

**LANKA MULTI MOULDS PVT LTD**

**v.**

**COMMISSIONER OF LABOUR**

COURT OF APPEAL

J. A. N. DE SILVA, J. (P/CA)

C.A. 20/96

JANUARY 23, 2001

MARCH 7, 2001

MAY 2, 2001

*Termination of Employment of Workmen (Special Provisions) Act 45 of 1971 - S.2(1), 2(1)(b), 2(4), S.3, S.6, S.19 - Cessation of Employment - Prior consent in writing - Termination illegal - Discretion of Commissioner to order re-instatement - "May" - is it directory?*

The second Respondent is a British National who joined the employment of the Petitioner Company in 1992 initially for a period of 3 years. The Petitioner Company merged with another company resulting in the formation of a New Company. The Petitioner Company thereafter informed the 2<sup>nd</sup> Respondent that he could not be effectively integrated into the new Corporate Structure and offered him a benefit package. The 2<sup>nd</sup> Respondent complained to the 1<sup>st</sup> Respondent who ordered re-instatement with effect from 22. 11. 96 and payment of backwages.

It was contended on behalf of the Petitioner, that there was no termination but cessation of employment by mutual consent, and further as the contract of employment was for a period of 3 years, the Commissioner cannot extend the duration of 2<sup>nd</sup> Respondent's contract of employment.

**Held :**

- (i) The Commissioner had effectively and unlawfully extended the duration of the 2<sup>nd</sup> Respondent's contract of employment indefinitely and beyond the fixed term period of 3 years which had already expired on 30. 07. 95.
- (ii) Under Section 6 the Commissioner is vested with a discretion to grant alternate relief in lieu of re-instatement or to even refrain from granting any relief if the circumstances of the case so warrants.
- (iii) As no steps have been taken to produce the reasons of the Commissioner the Court has to come to the conclusion that he has no defensible reasons to give.

**APPLICATION** for a Writ of Certiorari.

**Case referred to :**

1. S.C. 884/75 - SCM 29. 03. 1976

*Faiz Mustapa P.C.*, for Petitioner.

*N. Malalasekare* for 2<sup>nd</sup> Respondent.

*A. Gnanathasan DSG* for 1<sup>st</sup> 3<sup>rd</sup> Respondent.

*Cur. adv. vult.*

May 02, 2001.

**J. A. N. DE SILVA, J. (P/CA)**

The petitioner company is seeking a writ of Certiorari from this Court to set aside and quash the order dated 22. 11. 95 made by the Commissioner of Labour who is the first respondent.

The petitioner is a private limited liability Company incorporated in terms of the provisions of the Company Law of Sri Lanka and is engaged primarily in the business of manufacturing steel injection moulds used by the plastic, rubber and glass industries. This company is an approved company by the Board of Investments (BOI) of Sri Lanka.

The second respondent above named is a British National who joined the employment of the petitioner company on or about 01. 09. 1992 in the capacity of Technical Manager of its factory situated in the export promotion zone.

The terms and conditions of employment of the 2<sup>nd</sup> respondent were governed by the provisions of the formal contract of employment which was entered into by both parties on 30. 07. 1992. According to the contract the 2<sup>nd</sup> respondent's appointment initially was for a period of three years and was scheduled to come to an end on 31. 08. 1995. However both parties in term of clause 2(b) reserved to themselves the right to terminate the contract upon the furnishing of three months notice to the other party of the intention to terminate the contract.

In 1994 the petitioner company negotiated a joint venture agreement with a German Organization which provided amongst other beneficial aspects the transfer of advanced technology through German experts and engineers. In pursuance of this agreement a merger was effected and the resulting position was the incorporation of a new company called and known as "Boehmin Leckner Multy Moulds Ltd." The petitioner company informed the 2<sup>nd</sup> respondent that he could not be effectively integrated into the new corporate structure and the petitioner company offered him the following benefits.

- (a) His salary of 7500 Pounds Sterling in lieu of notice.
- (b) Air passage from Colombo to London to his family and him.
- (c) Gratuity of 2500 Pound Sterling.
- (d) Service Certificate.
- (e) The facility of a car, telephone, free accommodation until he and his family left the shores of Sri Lanka.
- (f) Release from the obligation on his part of the Contract.

Initially the 2<sup>nd</sup> respondent did not agree to this and showed his dissatisfaction by letter dated 22. 01. 1994 (P8). However it seems that later he had reluctantly accepted the above offer.

Thereafter the 2<sup>nd</sup> respondent by his letter dated 19. 06. 1994 complained to the Commissioner of Labour that his services as the Technicle Manager with Lanka Multi Moulds (Pvt) Limited, the petitioner, had been terminated with effect from 30. 07. 1994 in contravention of the provisions of the Termination of Workman (Special Provisions) Act No 45 of 1971 as amended.

After an inquiry the Commissioner of Labour by his order dated 22. 11. 1995 (P26) ordered the reinstatement of the 2<sup>nd</sup> respondent with effect from 15. 01. 1996 and the payment of back wages amounting to Rs. 3,543,750/=.

The petitioner thereafter filed an application in this Court for a mandate in the nature of a writ of Certiorari. This Court

on 28. 02. 1998 dismissed the petitioners application on the basis of non-production of a certified copy of the memorandum prepared by the 3<sup>rd</sup> respondent. Thereafter the petitioner sought special leave to appeal from the Supreme Court and Supreme Court directed that the matter be argued de novo before this Court.

At the hearing of this application the learned Counsel for the petitioner submitted that no terminal situation as contemplated by Termination of Employment of Workman (Special Provisions) has arisen and therefore the Commissioner had no jurisdiction to hold an inquiry. It was the contention of the counsel that by mutual agreement there was a "cessation" of employment and the 2<sup>nd</sup> respondent had rendered his purported application in anticipation of an event to which he himself had agreed.

Section 2(1) of the said Act deals with the manner in which the employment of any workman may be lawfully terminated. Section 2(1) is as follows "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(1)(b) does not arise for consideration. The petitioner in paragraph 15 states that "the cessation of the 2<sup>nd</sup> respondent's employment had been brought about in pursuance of a consensus reached between the petitioner and the 2<sup>nd</sup> respondent." And again at paragraph 31 of the petition reference has been made to the fact that the "2<sup>nd</sup> respondent admitted that he had not on any occasion objected in writing to the proposal in respect of the cessation of employment." It is to be noted that these contentions would not help the petitioner for they cannot be substituted for the statutory requirement of "the prior consent in writing of the workman." The petitioner had failed to show "prior consent in writing of the workman and in terms of Section 5 of Act the termination shall be" illegal, null and void and accordingly shall be of no effect whatsoever."

In terms of Section 2(4) of the Act, the "Scheduled Employment" of the workman should be terminated by his Employer "otherwise than by reason of punishment imposed by way of disciplinary action." In terms of the definition of "Schedule Employment" of Section 19 of the Act the workman was in "Schedule Employment" and it is common ground that the non employment of the workman was not by reason of punishment imposed by way of disciplinary action."

Similarly Section 3 of the Act lists the circumstances under which the provisions of the Act will not apply; none of the circumstances apply to the workman in the instant case. Section 3 is to the following effect "The provisions of this Act other than this Section shall not apply to the termination of any workman who has been employed by an employer when such termination was effected by way of retirement in accordance with the provisions of. . . .

(1) . . . . .

(2) Any contract of employment wherein the age of retirement of such workman is expressly stipulated or . . .

Therefore it is clear that according to the provisions of the said Act the 2<sup>nd</sup> respondent was entitled to submit an application to the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent was equally entitled to hold an inquiry.

Mr. Musthapha the learned Presidents Counsel further submitted that the contract of employment between the parties was for a period of three years. As such the 1<sup>st</sup> respondent by directing the re-instatement of the 2<sup>nd</sup> respondent together with back wages had failed to exercise his discretion reasonably and had also failed to take cognizance of the employer's perspective in so doing. According to clause 1(b) of the contract "the appointment is for an initial period of three years."

Mr. Musthapha submitted that the Commissioner acted ultra vires in awarding re-instatement in as much as the 2<sup>nd</sup>

respondent had not sought the relief of re-instatement in his application which had initiated the proceedings and which had "purportedly" vested the 1<sup>st</sup> respondent with jurisdiction to launch an inquiry. However it is to be noted that when the 2<sup>nd</sup> respondent gave evidence he asked for re-instatement.

Learned Counsel for the 2<sup>nd</sup> respondent submitted that to hold that the contract is for three years would be to disregard the word "initial" and would amount to re-writing the contract. He further contended that no legal consequences flow whether the contract is a fixed terms contract or not in the context of the provisions of the Termination of Workman (Special Provisions) Act. His submission was that where the Commissioner finds that there is wrongful termination, Commissioner has no option but to order re-instatement of the Employee.

I hold the view that both parties by agreeing to use the word "initial" in the contract reserved their rights to re - negotiate and enter into a fresh contract at the expiration of the stipulated time period viz three years.

It is observed that once the Commissioner comes to a finding, as he did in this case, that the termination was illegal Commissioner can take action in terms of section 6 which reads thus "where an employee terminates the scheduled employment of a workman in contravention of the provisions of this Act the Commissioner may order such employer to continue to employ the Workman with effect from a date specified in such order in the same capacity in which the Workman was employed prior to such termination and to pay the Workman his wages and all other benefits which the Workman would otherwise have received if his services had not been terminated and it shall be the duty of the employer to comply with such order."

The power of the Commissioner under Section 6 of the Termination Act was examined by the *Supreme Court*<sup>(1)</sup> by Chief Justice Tennakoon, Justice Sharvananda and Justice Wanasundara and the Court held "The words in the section are

"may order" and not "shall order". The legislature obviously did not contemplate that in every case of termination of employment without permission of the Commissioner to order re-instatement or continuance of employment upon a complaint being made to him under Section 6." Therefore it is clear that the Commissioner is vested with a discretion to grant alternate relief in lieu of re-instatement or to even refrain from granting any relief if the circumstances of the case so warrant.

It is obvious from the order P26 that the Commissioner has not given his mind at all to the question that the contract was "initially" for three years. In directing that the 2<sup>nd</sup> respondent be reinstated with effect from 15. 01. 1996 the Commissioner had effectively and unlawfully extended the duration of the 2<sup>nd</sup> respondent's contract of employment with the petitioner, indefinitely and beyond the fixed term period of three years which had already expired on 30. 07. 1995. As such the Commissioner had purported to undermine the contractual violation of the contracting parties and exceeded the jurisdiction vested in him by Statute.

It is to be noted that no proper reasons had been adduced in support of the Commissioner's impugned order and therefore relevant adverse inference will have to be drawn against the order. No steps were taken to even produce the reasons before this Court and the Court has to come to the conclusion that he has no defensible reasons to give.

In all the foregoing circumstances and in view of the fact that Commissioner has held that the termination is illegal and wrongful I permit only part of the order to stand. I quash the part of the order dealing with reinstatement. On the question of back wages the petitioner is entitled only to get wages for the balance period of his three year contract viz for 13 months. Subject to the above the application is allowed with costs fixed at Rs. 5000/=.

*Application partly allowed.*