

WIMALASIRI DE SILVA

v.

GUNATUNGA

COURT OF APPEAL
SOZA, J. AND TAMBIAH, J.
C. A. APPLICATION NO. 190/81
JUNE 22, 1981

Government Quarters (Recovery of Possession) Act No. 7 of 1969 - Officer ceasing to be in State Service - Regulation 41 of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 1980 - Notice to quit Government quarters.

By regulation 41 of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 1980 any public servant who failed to report for work on or after 17th July 1960 was deemed for all purposes to have forthwith terminated or vacated his employment notwithstanding anything to the contrary in any other law or in the terms and conditions of any contract governing his employment. Termination of employment in a generic sense can take place in many ways like death, effluxion of time, dismissal, retirement, compulsory or voluntary, resignation and vacation of post. The incidents of termination of employment can vary with the mode of termination. Vacation of post results from an act of the employee coupled with an act of the employer (service of notice of vacation of post). By a deeming provision as in Regulation 41 a person could be deemed to have vacated his post even when he has otherwise a valid excuse for not attending his place of work and even though the employer has not served notice of vacation of post. The fact that no official intimation was served on the petitioner that he is deemed to have vacated his post is of no consequence. Vacation of post and dismissal are two different modes of termination of employment. Hence the reason "not in State service" is true and correct in fact and in law. Therefore there is no ground for *certiorari* to issue to quash the notice to quit the government premises occupied by the petitioner.

Cases referred to:

- (1) *Billimoria v. Minister of Lands and Land Development and Mahaweli Development* [1978-79] 1 SLR 10
- (2) *St. Aubyn v. Attorney-General (No.2)* [1952] AC 15.

*F. Mustapha with P. K. Withanachchi for petitioner
K. C. Kamalaseyson S. C. for respondents.*

Cur adv vult

September 4, 1981.

SOZA, J.

The petitioner in this case was a public officer of the General Clerical Service and was last employed as a clerical servant in the Department of Agrarian Services. As he was a public servant in the Public Administration Division of the Ministry of Public Administration provided him with Flat No. H-60 of the Government Flats, Torrington Avenue, Colombo 5 for the residence of himself and the members of his family on a monthly rental of Rs. 77/-. The petitioner was a member of the Government Clerical Service Union which is a trade union duly registered under the provisions of the Trade Unions Ordinance. In pursuance of a decision to strike taken by the Central Committee of the Government Clerical Service Union on 12th July 1980 the petitioner joined the strike and did not report for work from 17th July 1980. Subsequently however in response to an announcement by the Government that public officers who struck work would be considered for re-employment the petitioner made an application for relief on 3rd September 1980. It would seem that no relief was granted on this application.

On 19th December 1980 the respondent to the present application who is the acting Director of Establishments, Ministry of Public Administration, Independence Square, Colombo 7 acting under section 3 of the Government Quarters (Recovery of Possession) Act, No. 7 of 1969 served a notice (P2) on the petitioner requiring him to vacate the Government Quarters occupied by him together with his dependants and to deliver vacant possession of them within two months from 19.12.1980. The reason for the quit notice is given as follows:

“As (you) are not in State service.”

Under Section 3 of the Government Quarters (Recovery of Possession) Act, No. 7 of 1969 a competent authority may at any time serve or cause to be served on the occupier of any Government Quarters a notice stating the reasons for the issue of such notice and requiring the occupier to vacate such quarters together with his dependants and deliver vacant possession of them to such authority or any other competent authority or authorised person as may be specified in the notice before the expiry of the period (not less than two months) specified in the notice.

The contention of the petitioner is that he has not been served with any intimation of vacation of post. No order has been served on him that his services have been terminated. What he had done constituted legitimate trade union action and by resorting to such action he did not intend to effect a severance of

his contract of employment. The pleadings before us show that the plaintiff is not attending his place of work whatever the reason may be. Even if there has been no proper termination of the petitioner's services it cannot be denied that the petitioner is not now working in the Department of Agrarian Services or in any other Government department for that matter. The Minister of Agricultural Development and Research had on 2. 12. 1980 informed the Minister of Public Administration that the petitioner must be deemed to have vacated his post - see R1.

I will examine the legal validity of the termination of the petitioner's services. But before I do so I must mention that I am not unmindful of the fact that interpretation of the Constitution is not within the jurisdiction of this Court. This does not however mean that this Court is precluded from considering the provisions of the Constitution for the purpose of applying them in appropriate cases - see the case of *Billimoria v Minister of Lands and Land Development and Mahaweli Development*¹. The termination of employment in the instant case is alleged to have taken place by the operation of regulation 41 of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 1980 published in Gazette Extraordinary No. 97/7 of 16.7.1980. Subsection (1) of regulation 41 is what is relevant for our purpose and it reads as follows:

"Where any service is declared by order made by the President, under regulation 2 to be an essential service, any person who, on or after July 17, 1980, was engaged or employed, on any work in connection with that service, fails or refuses after the lapse of one day from the date of such order to attend at his place of work or employment or such other place as may from time to time be designated by his employer or a person acting under the authority of his employer, or who fails or refuses, after the lapse of one day from the date of such order, to perform such work as he may be directed, by his employer or a person acting under the authority of his employer to perform, he shall notwithstanding that he has failed or refused to so attend or so work in furtherance of a strike -

- (a) be deemed for all purposes to have forthwith terminated or vacated his employment notwithstanding anything to the contrary in any other law of the terms of conditions of any contract governing his employment; and
- (b) in addition, be guilty of an offence."

By this regulation any public servant who has failed to report for work on or after the 17th July 1980 shall be deemed for all purposes to have forthwith terminated or vacated his employment

notwithstanding anything to the contrary in any other law or in the terms and conditions of any contract governing his employment. Learned counsel for the petitioner argued that this regulation is inconsistent with Article 55 of the Constitution whereby the appointment, transfer, dismissal and disciplinary control of public officers is vested in the Cabinet of Ministers. He submitted that it is only the Cabinet of Ministers who can make any order for the appointment, transfer, dismissal and disciplinary control of public officers. The Cabinet of Ministers of course can delegate these powers but this does not arise here. It is submitted therefore that regulation 41 operates in derogation of a provision of the Constitution because it seeks, indirectly albeit, to effect the dismissal of a public officer who can be dismissed only by the Cabinet of Ministers or its delegates and not by His Excellency the President. The question then is, Does regulation 41 in fact contravene in any way the provisions of Article 55 of the Constitution? The Constitution speaks only of dismissal by the Cabinet of Ministers. The termination of employment considered in a generic sense can take place in many ways like death, effluxion of time, dismissal, retirement compulsory or voluntary, resignation and vacation of post. Without any intervention by anyone termination can take place by death or effluxion of the period of employment prescribed by law or the contract of employment. Where the employer terminates the employment he does so by dismissing the employee or perhaps retiring him compulsorily. The employee can terminate his contract of employment by resignation and voluntary retirement. Vacation of post is also by an act of the employee but here the employer has to serve notice of vacation of post. The incidents of termination of employment can vary with the mode of termination. For instance, a person retiring may be qualified to receive a pension but not a person dismissed for misconduct. The termination contemplated in Article 55 of the Constitution is dismissal, that is, by the employer, in this instance by the Cabinet of Ministers. Vacation of post results from an act of the employee coupled with an act of the employer and this mode of termination of employment is not contemplated by Article 55 of the Constitution. What regulation 41 states is that a person who struck work on or after 17th July 1980 should be deemed to have terminated or vacated his post. When a statute carries a "deeming" provision what it does is to enact that something should be deemed to have been done or taken place, which in truth and in fact was not done or did not take place. In the House of Lords decision in *St. Aubyn v Attorney-General (No.2)*² Lord Radcliffe explained the expression "deemed" as follows at page 53:

"The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain

Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

Therefore by a "deeming" section even that which cannot take place can be deemed to have taken place. All that regulation 41 does is to place a fictional or hypothetical extension to the meaning of the expression vacation of post. Vacation of post is presumed to have taken place without the act of the employer (service of notice of vacation of post).

It was contended that by regulation 41 His Excellency the President is doing indirectly what he cannot do directly, that is, effecting a dismissal which only the Cabinet of Ministers is entitled to do. What regulation 41 states is that a person who struck work on or after the 17th July 1980 would be deemed to have terminated or vacated his post. To contend that vacation of post by a "deeming" provision is the same as dismissal is to blur the distinction between vacation of post and dismissal. Vacation of post on the deeming provision ensues on an act of the employee while dismissal is unilaterally an act of the employer. Further the attendant consequences of vacation of post may differ from those of dismissal. So these two modes of termination of employment are not the same.

By a "deeming" statutory provision as in Regulation 41, a person could be deemed to have vacated his post even when he has otherwise a valid excuse for not attending his place of work even though the employer has not served notice of vacation of post. If a person does not attend his place of work in pursuance of a legitimate strike he cannot be said to have vacated his post because such non-attendance is not intended to effect a severance of his contract of employment. But when the enactment carries the "deeming" provision that vacation will be deemed to have taken place where he fails to attend his place of work in furtherance of a strike and without any notice of vacation of post by the employer. It will result in the legal presumption of a severance of the contract of employment by vacation of post. There can be no legal objection to enacting a suspension of the right to strike if the interests of the State warrant it and indeed none was taken before us. By the application of what may conveniently be called a statutory hypothesis the law deems him to have vacated his post. The fact that no official intimation was served on the petitioner that he is deemed to have vacated his post is of no consequence. By operation of law the petitioner is deemed to have vacated his post irrespective of whether he was informed or not. It is common knowledge however that such information was announced in the press and over the radio. Further, this is not an argument that the respondent can be expected to meet. Communications concerning

vacation of post must come from the Department of Agraria Services or the Ministry in charge of this Department who are not parties to this suit and not from the Department of Public Administration.

In view of my conclusions it is not necessary to go into the question whether it is open to the petitioner to subject regulation 41 to collateral attack in these proceedings. But for this, the question would arise whether the petitioner can do indirectly what he should do directly.

As the petitioner is deemed to have vacated his post by virtue of a legal provision the reason given in the notice P2 is true and correct in fact and in law. It cannot be said that there is any error on the face of the notice. Accordingly no ground exists which justifies the intervention of this court by way of *certiorari*. This application is therefore dismissed with costs.

TAMBIAH, J.

I agree.

Application dismissed.