[IN THE COURT OF APPEAL OF SRI LANKA]

1973 *Present:* **Fernando, P., Sirimane, J., and Samerawickrame, J.**

COLOMBO PAINTS LIMITED, Appellant, *and* W. L. P. DE MEL (Commissioner of Labour) and 3 others

APPEAL No. 3 OF 1973

S.C. 263/72—Application for a Writ of Certiorari

Certiorari—Scope of the remedy—Availability in order to quash an order which is technically not a speaking order—Availability against a wrong decision on collateral facts as distinct from preliminary facts—Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971—Sections 2, 16, 17, 21—Meaning of the term "employer".

An application for a writ of *certiorari* may be made to quash an order which, although it is technically not a speaking order, is based on the contents of a document which is a part of the record.

Where a person has been conferred jurisdiction to make orders which are conditional on the existence of certain facts which may be referred to as the collateral facts (as distinct from the preliminary facts), his orders are liable to be quashed by *certiorari* within the limits to which that remedy lies, if it can be shown that he has made a wrong decision on the collateral issues which clothed him with jurisdiction. This rule, for example, would be applicable against a wrong decision of the Commissioner of Labour when he purports to act under section 6 of the Termination of Employment of Workmen (Special Provisions) Act which empowers him to make a certain class of orders against employers who have terminated the scheduled employment of their workmen.

A workman employed by X company in a scheduled employment does not cease to be in the employment of that company if he is transferred to a new company but the two companies together with a number of other new companies form a group of companies and the Secretaries common to the members of this group of companies, in their dealings with the workman, have treated his employment under X company as being in existence even after the date of his transfer to the new company. Therefore, the workman can seek relief against X company as his employer, in terms of section 6 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, if the new company to which he was transferred purports to terminate his services in contravention of the provisions of that Act.

APPEAL from a judgment of the Supreme Court reported in (1973) 76 *N. L. R.* 381.

H. L. de Silva, with *K. Kanag-Iswaran,* for the applicant-appellant.

S. Sivarasa, State Counsel, for the 1st and 2nd respondents.

Nimal Senanayake, with *Miss S. M. Senaratne* and *P. A. D. Karunaratne,* for the 4th respondent.

Cur. adv. vult.

1*—A 03106—2,808 (73/11)

August 27, 1973. FERNANDO, P.—

The 4th respondent to this appeal was appointed by a writing dated July 30, 1966 a measurer and estimator in the appellant company (Colombo Paints Ltd.) as from August 1, 1966. Alleging that the appellant had terminated his employment with effect from May 31, 1971 in contravention of Section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, he invoked the power of the Commissioner of Labour (1st respondent) to make an order on the appellant to continue to employ him. Act No. 45 of 1971 (see section 21 thereof) received retroactive effect and is deemed to have come into operation on May 21, 1971. We may mention for purposes of record that provisions more or less identical with the provisions of this Act had become law by Regulations entitled Emergency (Termination of Employment) Regulations, No. 1 of 1971, made by the Governor-General under the Public Security Ordinance and published in *Gazette Extraordinary* No. 14,965/12 of July 6, 1971.

Section 6 of the said Act No. 45 of 1971 vested in the Commissioner of Labour a certain power in the following terms:—

> "Where an employer 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 have otherwise received if his services had not been so terminated; and it shall be the duty of the employer to comply with such order."

Before the Commissioner makes an order under the aforesaid section he has to make such inquiry as to him may seem best adopted to elicit proof or information concerning matters that may arise thereat. Section 17 requires him to hold the inquiry in a manner not inconsistent with the principles of natural justice. The Commissioner held an inquiry and made an order on March 13, 1972 in favour of the 4th respondent. No allegation of a non-observance of the principles of natural justice by the Commissioner has been advanced. Nor is there any dispute that the 4th respondent was a workman in a scheduled employment.

The appellant made an unsuccessful attempt to obtain an order from the Supreme Court by way of *certiorari* quashing the Commissioner's order principally on the ground that, in deciding the collateral issue whether the appellant was the employer of the 4th respondent at the date of the termination of employment, the Commissioner had erred in law "and failed correctly to determine the essential pre-condition for the exercise of his power and jurisdiction." This appeal to us resulted from that unsuccessful attempt. It may be mentioned that an appeal to this Court in terms of section 8 (1) (*b*) of Act No. 44 of 1971 is available only on a question of law. Two questions purporting to be questions of law were advanced on behalf of the appellant when it was argued that the Supreme Court itself erred in law in holding that (1) the appellant was the employer of the 4th respondent and (2) there was a termination of employment by the appellant.

Although, as pointed out to us by learned counsel for the 1st respondent, the order sought to be quashed is technically not a speaking order, the Commissioner, when he sent up his record to the Supreme Court on receipt of notice of the *certiorari* application, forwarded also the report made to him by his Deputy (2nd respondent) who had, on the direction of the Commissioner, actually held the inquiry into the 4th respondent's complaint and made a recommendation which the Commissioner accepted in making his order. This report could well have been and indeed was considered by the Supreme Court as the document containing the reasons for the order sought to be quashed.

The real nature of the tribunal or authority whose decisions are liable to the supervisory jurisdiction exercised by the Supreme Court by way of *certiorari* and *prohibition* has often to be gathered by an examination of the relevant provisions of the statute that set up the particular tribunal or authority. Where a tribunal or authority is being established by the legislature for the doing of certain things if a certain state of facts (for convenience referred to as the preliminary facts) exists, the legislature may well entrust the tribunal or authority also with the jurisdiction finally to determine whether the preliminary facts exist. When the legislature has done that, it is not possible for a court, without appeal given to it, to say that there has been an excess of jurisdiction by a wrong decision as to the existence of those preliminary facts. We do not see that section 6 vests that kind of jurisdiction in the Commissioner. Instead what it does is to empower him to make a certain class of orders against employers who have terminated the scheduled employment of their workmen. That is to say, his jurisdiction to make the orders

is conditional on the existence of certain facts which may be referred to as the collateral facts. If it can be shown that he has made a wrong decision on the collateral issues which clothed him with jurisdiction, his orders are liable to be quashed by *certiorari* within the limits subject to which that remedy operates.

It was contended on behalf of the appellant that there was error of law in the findings of the Commissioner on the two collateral issues as to (*a*) employer and (*b*) termination of employment in as much as, in respect of (*a*), he had failed to consider the existence and effect of certain documents, and in respect of (*b*) he had reached a finding unsupported by any evidence thereon. In regard to the first of these contentions, it was the appellant's position before the Commissioner that, although it employed the 4th respondent on August 1, 1966, the latter ceased to be in its employment as from April 25, 1967 with the formation of a company known as Interior Decorators and Consultants Limited. It was further contended that this new company employed the 4th respondent as from that date in a capacity similar to that in which he served the appellant. The new company and a number of other companies appear to have been formed in 1967, and these new companies and the appellant company together formed part of a group of companies known as the Collettes Group, which latter body acted as the Secretaries to all the companies. This contention of the appellant relative to a change of employment was disputed by the 4th respondent who claimed that in spite of the formation of new companies within the Group he always remained an employee of the appellant. The parties before the Commissioner produced certain documents and made certain submissions. It is unnecessary to particularise these, and it is sufficient to note that, having considered them, the Commissioner came to the conclusion that the 4th respondent was an employee of the appellant and that the purported termination of his employment by Interior Decorators and Consultants Limited, the 3rd respondent, was not lawful. The Supreme Court did not find it possible to reach a different conclusion.

Learned counsel for the appellant urged before us that, with the formation of the new company (3rd respondent), a new legal entity came into existence and became the employer, and that the conclusion that the appellant remained the employer was erroneous in that it ignored the existence of the relevant facts and the inference therefrom. This argument, we must observe, was well before the Commissioner, but he found an answer thereto in the circumstance that, notwithstanding an elaborate facade of new companies, the secretaries common to

the members of this group of companies in their dealings with the 4th respondent treated his employment under the appellant as being in existence till May 31, 1971. Quite apart from finding an error of law there, it is, in our view, hardly possible to maintain that the conclusion was erroneous even in fact.

The other contention that, even on an assumption that the appellant was the employer, the finding of a termination of employment was unsupported by any evidence, appeared to us to be completely devoid of merit. The termination of employment was not disputed before the Commissioner, the only dispute there between the parties being whether the termination had been effected by the appellant or by the new company. It is unnecessary to say more on this contention than to observe that section 2 (3) of Act No. 45 of 1971 has, for the purposes of that Act, defined termination as including non-employment, whether temporarily or permanently. This contention could not, for obvious reasons, have been put forward before the Commissioner. We note that it has not been advanced even in the Supreme Court. It is however adverted to in the petition of appeal addressed to this Court, but has all the symptoms of an argument *in extremis* which calls for a quick rejection by us.

We dismiss the appeal, but we limit the costs to one set and direct that half thereof be paid to the 1st and 2nd respondents and the other half to the 4th respondent.

Appeal dismissed.