1975 *Present*: **Tennekoon, C. J., Sharvananda, J., and Gunasekera, J.**

K. NAGALINGAM, Petitioner *and* LAKSHMAN DE MEL (Commissioner of Labour) and 2 others, Respondents.

S.C. 650/74—Application in the nature of a *Writ of Certiorari* under Section 12 of the Administration of Justice Law No. 44 of 1973

Termination of Employment of Workmen (Special Provisions) Act No. 45 1971—Order under Section 2—Validity of Order made by Commissioner on the recommendation of his Assistant—Whether

provisions of Section 2(2)(c) are mandatory or directory—Participation in proceedings without raising objection to jurisdiction—waiver.

(1) Where an application is made under Section 2 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 to terminate the employment of a workman, it is lawful for the Commissioner of Labour to delegate to an Assistant Commissioner of Labour the function of holding the inquiry into such application. It is open to the Commissioner of Labour to make the order under Section 2 on the recommendation made by the Assistant Commissioner who held the inquiry.

(2) Non-compliance with the time limit stipulated by Section 2(2)(c) of the said Act does not render the Order of the Commissioner of Labour void.

"Further the Petitioner, having participated in the prolonged proceedings without any objection and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection to the jurisdiction of the Commissioner of Labour to make a valid Order after the zero hour. The jurisdictional defect, if any, has been cured by the Petitioner's consent and acquiescence."

APPLICATION for a *Writ of Certiorari,*

H. W. Jayawardena, with *N. Satyendra, Chula de Silva,* and *P. Suntharalingam* for the Petitioner.

K. M. M. B. Kulatunge, Deputy Solicitor General, *with G. E. M de Silva,* State Counsel, for the 1st and 2nd Respondents.

H. L. de Silva, with *Mark Fernando* and *John Kitto* for the 3rd Respondent.

Cur. adv. vult.

December 10, 1975. SHARVANANDA, J.—

This is an application for a Writ of Certiorari to quash the order dated 28.3.74 whereby, in terms of section 2 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, the Commissioner of Labour has granted written approval to the 3rd respondent-employer to terminate the employment of the petitioner.

The petitioner joined the Department of Labour in 1946, and in November, 1962, was in the service of the Department as the Assistant Commissioner of Labour. While holding that post, he applied to join the service of the Employers Federation of Ceylon, the 3rd respondent. On 29th November, 1962, he was appointed to the post of Assistant Secretary under the 3rd respondent. Upon receipt of the said appointment, the petitioner retired from Government Serivce on the language issue with a pension and joined the service of the 3rd respondent with effect from 1st January, 1963. At the time of his appointment, the petitioner was

48 years old. The letter of appointment did not stipulate any retiring age. By letter dated 16th March, 1973, the 3rd respondent intimated to him that he had reached the age of sixty on 10th February, 1973, and that according to the policy of the Federation, he should have retired at the end of February, 1973, and that the Board of Trustees of the Federation had decided to give him one year's notice of retirement to expire on 31st March, 1974. As the petitioner did not consent to the retirement, the 3rd respondent made application *on the 18th of September,* 1973, to the Labour Commissioner under the provisions of section 2 of the Termination of Employment of Workmen (Special Provisions) Act (hereinafter referred to as the Act) for his written approval to terminate the employment of the petitioner from 31st March, 1974, on the retirement age. The aforesaid application was inquired into by the 2nd respondent, who was at that time the Assistant Commissioner of Labour. The petitioner resisted the application on the ground that since no age of retirement was specified in his letter of appointment, he could serve as long as he was physically fit and his service was satisfactory. The 2nd respondent gave the parties an opportunity to state their case and make their submissions. The oral hearing before the 2nd respondent commenced on the 14th of December, 1973, and was concluded on the 28th of February, 1974. Both parties, without any protest or objection, participated in the inquiry. They were represented at the inquiry by counsel and all acquiesced in the inquiry dragging on till the end of February 1974. The parties thereafter made written submissions to the 2nd respondent. The copy of the written submissions filed on behalf of the petitioner is dated 14th March, 1974. On the recommendation of the 2nd respondent, the Commissioner of Labour, by his letter dated 28th March, 1974, gave to the 3rd respondent his written approval, in terms of section 2 of the Act, for the termination of the employment of the petitioner with effect from 31st March, 1974. The 3rd respondent has accordingly terminated the petitioner's services from 31st March, 1974.

By his present application dated 19th June, 1974, the petitioner has moved this Court to quash the entire proceedings held by the 2nd respondent and the order dated 28th March, 1974, made by the 1st respondent, the Commissioner of Labour.

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

One ground was that the inquiry into 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, 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 other ground which formed the main plank of Counsel's argument was that the 1st respondent had admittedly made the order P12 after the expiry of 3 months from the date of the receipt of the application made by the 3rd respondent and that the order was in breach of the provisions of section 2(2) (c) of the Act and hence is ultra vires the powers of the Commissioner of Labour and is null and void. Counsel submitted that no valid approval could be given in terms of section 2 of the Act outside the 3 months from the date of receipt of the application made by the employer that the Commissioner's jurisdiction to grant approval was conditioned by this time limit and that the provision as to time was mandatory. His argument was that the delay, even if attributable to the parties, ipso facto divested the Commissioner of his jurisdiction to grant the approval and rendered invalid his decision.

For a proper appreciation of the contention of Counsel, an examination of the following provisions of the Act is necessary:—

Sec. 2

(1) No employer shall terminate the scheduled employment of any workman without—

(a) the prior consent in writing of the workman;

(b) the prior written approval of the Commissioner.

(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:

(a) such approval may be granted or refused on application in that behalf made by such employer;

(b) the Commissioner may, in his absolute discretion decide to grant or refuse such approval;

(c) the Commissioner shall grant or refuse such approval *within three months from the date of receipt of application* in that behalf made by such employer ;

(d) the Commissioner shall give notice in writing of his decision on the application to both the employer and the 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 sub-section shall be final and conclusive and shall not be called in question in any Court, whether by way of writ or otherwise.

Sec. 12

(1) The Commissioner shall have power to hold such inquiries as he may consider necessary for the purposes of this Act.

(2) The Commissioner shall, for the purposes of any inquiry under this Act, have all the powers of a District Court—

(a) to summon and compel the attendance of witnesses ;

(b) to compel the production of documents.

Sec. 17

The proceedings at any inquiry held by the Commissioner for the purposes of this Act may be conducted by the Commissioner in any manner not inconsistent with the principles of natural justice which to the Commissioner may seem best adapted to elicit proof or information concerning matters that arise at such inquiry.

The scheme of the Act thus provides for the holding of a fair and sufficient inquiry to precede the grant or refusal of the written approval referred to in section 2 of the Act. In the nature of things, this inquiry is bound to be spread out and to take time. The examination of witnesses and documents may go on for a number of days. Witnesses may not turn up when summoned. Coercive processes may have to be employed to ensure the attendance of witnesses and the production of documents. Counsel appearing for parties will have to be heard. The inquiry

must exhibit all the indicia of a fair trial. Through necessity or default of the inquirer, whether culpable or not, the inquiry may not be concluded within the period. With all these contingencies, did the Legislature postulate that the inquiry should be completed and order thereon given within 3 months from the date of the receipt of the aplication with an implied nullification of all the proceedings for any disregard of the time limit ? There is no express provision in the Act indicative of the Legislature's intention regarding the effect of any non-compliance. As is stated in Maxwell's Interpretation of Statutes (11th Ed. at page 362): "When a statute requires that something shall be done, or done in a particular manner, or form without expressly declaring what shall be the consequence of non-compliance, the question often arises: What intention is to be attributed by inference to the Legislature ? Where indeed the whole aim and object of the Legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention." It is trite law that it is the duty of the Court, in construing a statute, to ascertain and implement the intention of Parliament as can be gathered therein. When Parliament prescribes the manner or form in which a duty is to be performed, or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The Courts must therefore formulate their own criteria for determining whether the pocedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done. Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act"—Smith Judicial Review of Administrative Action (2nd Ed. at page 126).

"Where the prescriptions of a statute relate to the performance of a public duty, and where invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty yet not promote the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them. It has often been

held, for instance, when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, then the Act was directory only and might be complied with after the prescribed time."

(Maxwell—11th Ed. at page 369).

To hold that non-compliance with the time limit stipulated by section 2 (2) (c) renders the Commissioner's order of approval or refusal void will cause grave hardship to innocent parties. Parties who have done all that the statute requires of them should not lose the benefit of the order because it was made after the final hour had struck with the passage of the 3 months. On the argument of Counsel for the petitioner, if the order was made on the last terminal date of the 3 months, the order is a valid order, but, if, for any unavoidable reason, the order could not, or was not given by that time, the entire proceeding was a useless exercise. In my view, Parliament is to be presumed not to have intended such an inequitable result.

" When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to *persons who have no control over those entrusted with the duty* and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."— per Sir Arthur Channell in *Montreal Street Ry. Co. vs. Normandin* (1917 A.C. 170 at 175).

The object of the provision relating to time limit in section 2(2) (c) is to discourage bureaucratic delay. That provision is an injunction on the Commissioner to give his decision within the 3 months and not to keep parties in suspense. Both the employer and the employee should, without undue delay, know the fate of the application made by the employer. But the delay should not render null and void the proceedings and prejudicially affect the parties, as the parties have no control over the proceedings. It could not have been intended that the delay should cause a loss of the jurisdiction that the Commissioner had, to give an effective order of approval or refusal. In my view, a failure to comply literally with the aforesaid provision does not affect the efficacy or finality of the Commissioner's order made thereunder. Had it been the intention of Parliament to avoid such orders, nothing would have been simpler than to have so stipulated.

Further, the petitioner, having participated in the prolonged proceedings without any objection and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection to the jurisdiction of the Commissioner of Labour

to make a valid order after the zero hour. The jurisdictional defect, if any, has been cured by the petitioner's consent and acquiescence. The petitioner had approbated the act of the 2nd respondent in continuing to hold the inquiry after 18th December, 1973. The right to impugn the proceedings has been lost by his acquiescence. "Where nothing more is involved than a mere irregularity of procedure, or (e.g.) non-compliance with statutory conditions precedent to the validity of a step in the litigation of such a character that if one of the parties be allowed to waive the defect, or by conduct or inaction to be estopped from setting it up, no new jurisdiction is thereby impliedly created and no existing jurisdiction impliedly extended beyond its existing boundaries, the estoppel will be maintained and the affirmative answer of illegality will fail". (Spencer Bower—Estoppel by Representation (2nd Ed.), section 142 at page 136) "Where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round to challenge the legality of proceedings due to his own invitation or negligence."—*Alagappa Chitty vs. Arumugam Chitty* (2 *C. L. Rep.* 202). In the present case, the 1st respondent had jurisdiction to enter upon the inquiry and give his order. The consent or lack of objection prevents the petitioner from relying on the irregularity and from complaining that the jurisdiction of the Commissioner was ousted by the time-bar. Had the petitioner objected to the proceedings continuing after 18th December, 1973, the 3rd respondent might have made a new application which would have supplied a further 3 months' period to complete the inquiry. But, the petitioner sensibly and realistically represented "Of course, that is not necessary" and encouraged the 2nd and 3rd respondents to proceed with the inquiry beyond that date by refraining from objecting to the further proceeding. "If a person having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.".—per Thesiger L. J. in *De Busache vs. Alt* (1878) 8 ch. D. 286 at 314. The petitioner's right, if any, to *certiorari* has, in the circumstances, been lost by his acquiescence or implied waiver.

Though the petitioner has thus lost his right to impugn the proceedings held by the 1st and 2nd respondents, the conduct of these respondents in not endeavouring to conform to the law and failing to grant or refuse the approval within the 3 months as required by section 2 (2) (c) of the Act cannot be condoned.

No explanation for the delay has been ever attempted. Public officials should seek to comply with the law. The 2nd respondent was in charge of the proceedings. No reason has been adduced as to why the hearing of the inquiry commenced only on the 14th December, 1973, when the application was made on 18th September, 1973. One wonders as to how the Commissioner thought he would be able to complete the inquiry and give or refuse his approval by 18th December, 1973, in terms of section 2(2) (c) having commenced his inquiry so late as on 14th December, 1973.

The petitioner's application accordingly is refused with costs fixed at Rs. 500 payable to the 3rd respondent. The 1st and 2nd respondents will not, in the circumstances, be entitled to any costs.

TENNEKOON, C.J.—I agree.

GUNASEKERA, J.—I agree.

Application refused.