KUNDANMALS INDUSTRIES LTD

v.

WIMALASENA COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
J. A. N. DE SILVA (P/CA)
C.A. 708/97
APRIL 05TH, 2001

Termination of Employment (Special provisions) Act No. 45 of 1971 - Amended by 4 of 1976 and 51 of 1988 - S. 2, S. 11(2) - Approval to terminate the services - Closure of Business - Compensation ordered - legality - No reasons given - applicability of "he who hears must decide" Rule.

Whilst a strike was in progress the Petitioner Company sought approval from the Commissioner of Labour to terminate the services of its employees upon the closure of the business, and whilst the application was pending closed down its business. The Commissioner of Labour after inquiry ordered the Petitioner to pay compensation.

It was contended by the Petitioner that:

(i) No reasons were given for the order;

(ii) The order is ultra vires as it is in violation of the principle 'he who hears must decide.

(iii) that, the 1st Respondent has not disclosed the material on which he made the order;

(iv) the legality of the payment.

(vi) that the Commissioner of Labour has not taken into account the financial capacity of the Petitioner.

Held :

(i) There is no general duty to give reasons but reasons must be available for perusal, if and when ordered by Court. Court is satisfied on perusal of the documents that there are adequate reasons in the order, though not communicated to the Petitioner.

Per J. A. N. de Silva, J. (P/CA)

> "I see no serious objection to the Head of the Department taking a final decision having considered the evidence recorded and documents

made available to him in the question that has to be decided. There is no material available to establish that the Commissioner mechanically adopted the recommendations without giving his mind to the evidence and documents."

(ii) There is no statutory requirement that the Commissioner should take into account the financial position of the company, but it is clearly a matter for the Commissioner to take into consideration, in balancing the competing interest of the employer and workman.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *Karunadasa v. Unique Gemstones Ltd.*, - 1997 - 1 SRI LR 256
2. *Yaseen Omar v. Pakistan International airlines & two others.*- SC 28/96
3. *Samalanka Ltd., v. Weerakoone, Commissioner of Labour.* -- 1994 - 1SRI LR
4. *Edirisinghe v. Commissioner of Labour* - BASL 1998 Vol. 11 Part 11
5. *Nagalingam v. Luxman de Mel* - 78 NLR 23
6. *Chas P. Hayley & Co. Ltd., v. Commercial & Industrial Workers* 1995 - 2 Sri LR 42 at 50

Faiz Musthapa P.C., with *Hemasiri Withanachchi, Sanjeewa Jayawardena* and *M. S. M. Suhaid* for Petitioner.

Uditha Egalahewa, S. C for 1st, 2nd Respondents.

Shirley Fernando P.C., with *H. Amarawickrema* for 3rd Respondent and added Respondent.

Cur. adv. vult.

June 20, 2001.

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

The petitioner company is seeking a writ of certiorari quashing the order of the Commissioner of Labour, the 1st respondent to this application, dated 28. 02. 1997 requiring the petitioner company to pay compensation to several workman under the Termination of Employment (Special Provisions) Act No 45 of 1971 as amended by Law No 4 of 1976 and Act No 51 of 1988.

The facts relevant to this application are as follows.

The petitioner company had been incorporated on 14th November 1960 and had been affiliated with two Japanese Companies namely Ceiko Ltd. and Tevjin Ltd. for the manufacture of Rayon and Synthetic materials for the local market. Raw materials were imported and after the process of weaving, dying and finishing, the finished products were released to the local market. The production commenced in or about 1964. During the period of 1964 -1980 the petitioner's business had generated a profit of approximately Rs. 49.2 Million. According to the petition after 1980 the company started running at a loss, it is alleged that the petitioner lost several million of rupees during the period 1980 -1994.

The position of the company was that losses occasioned due to the following reasons which were beyond its control.

(1) Increase in the cost of production.

(2) Liberalization of the imports in 1977.

(3) Competition prevailed in the free market economy.

(4) Establishment of several new garment factories by the public sector.

(5) A strategically timed strike in 1994.

According to the petition in the early part of 1994 the 3rd respondent union made certain demands including a salary revision. With a view of effecting a resolution of the matters the petitioner formulated proposals and held several rounds of discussions with the employees. However the 3rd respondent union rejected the proposals put forward by the petitioner and commenced a strike on or about 09. 08. 1994 and the said strike continued till 02. 05. 1995. Whilst the strike was in progress the petitioner preferred an application to the 1st respondent on or about 28. 12. 1994 in terms of Section 2 of the Termination of Employment of Workman (Special Provisions) Act No 45 of 1971 as amended, seeking approval of the 1st respondent to terminate the service of its employees upon

the closure of the business. When the said application was pending before the Commissioner of Labour the petitioner company closed down the factory with effect from 20. 04. 1995 which resulted in the termination of services of all the workmen. The Commissioner of Labour conducted an inquiry and the order was delivered on 28. 02. 1997 in which he directed the petitioner to pay compensation as set out in the said order P4 which is the subject matter of this application.

Learned Counsel for the petitioner in his submissions to Court as well as in his application challenged the said order on the following grounds.

(a) The 1st respondent and 2nd respondent acted in breach of natural justice by not giving reasons for the order dated 28. 12. 1997.

(b) The order is ultra vires in as much as it is in violation of the principle that "he who hears must decide".

(c) Alternatively, even assuming that a "delegated hearing" is permissible the 1st respondent had not disclosed the material on which he made the order and there is nothing to show that he addressed his mind to the evidence, the documents produced at the inquiry and the issues involved and as such the order is ultra vires.

(d) The 1st respondent himself has held that the closure was due to circumstances beyond the control of the petitioner company but failed to address his mind to the question as to whether compensation should be paid.

(e) The order is vitiated by the failure on the part of the 1st respondent to take into account the financial capacity of the petitioner company. Therefore the basis of compensation is arbitrary.

It is to be noted that having issued Noice to the petitioner on 17. 10. 1997 Justice F. N. D. Jayasuriya who presided in that Court has observed thus.

"The petitioner has applied for certified copies of the written reasons of the commissioner for his order dated 28. 02. 1997 and for a copy of the recommendations with reasons of the Deputy Commissioner Mr. Wijeweera (2nd respondent). There had been no response to this request from the two respondents. This Court is of the considered view that a perusal of reasons for the order of the Commissioner dated 28. 02. 1997 and perusal of recommendation and the reasons are grounds for the findings and recommendations of Mr. Wijeweera are necessary for the consideration of the matter arising upon this application. In the circumstances Court direct the 1st respondent to issue certified copies of the following documents.

(a) The order together with reasons dated 28. 02. 1997.

(b) The memorandum of recommendation together with reasons for grounds for the findings of the 2nd respondent contained in file bearing reference No. TE/3/95. . ."

In compliance with this direction the said documents were furnished to the petitioner on 27. 11. 1997. The said documents were also made available for perusal of Court by the State Counsel who appeared for the 1st and 2nd respondents. Having examined the documents this Court is satisfied that there are adequate reasons in the order as well as in the memorandum of recommendation though not communicated to the petitioner. In several of Sri Lankan cases it has been held that there is no general duty to give reasons but reasons must be available for perusal if and when ordered by Court. (*Vide Karunadasa v. Unique Gemstones Ltd.*[1], *Yaseen Omar v. Pakistan International Airlines and Two others*[2], *and Samalanka Ltd. v. Weerakoon, Commissioner of Labour and Others*[3]) In these circumstances the 1st ground relied on by the petitioner that the absence of reasons has resulted in the breach of natural justice is untenable.

The 2nd and 3rd objections relate to the concept of "delegated hearing".

Learned Counsel for the petitioner contended that the principle "he who hears must decide" has been violated as the inquiry was held by the 2nd respondent and the order made by the 1st respondent.

It must be noted that sometimes it is impossible for a single officer or a Minister to decide multitude of applications. In such situation the law, on account of necessity permits the authority who is called upon to make the decision to delegate to a subordinate officer the functions of holding an inquiry in the sense to collect the facts. That officer may record evidence, collect all the relevant documents and submissions of the person or his representatives and forward the inquiry notes to the deciding authority with or without his recommendations. This principle is clearly brought out by Professor Wade in his book "Administrative Law" 7th Edition at Page 548 in the following words.

"Where the deciding authority is a Minister or Central Government Department, it must be assumed that Parliament intends the Department to operate in its usual way, so that the Minister's duties may be performed by subordinate officials. In other cases, the Courts allow some relaxation of the normal rule which requires statutory powers to be exercised by the precise person or body on whom they are conferred and make it impossible for them to be legally exercised by others e. g. sub committees. The Privy Council has held that the Dairy Board, in making zoning orders affecting milk producers, may appoint a person or persons to receive evidence and to make an order, the Board is fully informed of the evidence and submissions, there will be no breach of natural justice."

The learned Counsel for the petitioner submitted that in terms of Section 11(2) of the Termination of Employment of Workman Act the concept of delegated hearing as a matter of necessity does not arise since the power of making the order itself can also be delegated with the power to decide. He relied on the decision of *Edirisinghe v. Commissioner of Labour* [4]

I do not accept this proposition. Even if it is accepted for the purpose of argument since the Courts have recognized that it is permissible to delegate to subordinate officials to collect facts and record evidence. 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 Workman Act was considered and accepted in the case of *Nagalingam v. Laxman de Mel*[5].

The final point raised by the learned Counsel for the petitioner was that having decided that the closure of the company was due to circumstances beyond the control of the petitioner, the Commissioner should have taken into account the financial capacity of the petitioner in determining whether compensation should be paid or not. It was his submission that the Chief Internal Auditor of the petitioner company gave evidence and produced copious documentation marked A - 1 to A - 20 to demonstrate the adverse financial status of the petitioner company and its inability to continue in business any further. Mr. Mustapha, PC, submitted that when the Commissioner made the order he had not made any reference whatsoever to the loss incurred and the financial capacity of the petitioner to pay the compensation awarded. He relied on the decision in *Chas. P. Hayley and Co. Ltd. v. Commercial and Industrial Workers Union*[6] and submitted that it is a fatal error.

It is to be noted that the above case deals with a situation where the workers demanded an increase in the salary and the company took up the position that as the company was running at a loss the demands cannot be met. In these circumstances the Court had held that the arbitrator appointed under the Industrial Disputes Act should have considered the financial - position of the company in granting an award in favour of the workers.

The instant case deals with a terminal situation and a cessation of services of employees on account of closure. However in the order of the Commissioner he deals with the profits gained and also losses incurred by the petitioner company for the period of 1964 - 1994. In addition to this the 1st respondent in paragraph 6 of his affidavit has stated as follows.

(i) That 8% of the earnings of the employees has been deducted by the petitioner for contribution to the Employees Provident Fund and the said sum has been used by the company.

(ii) That 12% of the earnings of the employees has to be contributed by the employer to the Employees Provident Fund.

(iii) That a sum of money equivalent to 20% of the earnings of the employees should have been deposited with the Central Bank as contributions to the Employees Provident Fund.

(iv) That the employees would have received 12% interest on the sum referred to above.

(v) That a sum not less than 17 Million Rupees is due as Employees Provident Fund contribution for a period prior to the application of the petitioner in this Court.

(vi) That the default by the company in the payment of Employees Trust Fund contributions has deprived the employees of many benefits like medical assistance and scholarships to children of the employees.

(vii) That I deny that the company's perilous financial status did not permit the company to deposit the Employees Provident Fund and the Employees Trust Fund contributions.

From the above it is very clear that the petitioner company had not only failed to contribute the statutory dues to the employees but also had misappropriated the same. On top of

that if the employees are to go home without a cent at the time of closure where do the employees stand? There is no statutory requirement that the Commissioner should take into account the financial position of the company before ordering compensation to workman under the Termination of Employment of Workman Act. By this I do not mean to say that the Commissioner should be completely oblivious to the financial capacity of the employer. It certainly is a matter for the Commissioner. He may take into consideration in balancing the competing interest of the employer and workman. But on the facts of this case, the petitioner's deliberate and wilful failure to perform his statutory obligations towards his employees operates as a bar to any request for relief on account of his financial capacity. The order to pay compensation had been given having taken into account the workman's age, their period of service, family position and difficulties in finding alternate employment. I see nothing arbitrary or unreasonable in this order. It is an order the Commissioner could have justly made in the circumstances of this case. Accordingly the application of the petitioner is dismissed with costs.

Application dismissed.