

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for the issue of a mandate in the nature of a Writs of Certiorari under Article 140 of the Constitution of Sri Lanka.

China Harbour Engineering Company (Lanka) Limited

Level 32, East Tower,

World Trade Centre,

Echelon Square,

Colombo 01.

CASE NO.C.A. (WRIT) 464/2021

PETITIONER

Vs.

1. B. K. Prabath Chandrakeerthi  
Commissioner General of Labour,  
Department of Labour,  
Colombo 05.

2. P. L. S. Lekamge  
Labour Officer,  
Termination of Employment Unit,  
Department of Labour,  
Colombo 05.

3. H. P. C. Perera  
No. 204/3, Olaboduwa,

Gonapala Junction.

4. Madushanka Hettiarachchi  
No. 215/1, Kumbuka North,  
Gonapala Junction.
5. M. S. Athukorala  
No. 150/2/A, Mahena,  
Horana.
6. S. A. Sahan Eranthaka  
No. 336/1, Pinnagolla Road,  
Nittambuwa.
7. M. K. L. E. Karunarathna  
No.281/A/4, Kanaththagoda,  
Bandaragama.

**RESPONDENTS**

**Before** : Sobhitha Rajakaruna, J.  
Dhammika Ganepola, J

**Counsel** : Malik Hannan for the Petitioner.  
Navodi de Zoysa, SC for 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Argued On** : 30.10.2023

**Written Submission** : Petitioner : 12.12.2023  
**tendered on**

Decided On : 19.01.2024

**Dhammika Ganepola, J.**

The Petitioner by this Application has sought a Writ of Certiorari quashing the order dated 19.07.2021 marked P3 by the 1<sup>st</sup> Respondent. The 3<sup>rd</sup> to 7<sup>th</sup> Respondents were employed by the Petitioner Company at premises attached to its site at D.R. Wijewardena Mawatha, Colombo 10. The Petitioner states that on or about 10.09.2018, the 3<sup>rd</sup> Respondent was involved in an incident of misconduct and later on, on or about 12.09.2018, the 4<sup>th</sup> to 7<sup>th</sup> Respondent also got involved in the same incident of misconduct by abetting the 3<sup>rd</sup> Respondent in jeopardizing day-to-day activities of the Petitioner Company. The Petitioner has stated that they intended to conduct a disciplinary inquiry regarding the incident. However, before the Petitioner could initiate any such inquiry, the 3<sup>rd</sup> to 7<sup>th</sup> Respondents had lodged complaints before the 1<sup>st</sup> Respondent on 21.09.2018, alleging that their employment had been wrongfully terminated. The 1<sup>st</sup> Respondent appointed the 2<sup>nd</sup> Respondent to hold an inquiry relating to the said complaints. After the conclusion of the inquiry on 19.07.2021, the 3<sup>rd</sup> to 7<sup>th</sup> Respondents were awarded a sum of Rs. 969,540.00 for their wrongful termination of services by the Petitioner. The Petitioner contended that the 1<sup>st</sup> Respondent had not taken into consideration the evidence led at the inquiry and has acted in contrary to the provisions under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (TEWA) as amended. Further, the Petitioner claims that the jurisdiction of the 1<sup>st</sup> Respondent is ousted from hearing the complaints made by the 3<sup>rd</sup> to 7<sup>th</sup> Respondents under TEWA as there was no termination of employment by the Petitioner on non-disciplinary grounds or due to closing down of business or retrenchments or temporary layoffs and also as the employees, whose services were terminated due to disciplinary grounds or constructively terminated cannot seek relief under TEWA.

The 1<sup>st</sup> & 2<sup>nd</sup> Respondents state that the 1<sup>st</sup> Respondent received complaints under the TEWA from the 3<sup>rd</sup> to 7<sup>th</sup> Respondents alleging that the Petitioner has terminated their services. The 2<sup>nd</sup> Respondent was appointed to hold an inquiry by the 1<sup>st</sup> Respondent. Accordingly, an inquiry was conducted by the 2<sup>nd</sup> Respondent and based on the evidence led at the inquiry, the 2<sup>nd</sup> Respondent concluded that the

services of the above employees were terminated without their prior consent in writing or without the prior approval of the Commissioner General of Labour. As it is not prudent to reinstate the employees in the Petitioner Company due to the nature of the dispute, the 2<sup>nd</sup> Respondent has recommended that compensation be awarded to 3<sup>rd</sup>-7<sup>th</sup> Respondents. The said recommendations (1R1) had been communicated to the 1<sup>st</sup> Respondent. Accordingly, the 1<sup>st</sup> Respondent issued the Order dated 10.07.2021 marked P3 awarding the 3<sup>rd</sup> to 7<sup>th</sup> Respondents a sum of Rs. 969,540.00 for the relevant wrongful termination of services by the Petitioner. Thus, the Respondents claim that the Application of the Petitioner should be dismissed.

The learned Counsel for the Petitioner has indicated his willingness to proceed against only the 1<sup>st</sup> & 2<sup>nd</sup> Respondents at the commencement of the application.

The Petitioner states that while the Petitioner was intending to hold a disciplinary inquiry against the 3<sup>rd</sup> to 7<sup>th</sup> Respondents regarding the impugned incident, the 3<sup>rd</sup> to 7<sup>th</sup> Respondents proceeded to make complaints to the 1<sup>st</sup> Respondent allegedly in terms of the provisions of the TEWA on the basis that the Petitioner has terminated their services. The Petitioner denies such termination of service of the 3<sup>rd</sup> to 7<sup>th</sup> Respondents. However, upon an inquiry, the 1<sup>st</sup> Respondent had held that the Petitioner has terminated the services of the 3<sup>rd</sup> to 7<sup>th</sup> Respondent in contrary to the provisions of TEWA. As the Petitioner denies the termination of employment, it is crucial to ascertain if the 1<sup>st</sup> Respondent could have exercised any of his powers under TEWA in respect of the given incident.

Section 6 of the TEWA stipulated that where an employer terminates the 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. However, the provisions under TEWA do not apply in respect of every category of termination of employment. It only applies in respect of termination of services other than voluntary terminations and terminations on disciplinary grounds. As per Section 2(4) of the TEWA, the employment of any workman shall be deemed to be terminated, for the purpose of the Act, if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action. The Section 2(4) of the TEWA is as follows.

*2(4) For the purposes of this Act, the scheduled employment of any 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 of 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) non-employment of the workman in such employment in consequence of the closure by his employer of any trade, industry or business.*

In view of the interpretation provided above under Section 2(4)(a), termination of services of a workman includes non-employment of the workman in such employment by his employer, whether temporarily or permanently. As such, it is apparent that for the purpose of TEWA, any termination of services including constructive termination of a workman effected in noncompliance of the said Section 2 of TEWA falls within the purview of “termination of employment”.

It is on the common ground that no letters of termination were issued to the 3<sup>rd</sup> to 7<sup>th</sup> Respondents. It appears that there was no formal documentation supporting the termination of employment of the 3<sup>rd</sup> to 7<sup>th</sup> Respondents. Further, there is no agreement on termination of employment among the parties and the reason for the termination is unknown. Hence, the burden is on the 3<sup>rd</sup> to 7<sup>th</sup> Respondents to prove that their services have been terminated by the Petitioner.

The 3<sup>rd</sup> to 7<sup>th</sup> Respondents complained to the police on 20.09.2018 that they were not allowed to report to duty from 12.09.2018 and their services were terminated. At the inquiry, the 4<sup>th</sup> Respondent stated that they were prevented from reporting to work, which unequivocally amounted to constructive termination of their services. Thus, it appears that the Petitioner has endeavored to deny the employment for the 3<sup>rd</sup> to 7<sup>th</sup> Respondent, temporarily or permanently. In the above premise, the 3<sup>rd</sup> to 7<sup>th</sup> Respondents will be compelled to seek relief in terms of Section 2(4)(a) of TEWA. Hence the stance taken up by the Petitioner that those who are constructively terminated from employment cannot seek relief under the TEWA cannot stand in law.

The Petitioner states that the Petitioner Company intended to take disciplinary actions against the 3<sup>rd</sup> to 7<sup>th</sup> Respondents in respect of the impugned misconduct. However, it appears that the Petitioner has not exposed or expressed its intention

to take disciplinary actions against the 3<sup>rd</sup> to 7<sup>th</sup> Respondents until the Petitioner has taken up that stand at the inquiry before the 2<sup>nd</sup> Respondent. No evidence has been produced before the 2<sup>nd</sup> Respondent to substantiate such a position that the Petitioner had the intention to take any disciplinary actions against the 3<sup>rd</sup> to 7<sup>th</sup> Respondents. It appears that the Petitioner has failed to notify the 3<sup>rd</sup> to 7<sup>th</sup> Respondents of its intention to take disciplinary actions. No charge sheet had been served against them. Even the Human Resource Manager of the Petitioner Company who had provided a statement to the Police on 20.09.2018 had not indicated any intention of the Petitioner Company to take disciplinary actions against the 3<sup>rd</sup> to 7<sup>th</sup> Respondents. A mere statement, not substantiated with any evidence, shall not prove the alleged intention of the Petitioner Company that the Petitioner Company was in the process of taking disciplinary actions against the 3<sup>rd</sup> to 7<sup>th</sup> Respondents. It is noteworthy the period of time taken by the Petitioner even to express an intention of conducting an inquiry against the 3<sup>rd</sup> to 7<sup>th</sup> Respondents and further such intimation was made only at the later part of the inquiry before the 2<sup>nd</sup> Respondent. It appears that there was no reason for the 3<sup>rd</sup> to 7<sup>th</sup> Respondents to believe that the Petitioner was intending to take disciplinary actions against them. Therefore, the assertion of the 3<sup>rd</sup> to 7<sup>th</sup> Respondents that the Petitioner Company terminated their services by preventing them from reporting to work without any reason and on non-disciplinary grounds cannot be denied. Accordingly, the application made by the 3<sup>rd</sup> to 7<sup>th</sup> Respondents to the 1<sup>st</sup> Respondent cannot be considered a premature application or that it is contrary to the provisions of TEWA.

Since there was no disciplinary action taken against the 3<sup>rd</sup> to 7<sup>th</sup> Respondents by the Petitioner, the termination of their services by the Petitioner cannot be considered as a termination on disciplinary grounds. Therefore, the applicability of TEWA in respect of the termination of services of the 3<sup>rd</sup> to 7<sup>th</sup> Respondents cannot be denied while the 1<sup>st</sup> Respondent cannot be ousted from exercising the power vested upon him under TEWA.

The Petitioner further claims that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent could have made an Order directing the Petitioner Company to hold a disciplinary inquiry with regard to the incident on the very first day of the inquiry. Nevertheless, upon perusal of the proceedings of the inquiry before the 2<sup>nd</sup> Respondent and the material placed before this Court, it is evident that the Petitioner has not taken up any such stand or made a request in that respect at the initial stage of the inquiry before the 2<sup>nd</sup>

Respondent. However, it is observed from the proceeding of the inquiry before the 2<sup>nd</sup> Respondent dated 22.01.2020, that a suggestion had been made to hold a disciplinary inquiry by the Petitioner at a later stage of the inquiry before the 2<sup>nd</sup> Respondent. Although the 3<sup>rd</sup> to 7<sup>th</sup> Respondents have consented to same, the Petitioner had informed no formal settlement could be arrived in respect of such suggestion. Accordingly, the inquiry has proceeded (see pages 332-334 of the proceedings of the inquiry). Under such circumstances, the Petitioner is now not entitled to claim that its application to hold a disciplinary inquiry against the 3<sup>rd</sup> to 7<sup>th</sup> Respondent was not accommodated.

Further, the Petitioner submits that, as the 3<sup>rd</sup> to 7<sup>th</sup> Respondents claimed that their services were constructively terminated by the Petitioner the complainants should have been referred to the Labour Tribunal. However, since the 3<sup>rd</sup> to 7<sup>th</sup> Respondents based on the circumstances of this case have met the adequate statutory requirements to submit a complaint to the 1<sup>st</sup> Respondent under TEWA, I am of the view that the 3<sup>rd</sup> to 7<sup>th</sup> Respondents were entitled to maintain their complaint before the 1<sup>st</sup> Respondent under the provisions of TEWA. In the above circumstances, the reason that the 3<sup>rd</sup> to 7<sup>th</sup> Respondents have not resorted to the Labour Tribunal cannot restrict the rights of the 3<sup>rd</sup> to 7<sup>th</sup> Respondents to make an application under TEWA.

In light of the above, the 1<sup>st</sup> & the 2<sup>nd</sup> Respondents' decision to hold an inquiry in terms of the TEWA cannot be considered as an act of ultra vires or as contrary to the statutory provisions. Therefore, I hold that the Petitioner is not entitled to any of the reliefs as prayed for in the prayer of the Petition. Accordingly, the application is dismissed.

**Judge of the Court of Appeal**

**Sobhitha Rajakaruna J.**

**I agree.**

**Judge of the Court of Appeal**