COURT OF APPEAL

Samarasinghe
V.
De Mel and Another

C.A. Application No. 866/76

Mandamus – Termination of Workmen (Special Provisions Act) Section 2(2) – Power of Commissioner of Labour to make award – Circumstances in which Writ of Mandamus would not be available.

The Petitioner was an employee of Messrs Harrison and Crossfield (Colombo) Ltd. Business declined in 1975 when estates were taken over by the Land Reform Commission and for diverse other reasons. In these circumstances Messrs H & C wrote to the Commissioner of Labour in terms of the Termination of Workmen (Special Provisions) Act requesting permission to terminate services of Petitioner and a few others. Commissioner of Labour granted permission subject to the condition that gratuity, leave payments and E.P.F. payments be made. (No mention was made of compensation). Messrs. H & C complied with the conditions and terminated the Petitioners services. The Petitioner complained that the Commissioner had a statutory duty to award compensation also in terms of the Act and applied for a Writ of Mandamus on the Commissioner of Labour directing him to order payment of compensation.

Held (1) that in terms of section 2(2) the Commissioner of Labour had a power to award gratuity or compensation or both gratuity and compensation.

(2) that his order was ex facie within the power conferred on him by Statute and hence no Writ of Mandamus would be available against the Commissioner of Labour.

APPLICATION for writ of Mandamus

Before: Atukorale, J. & Tambiah, J.

Counsel H.L. de Silva, Senior Attorney-at-Law, with S. Nandalochana for the Petitioner
S. Ratnapala, State Counsel, for the 1st Respondent
H.W. Jayewardene, Q.C. with Mark Fernando, W. Siriwardene and R. Perera for the 2nd Respondent

Argued on: 11.01.1982
Decided on: 17.02.1982

Cur. adv. vult.

TAMBIAH J.

The petitioner was employed by Messrs Harrisons & Crosfield (a Company incorporated under the Laws of the United Kingdom) as an Executive Assistant in the Chemical Department of the Firm from 1st November, 1960. His duties related to Agro-Chemical and Veterinary Chemical sales promotion and conducting of field trials. In the year 1972, he was transferred to the Import Department and at this time, it would appear, that the Import and Chemical Department were combined under a common head. The petitioner's function related to the import and local procurement of estate supplies, local purchase of fertilisers for tea estates, import and distribution of industrial chemicals and import and distribution of veterinary chemicals.

In about February, 1975, the business of the company was transferred to the 2nd respondent-company, in compliance with the provisions of the Companies (Special Provisions) Law No. 19 of 1974. The petitioner, along with the other staff, was transferred to the 2nd respondent-company on the same terms and conditions, and he was offered and he accepted employment in terms of a letter dated 20th February, 1975 (P1). The letter (P1) stated that the petitioner will be attached to the Chemical Department, but that the Company reserved the right to transfer him to any other Department, should this be necessary in the Company's interests.

At the end of February, 1975, it would seem that on account of the reduction of business and for other reasons, the functions pertaining to the procurement of estate supplies, hitherto carried out by the combined Import/Chemical Department, was brought within the purview of the Estate Department. The petitioner was transferred to the Estate Department and his revised duties related to estate staff training and recruitment, labour welfare and medical facilities, produce marketing, responsibility for overall administration of 7 estates and responsibility for a pilot project on labour welfare facilities in St. John del Rey Estate.

In October 1975, estates which were managed by the 2nd respondent-company as Agency House, became vested in the Land Reform Commission and the 2nd respondent-company became a

statutory trustee and managed the estates for and on behalf of the Land Reform Commission. By letter dated 17th March, 1976 (P2a), the 2nd respondent-company wrote to the Commissioner of Labour requesting his written approval to terminate the services of the petitioner and others, on the ground of redundancy, as its statutory trusteeship in respect of some estates had been cancelled on 15th March, 1976, and also on account of the impending cessation of the trusteeship for the remaining estates managed by the 2nd respondent-company. After inquiry, the 1st respondent granted permission to the 2nd respondent-company to terminate the services of the petitioner, on the following conditions:-

(1) Gratuity of half-month's gross salary, per year of service. For this purpose, the last gross salary he was drawing to be taken into account.

(2) His annual leave payments due to him under the Shop & Office Employees Act; and

(3) The Provident Fund monies due to him.

The petitioner complains that the 1st respondent has a statutory duty to consider the question of compensation; he has failed and neglected to consider the amount of compensation payable to him on account of his premature termination of service. He wants this court to issue a Mandamus directing the 1st respondent to hold an inquiry into the question of compensation payable to him and make an award which is just and equitable in the circumstances. The petitioner is not contesting the order made by the 1st respondent granting permission to terminate his employment.

S. 2 (2) (e) and (f) of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, as amended by the Termination of Employment of Workmen (Special Provisions) Amendment Law, No. 4 of 1976, now reads as follows:-

S. 2 (2): The following provisions shall apply in the case of the exercise of the powers conferred on the Commissioner to grant or refuse his approval to an employer to terminate the scheduled employment of any workman:-

(e) the Commissioner may, in his absolute discretion, decide the terms and conditions subject to which his approval should be granted, including any particular terms and conditions relating to the payment by such employer to the workman of a gratuity or compensation for the termination of such employment; and

(f) 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 Disputes Act.

It is conceded on all sides that the disjunctive or in s. 2(2) (e) of the Act may be read as "and" so that the Commissioner of Labour had the power to order both gratuity and compensation, or either.

Learned Senior Attorney for the petitioner submitted that the Statute requires the Commissioner of Labour to address his mind to both questions of gratuity and compensation; that the 1st respondent has not filed an affidavit denying the assertion of the petitioner in his petition that he has omitted to consider the question of compensation. The 1st respondent, he submitted, had merely adopted an administrative formula, viz, half-month's salary for each year of service, and applied it generally without considering the particular merits of the case before him. Learned Senior Attorney cited passages from *de Smith's "Judicial Review of Administrative* Action.":-

"If a tribunal wrongfully refuses to determine a question that it is obliged to determine, mandamus will issue to order it to hear and determine the matter. A refusal to exercise jurisdiction may be conveyed by express words or by conduct. Thus a tribunal is deemed to have declined jurisdiction if it fails to decide the question before it and instead decides a different question ..... or if it decides by reference to a predetermined rule of policy without giving any genuine consideration to the individual merits of the case before it ..... A tribunal

entrusted with a discretion must not, by the adoption of a general rule of policy, disable itself from exercising its discretion in individual cases. Thus a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied indiscriminately to all cases before it; ..... Again a factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases ..... although it (authority) is not obliged to consider every application before it with a fully open mind, it must at least keep its mind ajar.'

(2nd Edn. Pgs. 105, 109, 291, 295)

The 1st respondent has not filed his own affidavit. There is however an affidavit from the Joint Managing Director of the 2nd respondent - company in which he says that a full and proper inquiry was held by the 1st respondent and that he, having considered all the material before him and all the matters required of him in law, has exercised his discretion lawfully and in accordance with the powers conferred on him.

There is no evidence before us that the 1st respondent had fettered his discretion by indiscriminately applying a "predetermined rule of policy", without a consideration of the particular merits of the petitioner's case. The proceedings are before us. It would appear that the following matters were before him:-

(1) The petitioner was 40 years of age and had put in 15 years of service.

(2) The petitioner had not applied for employment under the Land Reform Commission.

(3) The Attorney-at-Law for the petitioner stated that if adequate compensation was paid, he was prepared to accept it and leave the employment. He referred to the case of the Shell Company employees who were paid two months salary for each year of service up to a maximum of 20 years.

(4) Mr. S.R. de Silva for the 2nd respondent-company indicated that the Company was unable to make any offer of compensation and that he leaves it to the Commissioner to make an appropriate order. Multi-millionaire Companies cannot be equated to Harrisons & Crosfield, he said. In regard to gratuity, he stated, the practice followed is to award one month's salary for each year of service, less E.P.F. contributions by the employer.

The 1st respondent did not give reasons for his order; nor is he required by the statute to do so, though I must say, it is indeed desirable if reasons are given. The matter of compensation was before the 1st respondent. After inquiry, he has made 3 awards – gratuity at the rate of half-month's salary for each year of service, annual leave payments and provident fund monies without deducting the employer's contribution. It must be therefore presumed that he addressed his mind to the question of compensation also, and in the exercise of his discretion elected to make the 3 aforesaid awards but chosen not to grant compensation. Merely because the order does not refer to compensation, it cannot be said that the 1st respondent has failed and neglected to consider the question of compensation.

The petitioner's application is beset with other difficulties as well. The petitioner has made W.L.P. de Mel, Commissioner of Labour, the respondent to his application. It is common ground that he has now ceased to hold this post and is presently the Secretary, Ministry of Trade. The petitioner has not sought to substitute the present holder of the office. A Mandamus can only issue against a natural person, who holds a public office. If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court. *(See, Haniffa v. The Chairman, U.C. Nawalapitiya, 66 NLR 48).* Before this Court issues a Mandamus, it must be satisfied that the respondent will in fact be able to comply with the order and that in the event of non-compliance, the Court is in a position to enforce obedience to its order. Mandamus will not, in general, issue to compel a respondent to do what is impossible in law or in fact. Thus, it will not issue ..... to require one who is functus officio to do what he was formally obliged to do." *(de Smith, 2nd Edn. 581).* So it seems to me, that even if the petitioner's application succeeded, the issue of a Mandamus would be futile.

S. 2(2) (f) of the Act contains the expression "shall not be called in question whether by way of writ or otherwise, in any Court, etc." S. 22 of the Interpretation (Amendment) Act No. 18 of 1972 provides that where such a expression appears in any enactment in relation to any order or decision etc. 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 etc. made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal. The proviso to the section empowers the Supreme Court to issue writs (a) where such order was ex facie not within the power conferred on such authority, or (b) where the rules of natural justice had not been complied with or (c) where there had ben no confirmity with any mandatory provision of law which was a condition precedent to the making of such order.

In *Jamis v. The Board of Review (Paddy Lands) and another*, (1978 - 79, 2 Sri Lanka L.R. Vol. II, C.A., Part 4, 123), Wimalaratne, P. examined the provisions of s. 22 of the Interpretation (Amendment) Act, and said (p. 129), "That Act expressly provides that where a 'no certiorari' clause is contained in a Statute, a determination could be questioned if and only if, the conditions specified in the proviso to s. 22 have not been satisfied."

Learned Queen's Counsel who appeared for the 2nd respondent company contended that by reason of the preclusive clause in s. 2(2) (f) of act, No. 45 of 1971, the petitioner could not have questioned on certiorari, the order made by the Commissioner. By a Mandamus, he is now seeking indirectly to call into question the decision of the 1st respondent, and this he cannot do. I agree with this submission.

What is the petitioner seeking to achieve by his application? A variation of the order, by the addition of compensation. Then is he not calling into question, the order of the 1st respondent? If this Court were to issue a mandamus, then it has to be on the footing that the 1st respondent's Order is defective, in that, he has failed to award compensation. This would be to call into question, the order of the 1st respondent. "There is a general rule in the construction of Statutes that what a Court or person is prohibited from doing directly, it may not do indirectly or in a circuitous manner (per Samarawickrama, J. in *Bandaranayake v. Weeraratne & others* (1981,

1 Sri Lanka L.R., Vol 1, S.C., Part I, at p. 16). *Bindra* in his *'Interpretation of Statutes'* (6th Edn., at p. 145) commenting on this rule says - "The maxim means that when anything is prohibited, everything by which it is reached is also prohibited."

In *Ratnasekera v. Dias Abeysinghe* (75 NLR 572) the Commissioner of Elections acting within the powers conferred on him by the Ceylon (Parliamentary Elections) Order in Council, disallowed the application of the Ceylon Independent Party to be recognised as a political party. A mandamus was sought to compel the Commissioner to treat the party as a recognised political party. It was held that as the Commissioner had ex facie acted within the powers conferred on him by the Statute, the applicants cannot avail themselves of the proviso to s. 22 of the Interpretation (Amendment) Act, No. 18 of 1972 to invoke the powers of the Court by writ of Mandamus. This case, it seems to me, is authority for the view that if a person acts ex facie within the powers conferred on him under a Statute, mandamus will not go against such person. Perhaps, if there is a total failure to exercise a power, proviso (a) to s. 22 of Act No. 18 of 72 would not exclude the remedy of Mandamus. In the case before us, it cannot be said that the 1st respondent had completely failed to exercise his power. He had the power, in terms of s. 2 (2) (e) of Act No. 45 of 1971, to order gratuity or compensation or both. He awarded gratuity and other reliefs but not compensation. The order he made is ex facie within the power conferred on the 1st respondent by Act No. 45 of 1971 and Mandamus therefore will not be available against him. In Jamis' case (supra) Wimalaratne, P. observed (p. 128)-"The body must be vested with legal authority to decide. If it is so vested with authority, an order, even if erroneous in fact or in law is yet capable of legal consequences, because in the words of Lord Radcliffe, 'it bears no brand of invalidity upon its forehead' ..... Is it (order) ex facie outside the enabling power? If so, it is a nullity. Or is it within the four corners of the enabling law ? If so, it is an order which acquires a certain immunity from judicial review ....."

Finally, there remains the question of delay. The impugned order was made on 28th April, 1976. The appliction for Mandamus has been made on 22nd November, 1976, about 7 months after the said order. The petitioner has not sought to explain his delay. On the other hand, it is the 2nd respondent-company's position that during

this period, it had acted on the basis that all its liabilities in respect of all matters connected with and arising out of the termination of services of all staff, as a result of the take over of estates, have been finally settled and has reorganised its business affairs on the said basis. To grant the relief prayed for would cause prejudice to the 2nd respondent-company.

For the reasons stated, the application is refused, but considering all matters, I make no order as regards costs.

ATUKORALE, J. – I agree.

Application Refused.