MAGPECK EXPORTS LTD.,

v.

COMMISSIONER OF LABOUR & OTHERS

COURT OF APPEAL.
DE SILVA, J.
CA. No. 141/99.
TEN/A/67/97.
04TH NOVEMBER, 1999.

Writ of Certiorari - Termination of Employment Act, No. 45 of 1971, S.2(1) (4) S.6A, S.6A(1) - Establishment closed - Frustration or impossibility of performance - Closure of business - Liability of Employer - Compensation - Assessment.

The Petitioner company had closed the establishment without informing the workers in time or without obtaining prior written approval of the Commissioner of Labour. The Commissioner of Labour on being informed caused an inquiry to be held and he made order directing the Petitioner Company to pay each workman 2 months salary for each year of service.

It was contended that due to financial constraints of the Company it was compelled to close the Company. "It was further contended that there was termination by frustration or due to impossibility of performance;" and that in any event the compensation awarded was excessive.

Held :

(1) Doctrine of frustration has no application. Where one party and not the other foresees the events which is said to have frustrated the contract, that party is not entitled to plead frustration.

(2) In the matter of the assessment of compensation and the ascertainment of the quantum payable, the Commissioner of Labour has to approach the problem before him in very much the same manner as a Labour Tribunal which is called upon to award compensation.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *Walton Harvey Ltd., vs. Walker & Hamfrays* - 1931 1 Chancery 274.
2. *Tobacco Company vs. Illangasinghe* - [1986] 1 Sri L. R. 1 at 4.
3. *Ceylon Transport Board vs. Wijeratne* - 77 NLR 481.
4. *Associated Newspapers Ltd., vs. Jayasinghe* - [1982] 2 Sri L. R. 595
5. *Jayasuriya vs. State Plantations Corporation* - [1995] 2 Sri L. R. 379.

R. K. W. Gunasekere with *Ajanta Athukorala* for petitioner.

Ms. Chamantha Weerakoon Unamboowa with *Ayanthi Abeywickrema* for 3rd Respondent.

Ms. B. J. Tilakaratna SSC for 1- 2 Respondents.

Cur. adv. vult.

January 19, 2000.

J. A. N. DE SILVA, J.

The petitioner - employer - company has preferred this application seeking a mandate in the nature of a writ of certiorari to quash the order of the first respondent dated 14th December 1998 which was produced marked P5. By order dated 14.12.1998 the first respondent, the Commissioner of Labour has directed the petitioner company to pay each workman two months salary for every year of service. The petitioner company avers that it ceased to carry out all trading and manufacturing operations with effect from the 16th of June 1997 and presently papers have been filed in the District Court of Colombo for winding up of the company.

The petitioner company closed the establishment without informing the workers in time or without obtaining prior written approval of the Commissioner of Labour to stop the work of employees in terms of the Termination of Employment Act No. 45 of 1971 as amended, before the closure of the Company. When the workers reported for work on the 16th of June they found the factory closed shutting out all the employees from employment.

The third respondent Union made a complaint to the first respondent on the 29th of August 1997 of the closure of the petitioner company and failure to afford work for over 1200 employees from the 16th of June 1997. The Commissioner of Labour caused an inquiry to be held by the 2nd respondent and the inquiry was commenced on the 30th of September 1997 and concluded on the 6th of July 1998. One Roshan Priyantha, a workman gave evidence on behalf of the Union and one Mr. Mylwaganam the Chief Executive Officer of the company on behalf of the company. Documents marked R-1 to R-24 respectively were produced by the company and both parties tendered their written submissions to the inquiring officer. The second respondent forwarded his findings of the inquiry to the Commissioner of Labour along with a report and documents.

The first respondent having considered the findings and recommendations of the second respondent, documents and the written submissions filed by both parties made his order on the 14th of December 1997 which has been produced marked P5. In that order the first respondent has ordered the petitioner company to pay each workman two months of salary for each year of service.

The issue in this case was whether the company has terminated the employment of some workers named in the schedule to the complaint, upon the closure of its business, in contravention of the provisions of the Termination of Employment of Workman (Special Provisions) Act, whether such persons are entitled to compensation and if so what such compensation should be.

It was conceded at the hearing and argument of this application that the petitioners 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 decision is taken, it is liable in law to pay compensation in terms of the provisions of section 6 A(1) of the Termination of Employment Act No. 45 of 1971 as amended.

At the hearing of this application counsel for the petitioner submitted that section 6 A of the Termination of Employment Act requires that,

(a) termination must be by the employer,

(b) such termination should be effected by the employer in consequence of the closure of business by the employer.

It was submitted that this necessarily means that the closure of the business must be effected by a conscious and deliberate decision by the employer who had a discretion or choice in the matter.

A termination which is "in contravention of the Act" is explained by section 2(1) read with section 2(4). Section 2(1) states that "No employer shall terminate the scheduled employment of any workman without (a) the prior consent in writing of the workman or (b) the prior written approval of the Commissioner.

Section 2(4) states that "for the purpose of this Act, the scheduled employment of any workman shall be deemed to be

terminated by his employer if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer and such termination shall be deemed to include

(a) Non - employment of the workman in such employment by his employer whether temporarily or permanently or

(b) Non - employment of the workman in such employment in consequence of the closure by his employer of any trade, industry or business."

It was conceded that there was in fact a closure of business. However such closure was not in truth or in fact a voluntary act done by the company which had no choice in the matter. It was contended that due to financial constraints of the company it was compelled to do so. The company was, at the relevant time, solely and entirely dependent upon the Commercial Bank for finance to continue operations including the payment of salaries. The said Bank in 1997 without any prior notice refused to give financial assistance to the company and in these circumstances it became physically impossible for the company to perform its fundamental contractual obligation of paying its employees and to continue its business operations. Therefore the contracts of employment of the companies employees were discharged by frustration.

Mr. Gunasekara drew the attention of Court to a passage in S. R. De Silva's book "the Contract of Employment" (1998 Edition at page 200) where he states thus "another method by which a contract may come to an end without necessity for the employer to terminate the contract is in circumstances where the law will consider the contract to have terminated by frustration or due to impossibility of performance".

It was also contended that there was a strike by the workers which lasted for nearly three weeks and due to that some foreign orders were lost to the company and these factors too contributed to the financial deterioration of the company.

Counsel for the 3rd respondent submitted that the financial position of the company deteriorated due to the mismanagement of the company by the directors. It was pointed out that out of Rs. 280 million collected from issuing shares to public Rs. 30 million were diverted to other companies of the Directors and not properly utilized for the upliftment of this company. It is to be noted that Mr. Mylwaganam Chief Executive officer in his evidence has admitted the fact that at some point of time the affairs of the company were mismanaged. It was the position of the 3rd respondent that the foreign orders were lost due to this mismanagement by the hierarchy of the company and not because the workers went on strike. Counsel also submitted that the strike referred to was prolonged for 22 days due to the failure on the part of the petitioner to negotiate with the 3rd respondent on certain demands made by the workers amongst which was a demand for recognition of the 3rd respondent Union.

Mrs. Unamboowa contended that "doctrine of frustration" has no application in this case. She pointed out that where one party and not the other foresees the events which is said to have frustrated the contract, that party is not entitled to plead frustration. She referred to Weeramantry on Contracts at page 794 and submitted that the position in regard to this aspect of the doctrine is clear and has been authoritatively laid down in *Walton Harvey Ltd. vs. Walker and Hamfrays*[1].

In this case the owners of a hotel entered into a contract by which they allowed the plaintiffs the right to display an advertising sign on the hotel. The hotel owners were held

liable in damages despite the compulsory acquisition and demolition of the hotel by a local authority acting under statutory power, for the reason that they were aware of the risk of compulsory acquisition and could therefore have provided against that risk.

I agree with the contention of the 3rd respondent and hold that the Commissioner of Labour has correctly come to the conclusion that doctrine of frustration has no application in the instant case and the petitioner company has acted in violation of Section 6A(1) of the Act.

The second matter urged by the petitioner was that even if there is liability on the part of the petitioner in the circumstances of this case the compensation awarded was excessive.

In the matter of the assessment of compensation and the ascertainment of the quantum of compensation payable, the Commissioner of Labour has to approach the problem before him in very much the same manner as a labour Tribunal which is called upon to award compensation upon the application for unjust termination of services. In *Tobacco Company vs. Illangasinghe*[2] at 4 Justice *G. P. S. De Silva* observed that "The powers conferred on the Commissioner of Labour under the aforesaid Act No. 45 of 1971 are very similar to the award that could be made by the labour Tribunal."

At the inquiry held by the Commissioner the petitioner led evidence to the effect that workmen of the company were also liable for the pathetic financial situation of the company as there was unwarranted strike and due to that several orders were lost to the company. As referred to earlier the 3rd respondent dismissed this allegation summarily and submitted that this was a ruse to get out of the difficulties the petitioner confronted because of the mismanagement. It was

also pointed out that the strike was in 1995 and thereafter the factory continued to work until the closure of the company in 1997.

Our Courts have considered in several judgments the manner in which a Tribunal should approach in awarding compensation. Vide decisions in the following case's.

Ceylon Transport Board vs. Wijeratne[3]

Associated Newspapers Ltd. vs. Jayasinghe[4]

Jayasuriya vs. State Plantation Corporation[5]

The first respondent in his order has emphasized that the petitioner company has suddenly closed its business and terminated the service of its employees without seeking prior written approval of the Commissioner and as a result of that sudden closure and termination the employees have been put to considerable detriment and irretrievable loss.

The first respondent has given his mind to the allegations levelled against the workmen and also to the assets of the company and given this award. I see no reason to interfere with it. Application dismissed with costs.

Application dismissed.