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

In the matter of an Application for a mandate in the nature of *Writ ofProhibition* under article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. P.M.K. Garments (Pvt) Ltd
2. Inatub Garments (Pvt) Ltd
   Both of Rajagiriya Road,
   Rajagiriya.

PETITIONERS

C.A. Writ 02/2012

Vs,

1. V.B.P.K. Weerasinghe
   Commissioner General of Labour,
   Labour Secretariat, Narahenpita,
   Rajagiriya.

2. Manoj Priyantha,
   Deputy Commissioner- Industrial Relations,
   Labour Secretariat,
   Colombo 05.

3. K.P. Piyaseeli
4. Sarath Chandima Wickramarachchi
5. A.A. Kurunawathi, Akaragalla, Keppitiwalana.
6. S.A. Dayawathi, Milla Godella, Giriulla.

   And 154 others

RESPONDENTS

Before:Vijith K. Malalgoda PC J (P/CA) &

A.H.M.D. Nawaz J

Counsel: M. Adamally with Rohan Dunuwila for the 1st and 2nd Petitioners

M. Fernando PC, ASG with Nayomi Kahavita for the 1st and 2nd Respondents

D.V.R. Isuru Lakpura and N. Gamage for the 5ht Respondent

Argued on 06.07.2015

Judgment on: 23.05.2016

Vijith K. Malalgoda PC J

The Petitioner to the present application P.N.K. Garments (PVT) Ltd and Inatub Garments (PVT) Ltd both of No. 276 Rajagiriya Road, Rajagiriya have come before this court against an order made by the 1st and/or 2nd Respondents seeking inter alia,

b) Issue a mandate in the nature of a Writ of Certiorari quashing the order dated 21st October 2011 of the 1st and/or 2nd Respondents marked as 'O'

c) Issue a mandate in the nature of Writ of Prohibition prohibiting the 1st and/or 2nd Respondents and/or any person acting under them from taking any step in pursuance of the said order of the 1st and/or 2nd Respondent dated 21st October 2011 marked as 'O' and /or from seeking to recover any sums of money so ordered by instituting a prosecution in the Magistrates Court or otherwise

The two Petitioners are companies duly incorporated in Sri Lanka having their respective registered offices at the aforementioned address and are engaged in the business of manufacturing Garments for export.

The Petitioners have further submitted that they are subsidiaryCompanies of "Butani Exports Ltd" and the head office and/or principle placer of business of the said Butani Exports Ltd and the Petitioner companies were situated at the above address.

As revealed before this court, three inquiries under the provisions of the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 were held at the Termination Unit of the Labour Development which was under the Deputy Commissioner of Labour – Industrial Relation, the 2nd Respondent to the present application.

The complainants to the said three inquiries were named as the 3rd, 4th and 5th Respondents to the present application. As submitted by the Petitioners, out of the three complainants the 3rd Respondent to the present application K.P. Priyaseeli was not present at the inquiry and her application was dismissed and the other two inquires proceeded before the 2nd Respondent.

Even though it is not relevant for this court to consider the facts of this matter, since what is challenged before this court is the legality of the purported order made by the 1st and/or the 2nd Respondents, we consider it important to be mindful of the factual matrix of this case before getting into the legality of the impugned order.

As revealed before this court, the two Petitioners had their factory at No. 168/2 Kurunegala Rd, Giriulla and collectively employed approximately 650 employees. The said factory was a garments manufacturing factory for export upon orders which were placed by foreign buyers and the petitioners have been carrying on business since 1989-1990.

The Petitioners' factory at Giriulla was severely damaged due to a severe flood situation the factory faced on.3rd, 4th, 11th and 12th November 2006 and the deluge was followed by further flooding on

18th and 19th of the same month. Due to the floods some of the buildings, machinery, stocks of garments and raw material and vehicles parked in the premises were severely damaged.

As revealed before this court, this position is confirmed by the Labour Officer attached to the Labour Office Kuliyapitiya who visited the factory after the floods on 7th January 2007.

The Petitioners have taken up the position that they were obliged to continue its operations and fulfill its contractual obligations towards its foreign buyers and as such were forced to commence its operation in a different location until the necessary repairs were done to re-commence operations at the same venue.

As observed by this court the dispute between the Petitioners and the 3rd to 162nd Respondents who were the employees of the said factories began subsequent to certain initiatives taken by the petitioners to commence the operations of the said factory at a different location.

As revealed before us the Petitioners had displayed a notice on 21.11.2006 at the factory premises. By the said notice (page 50 of the brief) the management of the Petitioners had informed the employees that the factory located at Giriulla would be closed indefinitely and a decision to re-open business at the same premises or at a different location would be decided once a report was received from an investigation team appointed by the management and until such time the management had requested the employees to report to their head office at 199/20 Rajagiriya Rd, Rajagiriya.

The said notice was followed by another notice (page 412 and 724 of the brief) received by the Respondents which gave rise to the inquiry conducted by the 2nd Respondent.

The Respondents have complained that the said 2nd notice gave an ultimatum to the employees to the effect that if they failed to recommence their work at Rajagiriya factory as required to do so by the management of the two Petitioners, steps would be taken to deem them as if they had vacated their posts.

As observed by this court the Petitioners have subsequently taken steps to issue letters to the employees who failed to commence work at Rajagiriya in accordance with their instructions and the management informed them that "they by their own conduct had terminated their contract of employment with the company (page 413, 414, 725, 854, 855 and 857 of the brief)

GENESIS OF THE COMPLAINT

Thesaid decision of the Petitioners to consider the employees who failed to report to Rajagiriya as required to do so, as having constructively terminated their contract of employment with Petitioners, gave rise to the complaints made by the 3rd to 5th Respondents alleging that the said decision of the Petitioners was tantamount to a constructive termination of their employment.

As referred to above, in the absence of the 3rd Respondent, the complaints made by the 4th and the 5th Respondents were taken up for inquiry by the 2ndRespondent.

At the commencement of the said inquires which were taken together, the employers (Petitioners to the present case) have raised a preliminary objection to the maintainability of the said applications before the 2nd Respondent under the provisions of the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 as amended, since the employment of the Respondents were not terminated and as such the 1st Respondent or his agent did not have the jurisdiction to entertain and hear the complaints made under the said Act.

The 2nd Respondent by his order dated 06.08.2007 overruled the said preliminary objection and decided to inquire into the complaint made by the Respondents. It is further revealed that the 2nd Respondent had restricted the inquiry to the employees who had worked more than 180 days with the Petitioners and also excluded the employees who had submitted their resignations.

As observed by this court, the most important issue to be dealt in the present application is whether there is in fact a termination of the employees, since the impugned order marked as 'O' was made by the 1st and/or 2nd Respondents based on the provisions of the Termination of Employment of Workmen

(Special Provisions) Act No.45 of 1971 as amended, and the jurisdiction the said Respondents was assumed by virtue of the provisions of said Act.

Section 2 (1) of the said Act reads thus,

2 (1) no employer shall terminate the scheduled employment of any workmen without

a) Prior consent in writing of the workmen or

b) The prior written approval of the Commissioner

In the absence of any prior approval obtained from the Commissioner, the Petitioners' position before this court and their objection before the Commissioner was based on the ground that the employees who failed to commence work at Rajagiriya as required to do so by the management had terminated the contract of employment with the company by their own conduct and therefore the above provisions of the Termination of Employment of Workmen (Special Provisions) Act has no application to the present case.

In support of the above contention the Petitioners have argued before this court,

a) The documents filed of record and the oral evidence led at the inquiry before the 1st and/or 2nd Respondents make it clear that there was no intercompany transfer but merely a transfer of location.

b) There is no change of employer by the said transfer.

c) The transfers were only a location transfer in view of the necessity caused by floods.

d) As a result of the floods experienced by the factory on two occasions heavy damage and loss were caused to the Petitioners Machinery, stocks etc.

e) Notwithstanding the heavy losses Petitioners were obliged to fulfill the contractual obligations.

f) The decisions to re-start the operations at the Petitioners' head office was taken in good faith rather than closes down the business or remain idle and face litigation from customers, employees and creditors.

As observed by this court, by placing the said argument before this court Petitioner have endeavored to justify the action taken by them by submitting before this court,

a) That the said transfer was only a transfer from one location to another and as such no consent of the employee is needed as they would be working within the service of the same employer.

b) Such a transfer was necessitated since the contract of service of the Respondent with the Petitioners were frustrated due to the supervening damage caused to the Petitioners which rendered the performance of the contract of employment impossible

When considering the said arguments placed before this court, it is important to consider whether the transfer referred to above was in fact a location transfer within the same company and whether such transfers are permitted.

The Petitioners have taken up the position that the two Petitioner Companies namely P.M.K Garments (Pvt) Ltd and Inatub Garments (Pvt) Ltd are subsidiary Companies of Butani Exports Ltd but they are also duly incorporated companies under the Companies Act. Therefore these three companies are to be considered as three separate legal entities. However as revealed before this court, the petitioners could only establish that the factory which was located at Rajagiriya was a factory operated by Butani Exports and not by P.M.K. Garments or Inatub Garments.

This position was transpired during the inquiry as follows;

[Page 427 on words- cross examination wit No.1 for the Respondents, (Petitioners to the present application)]

ප්‍ර: ඔබ කිවුවා ඉනර්ටැබ් හා පීඑම්කේ එකටම තමයි බූටානි එකෙන් අයිති වෙන්නේ?

පි: මේ සමාගම් 3ම එකම අධ්‍යක්ෂ මණ්ඩලය යටතේ තිබුනත් ඒ නිසාම මෙය එකම සමාගමක් නොවේ වෙනවෙනම සමාගම් තුනක්.....

ප්‍ර: එත කොටඔබ පිලිගන්නවා මෙම සේවකයන්ගේ ස්ථානමාරු කොන්දේසියක් නැතුවම ස්ථානමාරු කරලා කියලා

පි: එකම අධ්‍යක්ෂ මණ්ඩලය යටතේ පාලනයවන සමාගම් තුනක්

ප්‍ර: ඒ කියන්නේ නිත්‍ය වශයෙන්ම වෙනස් සමාගම් තුනක්

පි: ඔව්

ප්‍ර: එම සමාගම් තුන අතර තමයි මාරුවීම් දීල තියන්නේ

පි: කම්කරු කොමසාරිසතුමනි, මේ මාරුවීම් දීල තියන්නේ ඇතිවූ හදිසි තත්වය මත ඒ අයට බලකලේ නැහැ මීටපෙර මෙවැනි මාරුකිරීමකදී විරෝධයක් දක්වලා නැහැ.....

ප්‍ර: දැන් ගංවතුර උවදුරෙන් පස්සේ ගිරිඋල්ලේ පිහිටි සමාගම් දෙකේ ව්‍යාපාර කටයුතු වැඩිදුරටත් පවත්වාගෙන යාමට නොහැකි තත්වයක් ඇතිවුනා

පි: ඔව්

ප්‍ර: රටපස්සේ එම සමාගම් රාජගිරියේ පරිශ්‍රයට ස්ථාපනය ගෙන ගියාද

පි: ස්ථාපනය කලේ නැහැ

ප්‍ර: රාජගිරියේ තිබුනේ බූටානි පමණයිනේ

පි: ඔව්

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From the above questions and answers given by a witness who represented the Petitioners at the inquiry it is clear that the only factory operated at Rajagiriya was the factory belonging to Butani Exports and the Petitioners have asked the employees at Giriulla to report to the said factory.

Even though the said witness in her evidence said that the management did not compel the employees to report to Rajagiriya, the notice which was sent to the employees by the management of the two Petitioners was to the effect that if the employees failed to recommence their work at Rajagiriya factory steps would be taken to deem them as if they had vacated their posts. In our view by the said notice management had compelled its employees to report to work at Rajagiriya even without establishing P.M.K or Inatub factories in Rajagiriya.

On the other hand it was further revealed that none of the employees attached to P.M.K. Garments or Inatub Garments at Giriulla were recruited by the said companies to a transferable service. This position too was elicited at the inquiry before the Labour Commissioner as follows;

Witness-

At page 425,426

ප්‍ර: දැන්ඔබ පිලිගන්නවා සමාගමේ සේවකයන් මාරුකිරීමට බලයදෙන කොන්දේසියක් මෙම සේවකයන්ගේ පත්වීම් ලිපියේ නැහැ කියලා

උ: මේ පත්වීම් ලිපියේ ආයතන මාරු කරනවා කියලා නැහැ

ප්‍ර: ආයතන දෙකක් අතර ස්ථාන මාරු කරනවා කියලා නැහැ

උ: ඔව්

In these circumstances the following facts have been elicited before the Labour Commissioner,

- There was no provision in the letters of appointment issued to the employees of the two Petitioners to transfer them from the Giriulla factory.

- ❖ Even if there was a service requirement to transfer the location, there was no factory at Rajagiriya operated by the two Petitioners
- ❖ Therefore any transfer to Rajagiriya cannot be considered as an inter-company transfer.

In the case of ***Duch Lanka Trailers Manufacturers Ltd V. Commissioner of Labour and Others CA Writ 511/2011 [CA minutes dated 25.06.2013]***Sri Skandarajah J had considered a inter-company transfer of an employee in the absence of specific condition in the letter of appointment permitting the transfer, and held that the Commissioner of Labour is correct in concluding that the said transfer amounts to constructive termination of the employee and comes within the pervious of section 6A of the Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 as amended,

In the said case the 4th Respondent who was originally employed under a fixed term contract for a period of one year and thereafter was confirmed in his employment and continued to serve as an employee to the said company. The Petitioner re-located their factory in Dankotuwa and requested its employees, including the 4th Respondent to report to the new factory. The 4th Respondent although being requested by the management on several occasions in writing, refrained from reporting to work. The Petitioners' position too was that Petitioners never terminated the services but it was the 4th Respondent who vacated the services of employment as he had not reported to work at Dankotuwa factory.

During the inquiry before the Commissioner, it was considered by the Commissioner that in the absence of specific terms and conditions in his letter of appointment that he would be transferred to a subsidiary company or to another location in the discretion of the Petitioner,

(contrary to the letters of appointment issued to the other employees) held that the said 4th Respondent cannot be transferred from his present work place without his consent and the Petitioner by relocating the factory to a different location deprived the Respondents of reporting to work at the original location and therefore his services were terminated by closing down the factory.

In the said case the Court of Appeal when dismissing the case was mindful of the fact that in the absence of a specific condition to transfer an employee, in his letter of appointment, the consent of the employee is a must to effect a transfer of the employee.

The same issue was considered in slightly different circumstances in the case of ***Hassan V. Fairline Garments International Ltd and others 1989 (2) Sri LR 137*** where the Supreme Court held that a workman has an inalienable right to choose for himself the employer he will serve. Once the contractual relationship between himself and his employer is established, the employer cannot transfer his services to another without his (the employee's) consent or against his will.

During the argument before us the Petitioners have submitted that as a past practice of their group of companies, transferring the working location of staff for other reasons had taken place and at one stage the employees of Butani Export were transferred to Giriulla from Rajagiriya. A practice which was never challenged cannot be considered legally acceptable practice if it was done contrary to the service agreement between the employer and employee and therefore the said argument cannot be considered as a ground for the Petitioners to succeed in the present application.

A contract of employment delineates and defines the relationships between the employer and employee. Given that the employees in this case fall within the express provisions of the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 as amended, Section 2(1) of the Act is quite specific that prior consent in writing of the workman or the written approval of the Commissioner must be obtained before an employer proceeds to terminate the scheduled employment of any workman. The ultimatum given to the employees in the instant case that they would be deemed to have vacated their employment, unmistakably furnishers proof of constructive termination of the employment. No prior approval of the employees has been obtained to affect such an eventuality.

In the application before us, there is no clause in the contract of employment that the employees would be relocated to a factory as distantly locatedas Rajagiriya in the event of a supervening impossibility. If an onerous condition such as a transfer from Giriulla to Rajagiriya is to be imposed by the employer,

the employee has to be put on notice of such a possibility and he should express his consent, express or implied to such a term.

Such a term in the contract of employment would serve notice of a possibility of a relocation and if the employee had accepted his contract subject to the terms, it may not now lie in the mouth of the employee to contend that he had not consented to such a transfer. Such a notification is woefully lacking in the instant application before us. Instead what we have before us is a caveat that if the employee did not report to Rajagiriya he would be deemed to have vacated his post.

This is not the norm that is mandated by the provisions of the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 as amended. Instead of securing the prior consent of the workmen, one cannot, quite contrary to the legislative intent, impose a term that the employee would be deemed to have vacated the employment. We hold that there is an infringement of Section 2(1) of the Act when the employees were directed to report to work willy-nilly at Rajagiriya. Taking the view as we do of the requirement that employers have to incorporate in the contract of employment a notification of a possible change of location in the event of supervening circumstances and other causes, employers would reflect well bear in their contemplation such circumstances as would necessitate such a relocation in the event of natural calamities and *vis major* and therefore in the circumstances we hold that a plea of frustration of the contract of employment as was contended in the case would not hold water.

In ***Magpeck Exports Ltd., v. Commissioner of Labour***(2002)2 Sri LR p.308 the doctrine of frustration of contract was unsuccessfully pleaded where an employer company argued that it had to terminate its employees without compensation because the business was a failure. In that case, the petitioner company had closed the establishment without informing the workers on time or without obtaining prior written approval of the Commissioner of Labour. The Commissioner of Labour on being informed caused an inquiry to be held and he made order directing the company to pay each workman two months' salary for each year of service.

In appeal, it was argued that due to financial constraints the company was compelled to close down. It was further argued that there was termination by frustration or due to impossibility of performance. In rejecting the argument, the Court of Appeal held that the doctrine of frustration had no application.

So we hold that no error of law or fact is manifest on the order marked as "O" as we hold that it emanates from the findings and recommendation of the 2nd Respondent (R4) which are not tainted by any of the grounds on which judicial review lies and in the circumstances we are disinclined to allow the reliefs prayed for in the application for judicial review.

Thus we proceed to dismiss the application for prerogative writs.

PRESIDENT OF THE COURT OF APPEAL

A.H.M.D. Nawaz J

I agree,

JUDGE OF THE COURT OF APPEAL