter there is no cross application filed by the workmen impugning the award of compensation on the basis that there has been a failure to make an award considering the merits of each individual case. I hold that it is not open to the petitioner-company to impugn this award on the ground that the person with ten years service and person with 24 years service are both irrationally granted 3 years salary as compensation. In the absence of an impugnment of the award by the workmen on such a basis, it is not in the mouth of the petitioner- company to assail this award of compensation on this particular ground. Further, the award sets out that in any event the award of compensation shall not exceed the prospective wages upto the age of 55 and that an employee who did not qualify for any compensation in terms of the aforesaid compensation package shall receive a payment of six months' salary provided that such employee has served for more than one year.

I have attempted to review and refer to the landmark decisions pronounced by the Supreme Court and the Court of Appeal on the quantum of compensation. Having regard to the yardstick laid down in those judgments, it is manifest that in the present award even workmen with over 25 years of service have received only four years salary as compensation, which is certainly less than the award sanctioned by Justice Vaithyalingam in Henderson & Co. case, by Justice Seneviratne in Mervyn Perera's case and by Justice Sharvananda and the Supreme Court in Hillman's and in Thuraimugam's cases, respectively.

Certain factual aspects have been emphasised by the second respondent. The ***abrupt*** and ***sudden*** decision to effect a closure ***without*** obtaining the permission and approval of the Commissioner of Labour and thereby contravening the provisions of the Termination of Employment of Workmen Act which renders the termination of services unlawful, the loss of career and the difficulties of securing alternative employment on the part of the workmen, the age consideration of certain workers, the soaring cost of living at the date of termination and the correlative duties and obligations on the part of the workmen to maintain the members of their families. There has been no misconduct, fault or blameworthiness whatsoever attributable to the workmen for the closure in the instant applicant. These are factors which have been emphasised as relevant considerations by Justice Vaithyalingam both in Wijeratne's case and in Wijetunge's case. In Wijetunge's case, Justice Vaithyalingam specifically emphasised the haste with which the termination of the particular employee's services was effected and the fact that the applicant was unable to secure alternative employment. In Wijeratne's case, Justice Vaithyalingam stressed the following facts : "The *past conduct* of the applicant, the extent to which the ***employee's actions were blameworthy,*** the employee's age, the length of his services and seniority, his present salary, his future prospects and the opportunities of obtaining similar alternative employment, the nature of the employer's business and ***his capacity to pay***". Thus, the second respondent has considered many of the relevant factors in his order and affidavit. The second respondent states that he has : "also taken note of the ***financial aspects*** of the petitioner's operations as were placed before him at the inquiry and that the period of service of the petitioner's employees were based on the memorandum of settlement marked as P1 and P2 and that he did not consider any irrelevant matters or material which was not placed before him.

In the course of the argument and in the pleadings of the petitioner-company, it has been urged that the Commissioner of Labour and the Assistant Commissioner of Labour failed to consider the financial liability of the petitioner-company and that they did not take into consideration the ***ability*** of the petitioner-company to meet a heavy financial liability in making the order marked as P14. This averment in the petition and the contention advanced to the same effect at the argument has been refuted by the affidavit filed by the second respondent. It is an accepted proposition of law that the employer's financial position is a relevant factor to be considered in the computation of the award of compensation and that an award becomes just and equitable only if such ***a consideration is given effect*** to. Vide the judgment of Justice Vaithyalingam in *Ceylon Transport Board v. Wijeratne (supra),* at 498, judgment of Justice Alles in *Independent Industrial and Commercial Employees Union v. Board of Directors of C. W. E.*[13] at 350-353 and C. F. Judgment of Chief Justice Tennakoon in regard to the liability to pay gratuity on the part of the employer– *The National Union & Workers v. The Scottish Ceylon Tea Co. Ltd. and another*[14] at 150 and 151. However, the evidence elicited at this inquiry revealed that the petitioner-company is the owner of valuable land and buildings situated at premises No. 33, Katukurunduwatte Road, Ratmalana and 70 acres of land at Kandy. Vide the evidence of witness S. K. Gunasingham appearing at page 100 of the proceedings where he values the Kandy lands at the balance sheet depreciated book valuation of Rs. 741,000 – P8.

It was elicited in evidence that the petitioner-company had ***terminated*** the services of all its workmen and had effected a ***closure*** of the business. – Vide document marked as 1R1 (Annexe V1). The next imperative step would be to initiate liquidation proceedings to wind up the petitioner-company and once a liquidator is appointed, he would, in law, assume the status and character of a director and in the process of liquidating the company and selling its assets, he would, no doubt, give effect to the lawful claims of the workers and the rights enshrined to the workers in the order marked P14. The workers' claims and rights which have been embodied in the lawful order marked as P14 would be entitled to consideration and payment in the liquidation proceedings to be initiated against the petitioner-company. Thus, the sale of the valuable lands referred to above would realise sale proceeds which would be quite adequate to cover the liability incorporated in P14. In the circumstances, the ability of the

petitioner-company to pay the liability imposed by P14 must necessarily be decided on the assets of the company which would necessarily be sold in the liquidation proceedings. Further the directors of the petitioner-company incur a personal liability under pain of criminal prosecution and punishment to pay the award of compansation decree by the Commissioner of Labour in terms of the provisions of the statute under consideration : Vide section 9 (A) of the Termination of Employment of Workmen Act. Besides, the documents marked P5A, P5B and P5C disclose a sizeable turnover. In view of the aforesaid valuable assets owned by the petitioner-company, which would necessarily be sold in the ensuing liquidation proceedings, the petitioner-company is possessed of means and has the ability to pay the award of compensation decreed by order P14.

The petitioner-company, in paragraph 18 of the application, contends that the Commissioner and the Assistant Commissioner of Labour appear to have considered the period of employment of the workmen under Brown and Company Ltd. in computing the compensation payable by the petitioner-company and such computation is contrary to law. This contention was also pressed before this court at the stage of argument of this application. This averment and contention discloses the mental attitude and objective of the management controlling the affairs of the petitioner-company. The petitioner-company and its agents have omitted to take note of the fact that in the document 2R2, which was tendered by the petitioner-company to the second respondent, the petitioner-company itself has set out the period of service of the workmen under Brown and Company Ltd. and Browns Engineering Ltd. and thereafter, shown under a different column, the aggregated period of service under the two companies for the very purpose of computing the quantum of compensation by the first and second respondents. Further, the provisions of the memorandum of settlement entered into between Brown and Company Ltd., Browns Engineering Ltd. and the All Ceylon Commercial and Industrial Workers' Union, [in terms of section 12 of the Industrial Disputes Act] on 11. 12. 91 marked as P1 and P2 and of the Collective Agreement signed between Browns Engineering Ltd. and the All Ceylon Commercial and Industrial Workers' Union on the 18th of August, 1993, negative and nullify the aforesaid contention raised in paragraph 18 of the application. For the provisions of the aforesaid documents postulate that" the previous services of the said employees under Brown & Company Limited will be recognised by Browns Engineering (Pvt) Ltd. as service performed

under it for payment of gratuity and statutory and other purposes". Thus it was an agreed stipulation between the petitioner-company and the trade union which represented the workmen that the services of the aforesaid employees under Brown and Company Ltd. will be recognised by Browns Engineering Ltd. as service performed under it. For all purposes, including the computation of the quantum of compensation payable on the termination of their services. The provisions of the express stipulations between the parties stand in the way of the contention which was urged on behalf of the petitioner-company that the Commissioner and the Assistant Commissioner appeared to have wrongfully considered the period of employment of the workmen under Brown and Company Ltd. in computing the compensation and that such computation is contrary to law. Paragraph 18 of the petition uses the expression "Commissioner ***appeared to have considered"*** the period of employment of the workmen under BCL in computing compensation". This use of language clearly demonstrates that the petitioner's legal advisers have not read the contents of document marked 2RI and were unaware that the recommendation contained in document 2R1 was based on the aggregate period of service under the two respective companies. In fact, the second respondent in his affidavit in paragraph five states: "I also annex hereto marked as 2R2 a copy of the particulars of the employees submitted to me by the petitioner which was taken into consideration in the computation of compensation to the employees and referred to in the said document marked as 2R1". In preparing and tendering document marked 2R2, the petitioner-company's agents acted on the express stipulations contained in documents P1 and P2 and on the contents of the Collective Agreement signed on the 18th of August, 1993 (Collective Agreement No. 16 of 1993) by All Ceylon Commercial and Industrial Workers' Union with Browns Engineering (Pvt) Ltd.

Even if such stipulations were not expressly assented to, I hold that in the computation of the quantum of compensation that the petitioner-company is required in law to recognise the services of the said workmen under Brown and Company Ltd. and to give effect to such service as service performed for the petitioner-company. In the decision in *Universal Apparels (Pvt) Ltd. v. M. Winifreda Fernando,** the High Court of Colombo relied upon principles of estoppel and acquiescence and thereafter raised the issue whether a profit making manufacturing group could create a series of incorporated entities under the Companies Ordinance and thereafter resort to subterfuges,

* HCLT Appeal 24/90 LT No. 2/238/90 HCM 23.9.92

contrivances, machinations, legal ruses and devices to defeat and frustrate the legitimate and legal claims and dues of the workmen who have contributed long, loyal and meritorious service to the establishment and held that a court of law must not countenance any subterfuges to defeat the provisions of social legislation and held that the successor company is under a duty to recognise the period of service under the predecessor company in the computation of the award of compensation. Vide also the judgments of the Supreme Court and the Court of Appeal in *Colombo Paints Ltd. v. de Mel,*[15] respectively. The second respondent, in his findings and in his recommendations holds, particularly in regard to the valuable land and buildings situated at Ratmalana and the 70 acres of land situated at Kandy, which were the real estate assets of the petitioner-company that these assets have been unrealistically depreciated. He holds that these real estate assets have appreciated sharply in value in the open market and he is unable to accept a count of depreciation on such properties and the depreciated book values placed against them and, therefore, he is unable and reluctant to accept the values based on book value which is reflected in the balance sheet. Thus, there has been a rejection by the second respondent of the values placed in the accounts in relation to the real estate owned by the petitioner-company. Now that the business has been closed and employees' services terminated, liquidation proceedings would have to be initiated and if these assets are sold in the open market, the sale proceeds on realization would afford the liquidator with sufficient funds to pay the entire compensation awarded to the workers. In this light, it is idle to urge financial situation of the employer-company in relation to the recurring and increasing losses and liabilities because at the time the issue of compensation came up for consideration, the business was closed and a consideration of the financial viability of ***a continuing business concern*** was a matter of past history.

The second respondent has emphasized the indecent hurry and the haste with which the petitioner-company effected a closure of the business and terminated the services of all workmen by serving the letters of termination on 23. 11. 94, one of which letters has been produced and marked as R12. It was elicited in evidence that the decision to effect a closure and terminate the services of the workmen was a sudden decision taken at a meeting held in November 1994 and this decision was implemented in December 1994. It is in this

context that the second respondent, in his finding, holds that "by effecting such an abrupt closure, the petitioner-company had violated the provisions of section 2 of the Termination of Employment of Workmen Act". If, instead of deciding to effect an abrupt termination in this fashion, an application was preferred to the Commissioner of Labour for prior written approval and consent in terms of section 2 of the Termination of Employment of Workmen Act, the Commissioner of Labour would have had the opportunity to investigate and inquire into the varied allegations preferred by the workmen against the petitioner-company's management. Witness Yaddehi Aratchige Lalith Premalal testified at the inquiry that orders and work that came to Browns Engineering Ltd. were siphoned off to Messrs. Project Engineering Company, which was a private firm carried on by Mr. S. K. Gunasingham and in this manner Browns Engineering (Pvt) Ltd. lost the benefit of the lucrative orders it had received. Witness B. A. D. Gamini Ratne referring to the trading and manufacturing activities of the company in the hill country testified to the effect that the petitioner-company had turned down and refused orders placed with it for the manufacture and repair of engineering items *in pursuance of a long drawn objective* to close down Browns Engineering (Pvt) Ltd's manufacturing activities. Vide document marked P10 (first page; para 5). Hence it is manifest that proceedings filed marked P8 are incomplete and deficient if an application for such permission and approval was made, the Commissioner of Labour would have had the opportunity to inquire into such allegations and arrive at a determination with regard to the bona fides of the petitioner-company's intention to close down its business. Unfortunately, the management of the petitioner-company did not avail the Commissioner of such an opportunity but, ***for reasons best known to them***, they decided abruptly to effect a closure at a meeting summoned in November 1994, which decision was given effect to in December 1994. This abrupt decision to efffect a closure has also been taken into account as a material factor and a consideration in the computation of the award of compensation.

The second respondent holds that there has been culpable management negligence on the part of the petitioner-company which undoubtedly contributed to the financial collapse of the company in question. If continued losses were being incurred, as alleged, the second respondent holds that the management of the petitioner-company ought to have made an application for written approval to

effect retrenchment of staff at a much anterior point of time with the object of reducing the workforce substantially. If such legitimate steps were taken to reduce staff strength substantially with the blessings of the Commissioner of Labour, the second respondent holds that "the petitioner-company could have functioned without financial loss and detriment, with the work involving air-conditioning, repair and maintenance of tea machinery, jobbing, improvement to machinery and the entry into new areas of business instead of transferring or rejecting jobs received by the petitioner-company to be lucratively handled by other companies and the entities of interest". The second respondent also holds that the transfer of the engineering business by Brown and company Ltd. to Browns Engineering (Pvt) Ltd. was effected with a ***transfer of a paucity of assets and cash*** "which was hardly sufficient to keep the newly formed company functioning successfully". The second respondent also holds that in a faltering business venture, as alleged, the management should have been careful in curtailing and controlling wasteful expenditure.

The accounts for the period commencing August 1994 to the date of the closure has not been tendered and marked in evidence at the inquiry on an allegation that there was no opportunity of having had access to the office of the petitioner-company. Some of the statements of accounts which have been produced and marked in evidence are ***unaudited*** statements of accounts and this fact was emphasized and stressed by learned counsel who appeared for the respondents at the argument. The balance sheet disclosed the depreciated value of the real estate assets and witness Suresh Kumar Gunasingham accepted that though a valuation was done in 1993 yet the valuation shown in the balance sheet did not record the present market value of these valuable real estate assets situated at Ratmalana [which was 4 1/2 acres in extent] and that situated at Kandy, [which was 70 acres in extent]. Documents R10 to R12 have not been filed as exhibits annexed to the present application, though learned counsel for the petitioner attempted to make submissions at the hearing of argument on the contents of this unproduced document R10.

In paragraph 6 of the petition, the petitioner-company states that it commenced to function as a business in rendering engineering services to the tea industry and due to the changes that took place in the tea industry, the company incurred heavy financial losses from the year 1992 till 1994. Learned counsel for the petitioner in the

course of his submissions specifically referred this court to document R7 which was the affidavit filed by Suresh Kumar Gunasingham, the Managing Director of the petitioner-company and a Director of Project Engineering Services Ltd., wherein the reasons for the failure of the expectations of the company and for the loss are set out in paragraphs 5, 6, 7 and 8 of the said affidavit. The petitioner-company was incorporated in August, 1990 as a joint venture company with the following shareholders: to wit, Syrius (Pvt) Ltd., ***Brown and Company Ltd., Hatton National Bank and National Development Bank.*** The first respondent has produced attached to his affidavit and statement of objections marked as 1R1 the letter dated 23rd November, 1994 written by the petitioner-company informing all the employees of the intention to effect a closure of the business and the consequent termination of the employment of the workmen. This letter had been annexed as an enclosure six to the document marked as P6 which was written by the petitioner-company to the first respondent. In fact, there were six enclosures attached to the said document marked as P6 by the petitioner-company. However, the annexures marked V and VI have not been tendered to the Court of Appeal and have not been filed as exhibits to the present petitioner's application to the Court of Appeal. It is this enclosure marked VI which has been produced by the first respondent marked as 1R1. It surprises this court as to what reasons prompted the petitioner-company to omit to file this document 1R1 as a necessary and vital annexe to the present application. The contents of document 1R1 dated 23rd November, 1994 written by the petitioner-company's agents are ***illuminating.*** It sets out that the petitioner-company was established in January, 1991 and took over the engineering business of Messrs. Brown and Company Ltd. and ***"from its inception*** the petitioner-company has been running at a loss . . . and is unable to pay even the monthly salary and wages of the employees . . . and in the circumstances the company has resolved to close down its business forthwith and accordingly this communication serves to give you notice that the workmen's employment with the company has been terminated with effect from 23rd November, 1994". In paragraph 6 of the application it is alleged that financial losses were incurred from ***1992 to 1994*** but in 1R1 it is specifically stated that the petitioner-company incurred losses from ***its very inception.*** If the statement in 1R1 ***is correct,*** in regard to the incurring of losses from the very inception of the petitioner-company, it is very likely that there were losses incurred in the business shortly prior to the transfer of the business from Messrs. Brown and Company to the petitioner-company as well.

If that was the position, then the issue arises whether the transfer of the business from Messrs. Brown and Company to the petitioner-company was a subterfuge, contrivance, a machination, legal ruse and device to defeat and frustrate the legitimate and legal claims due to the workmen who have contributed long, loyal and meritorious services to the establishment or not? in terms of the pronouncements made by the High Court in the decision in *M. Winifreda Fernando v. International Garments Ltd.* If so, both the Commissioner of Labour and any court of law must not countenance any such subterfuge to defeat the provisions of social legislations such as the Industrial Disputes Act and the Termination of Employment of Workmen Act, specially in view of the contention advanced by the petitioner-company and its legal advisers in paragraph 18 of the petition that the Commissioner appeared to have considered the period of employment of the workmen under Brown and Company Ltd. in computing compensation and such a computation is contrary to the law.

Thus, this was another pertinent issue which had to be closely inquired into and investigated by the Commissioner and Assistant Commissioner of Labour, if an application was made for retrenchment or closure of the business in terms of the statute. Was the abrupt decision to effect a closure of the business and terminate the services of the workmen without applying for written permission and approval taken to prevent the Commissioner investigating into these issues? Had an application been made for written permission and approval in terms of the statute to the Commissioner of Labour, the Commissioner would have carried out a full-scale inquiry into these very pertinent and relevant issues and arrived at appropriate findings on material placed before him and eventually either allowed the application or refused it.

In document marked as 2R1, the second respondent voices his complaints on this score when he states: "With the abrupt closure, Browns Engineering (Pvt) Ltd. had violated the provisions of the Termination of Employment of Workmen Act and the complainants are therefore entitled to compensation under section 6 (*a*) (1). . . The above will include five months wages ***for closing the factory abruptly without the Commissioner's permission*".**

In considering and evaluating the submissions of learned counsel for the petitioner, in his impugnment of the assessment of compensation and the ascertainment of the quantum of compensation payable

by the petitioner-company to the aforesaid workmen, this court must necessarily have in the forefront of its mind that it is exercising in this instance a very limited jurisdiction quite distinct from the exercise of appellate jurisdiction. Relief by way of certiorari in relation to award of compensation pronounced by the Commissioner of Labour will be available to quash an award of compensation only if the Commissioner of Labour wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently unreasonable or irrational or is guilty of a substantial error of law. The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order and if the Commissioner's award of compensation was not set aside in whole or in part, it had to be allowed to stand unreversed. "The system of Judicial review is radically different from the system of appeals. When hearing an appeal, a court is concerned with the merits of the decision under appeal; when subjecting some administrative act or order to judicial review, the court is concerned with its legality. On an appeal the question is right or wrong? On review the question is lawful or unlawful?. . ." Judicial review is a fundamentally different operation to the exercise of appellate jurisdiction. A court on review is concerned only with the question whether the award under attack should be allowed to stand or not. – Vide Prof. H. W. R. Wade on Administrative Law, 7th edition, pages 38 to 39. Thus, the object of this court upon judicial review is strictly to consider whether the whole or part of the award of compensation pronounced by the Commissioner of Labour is ***lawful*** **or** ***unlawful.*** This court ought not to exercise its appellate powers and jurisdiction when engaged in the exercise of its supervisory jurisdiction and judicial review over an award of compensation decreed by the Commissioner of Labour. In this respect, I would reiterate the prudent and wise observations made by Justice Samarawickrema in *Silva v. Kuruppu, (supra).*

I hold that the award of compensation made by the Commissioner of Labour is lawful and in the assessment of compensation he has acted on correct and legal principles which have been consistently laid down by the superior courts in Sri Lanka. I hold that there is no ***substantial*** misdirection in point of fact or law, there is no failure on the part of the Commissioner of Labour and the Assistant Commissioner of Labour to take into consideration the effect of the totality of the evidence led at the inquiry, there is no improper evaluation

of evidence, neither is there any application of incorrect and illegal principles on a consideration of the totality of the evidence led at the inquiry and the findings and recommendations of the Assistant Commissioner and the order of the Commissioner of Labour. In the circumstances, I hold that there is no error of law disclosed on a perusal of the record. The Commissioner of Labour has considered the totality of the oral and documentary evidence led at the inquiry, the findings and recommendations of the Assistant Commissioner of Labour and the material in the record bearing number TE/57/94 and pronounced his order which is sought to be impugned before this court. In the circumstances, I make order dismissing the application of the petitioner-company with costs in a sum of Rs. 5,250 payable by the petitioner-company to each of the first and third respondents, respectively. The third respondent is the trade union which represented the workmen at the hearing of this application. Application is dismissed with costs.

Application dismissed.