

PANDA TOYS EXPORTS (PVT) LTD.
v
COMMISSIONER-GENERAL OF LABOUR AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 2412/2004
APRIL 26, 2006
MAY 18, 2006

Termination of Employment of Workmen (Sp. Prov.) Act No. 45 of 1971 – Sections 6, 11 and 12 – Factory closed – Toy factory converted to Garment Factory – Factory premises leased out. New Company to absorb all workmen – No compensation awarded – Commissioner acting on recommendation of a subordinate – violation of principle ‘he who hears must decide’.

The petitioner was engaged in the business of manufacturing / exporting soft toys. As there was a drop in orders the petitioner had decided to convert the factory into a garment factory and leased out the premises to V Company. The V Company was to absorb all workmen – with continuity of service.

The workmen complained to the Commissioner-General of Labour that the petitioner was planning to close the factory without giving compensation. An inquiry was held by the 2nd respondent, and an order was made based on the recommendation of a Deputy Commissioner of Labour, who did not conduct the inquiry. The 1st respondent Commissioner-General of Labour awarded compensation to the workmen.

The petitioner company urged that, the 1st respondent had made an order on a recommendation which was made by a person who has not held the inquiry.

Held:

- (1) The 1st respondent had made the impugned order on a recommendation which was made by a person, who did not hold the inquiry – the decision of the 1st respondent based on that recommendation is illegal.

(2) The procedure is in violation of the principle that 'he who hears must decide and as such the order is *ultra vires*.

APPLICATION for a Writ of *Certiorari*.

Cases referred to:-

1. *Kundanmal Industries Ltd., v Wimalasena, Commissioner of Labour and others* 2001-3 Sri LR 229.

2. *Nagalingam v Lakshman de Mel, Commissioner of Labour* 78 NLR 231.

Murshid Maharooof with S.M. Markhen for petitioner.

Uresha de Silva SC for respondents.

July 4, 2006

SRISKANDARAJAH, J.

The petitioner is a private limited liability company incorporated under the Company Laws of Sri Lanka has sought a writ of *Certiorari* to quash the order of the 1st respondent contained in the letter dated 22.3.2004 marked P17. By the said Order the 1st respondent has awarded compensation to the 4th to 14th respondent the workers of the petitioner company, under the powers vested in terms of section 6 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971.

The petitioner submitted that the petitioner company was engaged in the business of manufacturing and exporting soft toys from 1996. From 1998 the petitioner company experienced a drop in the orders and was facing financial crises and it has become impossible to run the business as a profitable business due to non availability of export orders. Due to this reason in early 2001 the petitioner decided to convert the soft toys factory into a garment factory and decided to lease out the factory premises to a company called Viking Fashions Limited at the said premises. The petitioner made special arrangements in April 2001 with the said company to absorb and employ all the workmen at the same place, with the same salary and positions with the continuity of service. Accordingly the said Company was to start its operation from 18.06.2006.

On 4.6.2001 some of the workers of the petitioner's company complained to the 1st respondent the Commissioner General of Labour stating that the petitioner was planning to close the factory

from 15.06.2001 without giving compensation to the workmen (P2). On 16.06.2001 the 4th to 14th respondents had made an application to the 1st respondent stating that their rights were denied with effect from 15.06.2001 (P3).

Consequent to the receipt of the aforesaid complaints of the employees, the petitioner was informed of this complaint and both parties were intimated to be present for an inquiry on 19.7.2002 (1R2) by the 1st respondent. The inquiry was held by the 2nd respondent with the participation of both parties and both parties were given an opportunity to file written submissions. The order marked P17 dated 22.3.2004 was made based on the recommendations (1R4) that were forwarded consequent to the aforementioned inquiry. This recommendation was made by one M.N.S. Fernando, Deputy Commissioner of Labour (Termination Unit). The petitioner contend that Mr. M.N.S. Fernando did not conduct the said inquiry and the petitioner never took part in an inquiry before M.N.S. Fernando but the recommendation marked 1R4 was given by a person who did not conduct the inquiry therefore the decision of the 1st respondent based on that recommendation is illegal and should be quashed.

The Counsel for the 1st respondent conceded that the recommendation 1R4 was made by M.N.S. Fernando, Deputy Commissioner of Labour (Termination Unit) and he made this recommendation after studying the proceeding that took place before the 2nd respondent. The 1st respondent has not given any explanation why the recommendation was not submitted by the inquiring officer and why it was submitted by another officer who has not held the inquiry.

In Kundanmals Industries Ltd. v Wimalasena Commissioner of Labour and others⁽¹⁾ J.A.N.De Silva P/CA (as he then was) held:

"I see no serious objection to the Head of the Department taking a final decision having considered the evidence recorded and documents available to him on the question that has to be decided. In the circumstances I state that there is no merit in this submission. There is no material available to establish that the 1st respondent mechanically adopted the recommendations without giving his mind to the evidence and documents. The power to delegate

hearing under the Termination of Employment of Workmen Act No. 45 of 1971 was considered and accepted in the case of *Nagalingam v Lakshman de Mel*⁽²⁾."

In *Nagalingam v Lakshman de Mel*, *Commissioner of Labour* (*supra*). Sharvananda J. with Tennekoon, C.J. and Gunasekera J. agreeing held:

"Mr. Jayawardena, appearing for the petitioner, urged two grounds in support of his application.

One ground was that the inquiry in to the 3rd respondent's application under Section 2 of the Act was conducted by the 2nd respondent and that in the premises the 1st respondent had no jurisdiction to make the order complained of. Section 12 of the Act provides that the commissioner shall have power to hold such inquiries as he may consider necessary for the purposes of the Act. Section 11(2) authorises the commissioner to delegate to any officer of the Labour Department any power, function or duty conferred or imposed on him under the Act. Hence, it was lawful for the Commissioner to have delegated to his assistant, the 2nd respondent the function of holding the inquiry into the 3rd respondent's application. The ultimate order dated 28th March, 1974, (P12), though it has gone under the hand of the 1st respondent, was in fact, as a perusal of the original record disclosed, made on the recommendation of the 2nd respondent. In the circumstances, there is no substance in this objection. In fact, the Counsel for the petitioner, when it was pointed out to him that the order only embodied the decision of the 2nd respondent, did not press the matter further."

The instant case is distinct from the above two cases, in this case the 1st respondent delegated the power to the 2nd respondent to hold an inquiry and the 2nd respondent had held the inquiry but he had not submitted a recommendation to the 1st respondent who made the said impugned order. The recommendation on which the 1st respondent relied was submitted by one M.N.S. Fernando, Deputy Commissioner of Labour (Termination Unit) but he did not inquire the said case at any stage. It appears that he had submitted the recommendation after perusing the said inquiry proceedings and documents.

Alternatively, there is nothing to show that the 1st respondent addressed his mind to the evidence, the documents produced at the inquiry and the issues involved. In other words the 1st respondent had made an order on a recommendation which was made by a person who has not held the inquiry. It is in violation of the principle that "he who hears must decide" and as such the order is *ultra vires*.

For this reason I set aside the order of the 1st respondent dated 22.3.2004 marked P17. The application of the petitioner for *writ of certiorari* is allowed without costs.

This order will not preclude the respondent to make an order on the recommendation of the inquiring officer of the said inquiry or to hold a fresh inquiry.

Application allowed.