HIDDELARACHI
VS.
UNITED MOTORS LANKA LTD., AND OTHERS

SUPREME COURT,
WEERASURIYA. J,
UDALAGAMA. J,
DISSANAYAKE. J,
SC 35/2004,
CA 1192/2001.
AUGUST 03, 2005.
SEPTEMBER 1, 15, 2005.

Termination of Services of Workmen (Special Provisions) Act , 41 of 1971 as amended by Act, No. 4 of 1976 and Act, No. 51 of 1988 (TEW Act) - Sections 2 (1) (a) (b), Section 3, Section 4, Section 5, Section 6- No Jurisdiction if termination is on disciplinary grounds? - Conduct of appellant - The purpose of the amending Act? - Difference.

The 4th respondent -appellant was the Chief Executive of the petitioner-respondent company. His contract of employment was terminated. The appellant sought an order, under Section 6 of the TEW Act, for reinstatement with back wages. On a preliminary objection raised that the Commissioner has no jurisdiction, the 2nd respondent inquirer made order directing that the respondent company should commence leading evidence to establish that the termination was effected as a punishment on disciplinary grounds. The Court of Appeal up held the preliminary objection raised, and held that, when the employer states that the termination has been on disciplinary grounds, the jurisdiction of the Commissioner is automatically ousted.

HELD :

(1)Before the TEW (Special Provisions) Amendment Act, No. 51 of 1988 came into the statute book, where termination of a workman was effected by informing the workmen by word of mouth or by an act or deed indicating to him not to come for work and where a complaint, to that effect is made to the Commissioner of Labour and the employer claims that the termination was on disciplinary grounds, the Commissioner had no alternative but to inqure into, as certain whether the termination was effected as a punishment imposed by way of disciplinary action in terms of sub-section, (4) the Commissioner had no jurisdiction to hear the matter.

(2) If the termination had been imposed as a punishment by way of disciplinary action, the Commissioner had no jurisdiction to hear the matter.

(3) However after coming into effect of the amending Act, No. 51 of 1988 on 7.12.1988 the employer who terminates the employment has to give reasons to the workmen within 2 days of such termination; and if the termination had been effected by reason of punishment imposed by way of disciplinary action, the jurisdiction to entertain an application by the Commissioner made by the workman against such termination is ousted. The present position of the law is where there is such termination the employer is required within 2 days to give his reasons for such termination, where such termination has been effected either by mutual consent or with the prior written approval of the Commissioner as a punishment imposed by way of a disciplinary action, the Commissioner has no jurisdiction to hear and determine the said matter.

(4) In the instant case, the appellants' services were terminated on disciplinary grounds by letter P2 - which sets out the various acts of misconduct allegedly committed by the petitioner. The jurisdiction of the Commissioner is ousted.

Per Nimal Dissanayake, J.

"Until the amendment came into effect the Commissioner of Labour had to go on a voyage of discovery to ascertain whether the termination in issue came within his jurisdiction in terms of section 2 (1) read with Section 5 and Section 6.".

APPEAL from the judgment of the Court of Appeal.

Cases referred to :

1. *Latiff vs. Land Reform Commission* - 1984-1Sri LR118
2. *Schmidt vs. Secretary of State for Home Affairs* – 1969-2 Ch. 149 at 170
3. *Ridge vs. Baldwin – 1994 AC 40*
4. *Gunawardane and Wijesooriya vs. Minister of Local Government, Housing and Construction and Others*-1999-2 Sri LR 26

S. L. Gunasekera with P. Jayawardane for 4th respondent-appellant.

Romesh de Silva PC with Geoffrey Alagaratnam for Petitioner-respondent.

Anil Gooneratne for 1-3 respondent-respondents.

cur. adv. vult.

May, 3, 2006

NIMAL DISSANAYAKE, J.

The facts of this case are briefly as follows :-

The 4th respondent-appellant (who shall be hereinafter referred to as the appellant) was employed as the Chief Executive and Managing Director of the petitioner-respondent Company. Upon the appellant reaching the age of 60, the respondent-respondent continued to employ him as Chief Executive Officer and Managing Director of the said company on a fixed term contract for a further period of three years which was due to expire, on 31st March, 2002.

By letter dated 21st September 2000 (P2 annexed to X1) the contract of employment of the appellant was terminated on disciplinary and other grounds. The acts of misconduct allegedly committed by the appellant have been enumerated in the said letter. He had been paid three months salary amounting to Rs. 744,000/-, in lieu of notice. Other terminal benefits have also been paid to him at his request.

At the time of termination the appellant's monthly salary had been Rs. 247,500/- and he was in receipt of the following monthly allowances :-

(a) entertainment allowance - Rs. 25,000/-
(b) reimbursement of club membership subscription upto a maximum of - Rs. 25,000/-
(c) reimbursement of electricity, gas water bills and for maintenance of his residence upto a maximum of - Rs. 25,000/-.

Thereafter the appellant by letters dated 30.10.2000 (P5 in X1) and 2nd January 2001 (P17 annexed to X1) addressed to the 2nd Respondent - respondent complained about the termination of his employment sought an order under section 6 of the Termination of Services of Workmen (Special

Provisions) Act No. 45 of 1971 as amended as by Law No. 4 of 1976 and Act, No. 51 of 1988. He sought reinstatement in employment with back wages and the monetary value of all employment benefits of which he had been deprived of. (P18 annexed to X1).

By letter dated 2nd January 2001, the appellant made an application for relief to the Labour Tribunal claiming, only compensation. He did not seek reinstatement.

At the inquiry before the 2nd respondent a preliminary objection was taken on behalf of the petitioner-respondent to the effect that the letter of termination P2 sets out disciplinary grounds for the said termination and therefore the 1st and 2nd respondent-respondents had no jurisdiction to hear and determine the said application by operation of section 2(4) of the Termination of Employment of Workmen (Special Provisions Act).

The 2nd respondent-respondent communicated his order dated 05.04.2001 (P23 a in annexure X1). He held that he had jurisdiction to inquire into the matter. He fixed the main matter for inquiry on 29.05.2001.

The Petitioner-respondent sought to canvass the said order of the 2nd respondent-respondent (P23A) before the Court of Appeal in application No. CA 718/2001. However it had been later withdrawn by the petitioner-respondent reserving their right to invoke the jurisdiction of the Court of Appeal at the appropriate stage.

The inquiry before the 2nd respondent-respondent had been resumed and despite objections in respect of jurisdiction of the 2nd respondent-respondent to hear the same, being taken by the petitioner-respondent, the 2nd respondent-respondent by his order dated 29th May, 2001 (P2 6(a) in annexure X1) had made order directing that the petitioner-respondent should commence leading of evidence to establish that the termination was effected as a punishment on disciplinary grounds.

The petitioner-respondent by his application to the Court of Appeal sought a Writ of Certiorari and/or order setting aside/quashing the decision of 1st and 2nd respondents-respondents as communicated to the petitioner in terms of the order dated 29.05.2001, for a Wirt of Certiorari and/or an

order setting aside/quashing the order of the 1st and 2nd Respondents communicated to the Petitioner on 09.11.2001, and a writ of prohibition, restraining the 1st and 2nd respondents-respondents from inquiring further into the petitioner's complaint dated 02.01.2001 made to the 2nd respondent-respondent.

The Court of Appeal by it's judgment dated 15.08.2002 had upheld the preliminary objections of the petitioner-respondent. The Court of Appeal had held that when the employer had stated that the termination has been on disciplinary grounds the jurisdiction of the Commissioner is automatically ousted.

It is from the aforesaid judgment that the appellant sought leave to appeal and this Court granted leave on the following questions :-

(1) Whether the Court of Appeal has erred in holding that when the employer stated that the termination had been on disciplinary grounds, the jurisdiction of the Commissioner was automatically ousted.

(2) Whether the Court of Appeal has erred in holding that the Commissioner of Labour was not empowered to inquire into and determine the question as to whether an impugned termination before him was on disciplinary grounds or not in terms of section 2(4) of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 where the employer contends that such termination was on such grounds.

(Further questions submitted by Romesh de Silva PC)

(3) Whether in the circumstances of this case the petitioner has a right and/or jurisdiction to pursue an equitable remedy before the Commissioner of Labour.

(4) In any event, on the facts of this case was the petitioner entitled to the writs prayed for in the Court of Appeal.

Learned counsel appearing for the appellant contended that in terms of the Termination of Employment of Workmen (Special Provisions) Act,

a mere statement by an employer in a purported letter of termination that termination was effected on disciplinary grounds was not sufficient to oust the jurisdiction of the Commissioner of Labour. It was his contention that the Commissioner had the jurisdiction to inquire into the question whether the termination in question was in fact a disciplinary termination or a non disciplinary termination.

On the other hand learned President's Counsel appearing for the petitioner-respondent contended that in terms of the Amending Act No. 51 of 1988, the employer is required to state, by way of reasons within two days of termination, whether the termination had been on disciplinary grounds or not. Therefore he contended that the intention of the legislature was that, where the employer states that termination was on disciplinary grounds the Commissioner was precluded from inquiring into the matter further.

I shall now examine the correctness or otherwise of the aforesaid two positions.

Section 2(1) and 2(4) of the Termination of Employment of Workmen Act, No. 45 of 1971 (Special Provisions) Act as amended, read as follows:-

2(1) No employer shall terminate the scheduled employment of any workman without-

(a) prior consent in writing of the workman ; or
(b) the prior written approval of the Commissioner.

2(4) For the purposes of this Act, the scheduled employment of a workman shall be deemed to be terminated by his employer if for any reason whatsoever otherwise than by reason of a punishment imposed by way disciplinary action.

The services of such workman in such employment are terminated by his employer and such termination shall be deemed to include,

(a) non employment of the workman in such employment by his employer, whether temporarily or permanently, or

(b) .....

Thus in terms of section 2(1) of the Termination of Employment of Workmen (Special Provisions) Act, services of a workman could be terminated only with

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

(b) the prior written approval of the Commissioner of Labour.

Section 2(4) has defined that terminations other than those imposed as punishment for disciplinary grounds by the employer amount to termination of employment of workmen.

Section 5 provides that any termination of employment of a workman by an employer in contravention of this Act shall be null and void and have no effect. In terms of section 6 of the said Act the Commissioner is vested with power to annul termination of employment effected in contravention of the said Act and give appropriate orders.

It is to be observed that, before Termination of Employment of Workmen (Special Provisions) Amending Act, No. 51 of 1988 came into the statute book, where termination of a workman was effected by informing the workman by word of mouth or by act or deed indicating to him to not to come for work and where a complaint to that effect is made to the Commissioner of Labour and the employer claims before the Commissioner that the termination was on disciplinary grounds, the Commissioner had no alternative but to inquire into it to ascertain whether the termination was effected as a punishment imposed by way of disciplinary action, in terms of sub section (4).

If the termination has been imposed as a punishment by way of disciplinary action, the Commissioner had no jurisdiction to hear the matter.

However after coming into effect of the Amending Act No. 51 of 1988 on 7th December, 1988, new subsection (5) was inserted immediately after sub section (4) of Section 2, which reads as follows:-

"(5) Where any employer terminates the scheduled employment of any workman by reason of punishment imposed by way of disciplinary action, the employer shall notify such workman in writing the reasons for the termination of employment before the expiry of the second working date of such termination."

Until the aforesaid amendment came into effect, the Commissioner of Labour to whom an application under the aforesaid Act was referred to, had to go on a voyage of discovery to ascertain whether the termination in issue came within his jurisdiction in terms of section 2(1) read with section 5 and 6 of the said Act.

It is to be observed that in terms of the aforesaid amendment, the employer who terminates the employment has to give reasons to the workman within 2 days of such termination. And if the termination has been effected by reason of punishment imposed by way of disciplinary action the jurisdiction to entertain an application by the Commissioner made by the workman against such termination was ousted. Therefore the present position of the law is where there is a termination of employment the employer was required, within 2 days to give his reason for such termination. Where such termination has been effected either by mutual consent or with the prior written approval of the Commissioner of Labour as a punishment imposed by way of disciplinary action, the Commissioner has no jurisdiction to hear and determine the said matter.

In such circumstances the remedy that lies for the workman is to make an application to the Labour Tribunal under section 31B(1)(a) of the Industrial Disputes Act challenging such termination and seek reinstatement or compensation for wrongful termination.

In the instant case the appellant's services were terminated on disciplinary grounds by letter dated 21.09.2000 (P2 in X1). Letter P2 sets out the various acts of misconduct allegedly committed by the Petitioner.

Therefore it appears that the jurisdiction of the Commissioner to entertain such an application was ousted.

This position appears to be very clear on an examination of sections 2(1)(a)(b), 2(4), 2(5), 3 and 6 of the Termination of Employment of Workmen (Special Provisions) Act as amended.

Thus it can be concluded that in terms of the Termination of Employment of Workmen (Special Provisions Act) the Commissioner of Labour is vested with power to hold that terminations other than those under section 2(1)(a),(b), 2(4) and sub section 5, are null and void and have no effect in law.

Has the appellant by his conduct accepted that his services have been terminated ?

The services of the appellant were terminated by letter dated 21.09.2000 (P2 in X1). Within a few weeks of such termination by letter dated 05.10.2000 (P4 in X1) the appellant requested the Petitioner-Respondent to make statutory payments that were due to him such as Employees Provident Fund, Employees Trust Fund, gratuity and allowance for unavailed leave. He did not protest to the petitioner-respondent regarding his termination. He did not refute the allegation of the termination as being a punishment made on disciplinary grounds. Further the 2nd respondent-respondent too in seeking enforcement of the aforesaid terminal benefits, has himself accepted the due termination of the Petitioner. The appellant's complaint to the 2nd respondent-respondent was made by letter dated 30.11.2000 (P2 in X1) after a period of more than 5 weeks after termination. **The appellant has also invoked the jurisdiction of the Labour Tribunal too against the termination of his employment.**

The aforesaid conduct of the appellant is also consistent with his acceptance that the termination of his employment was being imposed as punishment by way of disciplinary grounds.

Thus I am of the view that the appellant was not empowered to go before the Commissioner of Labour in so far, that the letter of termination (P2) has stated in no uncertain terms that his services were terminated as punishment on disciplinary grounds.

Thus the petitioner-respondent has a right to seek writs of certiorari and prohibition before the Court of Appeal. The Court of Appeal had rightly decided that the decision of the 2nd respondent-respondent to carry on with the inquiry, when it has been alleged that such termination has been on disciplinary grounds, was flawed.

For the aforesaid reasons, I answer the following questions of law as follows :

(1) No.
(2) No.
(3) No.
(4) No.

I dismiss this appeal with costs fixed at Rs. 25,000/-

WEERASURIYA. J. - *I agree*

UDALAGAMA. J. - *I agree*

Appeal dismissed.