

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 of certiorari  
under Article 140 of the constitution of the  
Democratic Socialist Republic of  
Sri Lanka.

City Housing and Real Estate Company  
PLC (Formerly named and known as  
"Ceylinco  
Housing and Real Estate Company PLC"),  
No.151, Darmapala Mawatha, Colombo 7.

**Petitioner**

**CA. Writ No.305/10**

**Vs.**

1. W.J.L.U. Wijeweera,  
Commissioner General of Labour,  
Labour Secretariat, P.O.Box 575,  
Narahenpita, Colombo 5.
2. W. Kahawatta,  
Assistant Commissioner of Labour,  
The Termination of Employment Unit,  
Labour Secretariat, P.O. Box 575,  
Narahenpita, Colombo 5.
3. H.K.K. Jayasundara,  
Assistant Commissioner of Labour  
Labour Secretariat, P.O. Box 575,  
Narahenpita, Colombo 5.
4. Kapila Kumara Wimalasuriya,

12/3, Salmal Mawatha,  
Nadimala, Dehiwala.

**Respondents**

**BEFORE** : **S. SRISKANDARAJAH, J (P/CA)**

: Canishka G Vitharana with Mrs. Kalyani Abeygunawardena

for the Petitioners,

Chaya Sri Nammuni SC

for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.

Jacob Joseph,

for the 4<sup>th</sup> Respondent

: 13.03.2012

**Decided on** : 23.07.2012

**S.Sriskandarajah.J,**

The Petitioner is an incorporated company under the Companies Act No.7 of 2007, and the 4<sup>th</sup> Respondent was an employee of the Petitioner Company. He was holding the post of Chief Manager with effect from 1<sup>st</sup> November 2008. The 4<sup>th</sup> Respondent's services were terminated by the Petitioner with effect from 10<sup>th</sup> September 2009. The Petitioner's termination letter referred to several allegations against the 4<sup>th</sup> Respondent. Some of the allegations are in relation to the poor management of the Petitioner Company and the inability of the 4<sup>th</sup> Respondent to perform the functional duties, and there was an allegation against the 4<sup>th</sup> Respondent that he made several

allegations against the management, and that contributed for the termination of the services of the 4<sup>th</sup> Respondent on the basis of misconduct.

The 4<sup>th</sup> Respondent made an application to the Commissioner General of Labour, the 1<sup>st</sup> Respondent, under the Termination of Employees (Special Provisions Act), and an inquiry was held by the 2<sup>nd</sup> Respondent. The inquiry was conducted on several days and, as the 2<sup>nd</sup> Respondent could not continue with the inquiry due to his other official commitments, the 3<sup>rd</sup> Respondent was appointed by the 1<sup>st</sup> Respondent to conduct the inquiry. The 3<sup>rd</sup> Respondent commenced the inquiry and requested the parties to file their respective written submissions. The Petitioner, in the said inquiry, raised a preliminary objection under Section 3(1)(b) of the Act, whereby it was submitted that the Act does not cover the 4<sup>th</sup> Respondent. The Petitioner submitted that it was a condition precedent to be a workman to seek relief under the said Act. A workman is defined in the said section as; "Workman who has been employed by the employer for not less than 180 days in the continuous period of 12 months, commencing from the date of employment." The Petitioner further submitted that the 4<sup>th</sup> Respondent's employment commenced on 1/11/2008, and it was terminated on 10/09/2009, and, accordingly, he had not been in the continuous period of 12 months from the commencement of the employment. The Commissioner of Labour, by his letter dated 22<sup>nd</sup> April 2010, made order that the 4<sup>th</sup> Respondent be reinstated from 14<sup>th</sup> May 2009, with payment of back wages from 11<sup>th</sup> September 2010 to 13<sup>th</sup> May 2010, as the Petitioner has violated the provisions of Section 2 of the Termination of Employment of Workmen (Special provisions Act).

The Petitioner contended that the order and the finding of the 1<sup>st</sup> Respondent is, *ex facie*, not within the power conferred on the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Respondent, since Section 3(1)(b) of the Act does not confer power or jurisdiction upon the said Respondents to entertain an application pertaining to the termination of employment of 4<sup>th</sup> Respondent, as he is disqualified by such section from making an application.

Section 3 of the Termination of Employment of Workmen (Special Provisions Act) provides as follows:-

3(1) - The provisions of this Act, other than this section, shall not apply:

- (a) ...
- (b) To the termination of employment of any workman who has been employed by an employer of a period of not less than 180 days, inclusive of -
  - (i) every day of absence on any ground approved by the employer;
  - (ii) every day of absence due to any injury to the workman caused by an accident arising out of and in the course of the employment;
  - (iii) Every day of absence due to anthrax or any occupational disease specified in Schedule 3 of the Workmens' Compensation Ordinance (Chapter 139);
  - (iv) Every day on which the employer fails to provide work for the workman;
  - (v) Every day of absence due to a lockout or strike that is not illegal, if such days do not, in the aggregate, exceed 30 days; and
  - (vi) Every holiday or day of absence from work to which a workman is entitled, by or under the provisions of any written law.

For the continuous period of 12 months, commencing from the date of employment, if such termination takes place within that period of 12 months or;

(c) ....

The above provision clearly indicates that the termination of employment of Workmen (Special Provisions Act) is not applicable to a workman who has been employed by an employer for a period of less than 180 days and, in the present instant, the employee was working from 1<sup>st</sup> November 2008 to 10<sup>th</sup> September 2009, more than 300 days, and this period is in the continuous period of 12 months,

commencing from the date of employment, and the termination has taken place within that period of 12 months. The section does not contemplate that the employee should have worked for a continuous period of 12 months for the application of this law. The continuous period of 12 months is taken into consideration when giving credit to the period of absence in order to calculate the period he was employed with the employer, if an employee was in service for not less than 180 days within that twelve months, then he is entitled to seek the remedy under the said law. In these circumstances the Commissioner has quite rightly over-ruled the preliminary objection raised by the Petitioner and held the 4<sup>th</sup> Respondent Employee is entitled to seek remedy under the said law.

The Commissioner of Labour has directed the 2<sup>nd</sup> Respondent to conduct the inquiry, and the 2<sup>nd</sup> Respondent has given opportunities to the parties to lead evidence and, as the 2<sup>nd</sup> Respondent could not conclude the said inquiry, the Commissioner General has appointed the 3<sup>rd</sup> Respondent to continue the said inquiry. The 3<sup>rd</sup> Respondent, after permitting parties to tender their written submissions on the inquiry held and after considering the material placed before him, has come to the finding that the termination was illegal. The decision of the Commissioner was made after giving a fair hearing and consideration of the facts placed before him, this Court, in a judicial review proceedings, can only consider the legality of the said order and, as there is no illegality in the said order, and this Court cannot decide on questions of fact in these proceedings, this Court dismisses the Petitioner's application without cost.

President of the Court of Appeal