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 and in terms of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Writ Application No: 93/2020

Cyril Rodrigo Restaurants (Pvt.) Ltd.,
No.85, Pepiliyana Road,
Nugegoda.

PETITIONER

-Vs-

1. Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat,
   Kirula Road,
   Colombo 05.

2. Y.A.B.S. Yahalawela,
   Assistant Commissioner of Labour,
   Termination of Employment Unit,
   Department of Labour,
   Labour Secretariat,
   Kirula Road,
   Colombo 05.

3. Chanaka Thilan Rodrigo,
   No. 12/5, Dutugemunu Street,
   Kalubowila,
   Dehiwala.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel: Chathura Galhena with Kavindu Indatissa, Ms. Umayangi Indatissa instructed by Charith Thuduwage for the Petitioners.

Sehan Soyza, SSC for the 1st and 2nd Respondents.

Mohomed Adamaly with Sindhu Ratnarajsn instructed by Ms. Shanya Wickramaratne for the 3rd Respondent.

Written submissions tendered on:

17.11.2022 by the Petitioner.

17.11.2022 by the 1st and 2nd Respondents.

08.06.2023 by the 3rd Respondent.

Argued on: 10.05.2023

Decided on: 10.01.2024

S. U. B. Karalliyadde, J.

The Petitioner-Company (the Company) is a duly incorporated Company under the Companies Act, No. 07 of 2007 and seeking a mandate in the nature of a Writ of Certiorari to quash the Order dated 14.02.2020 marked as P-14 of the Commissioner General of Labour, the 1st Respondent to pay the salary of the 3rd Respondent for the period of 24.10.2017 to 08.10.2018. The 3rd Respondent, a shareholder of the Company was employed as a Director of the Company with effect from 14.06.1991 and

subsequently appointed as the Managing Director. The Company informed its decision by the letter dated 23.10.2017 marked as P-3 for him to retire from the service, giving effect to the Company policy of retirement age of all employees which is 55 years. By the letters sent to the Company dated 24.10.2017 and 06.11.2017 marked as P-4(a) and P-4(b) respectively, the 3rd Respondent refused to accept the said decision of the Company and made a complaint dated 27.11.2017 marked as P-5(a) to the 1st Respondent in terms of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 (as amended) (the Act). The Assistant Commissioner of Labour, the 2nd Respondent commenced an inquiry regarding the complaint and while pending the inquiry, the 3rd Respondent resigned from the post of Managing Director on 08.10.2018. Based on the findings of the Inquiry, the 1st Respondent decided that the Company has terminated the employment of the 3rd Respondent in contravention of the provisions of the Act and in terms of Section 6 of the Act made the Order dated 14.02.2020 marked as P-14 to pay Rs. 5,244,000/- which should be the salary of the 3rd Respondent for the period from 24.10.2017 to 08.10.2018 without ordering to reinstate since he has resigned from the service with effect from 08.10.2018.

The position of the Company is that it has not terminated the services of the 3rd Respondent but it was a retirement affected due to attaining the age of retirement thus he is not entitled to reliefs in terms of the Act. The learned Counsel appearing for the Company argued that the Company has a policy regarding the age of retirement which is 55 years and the same policy should apply to the 3rd Respondent since he is an

employee of the Company. He has drawn the attention of Court to the appointment letters issued by the 3rd Respondent marked as P-8(h), P-8(i) and P-8(j) to two employees of the Company giving effect to the Company policy that the retirement age is 55 years.

The position of the 3rd Respondent is that there is no such Company policy for the senior executives at the level of Directors to retire upon reaching 55 years and a letter of appointment has not been issued to him which stipulates the retirement age. Further, it is the practice of the Company to employ family members as Executive Directors of the Company and his father and uncle had served in executive capacity in the Company until they reached 65 and 73 years respectively. Therefore, the learned Counsel appearing for the 3rd Respondent argued that the Company cannot unilaterally terminate the employment of the 3rd Respondent based on the purported policy that he has attained the age of 55 years and further that the termination of employment of the 3rd Respondent is a violation of the provisions of Section 2(1) of the Act that the services of an employee could not be terminated without his/her prior consent or the approval of the Commissioner General of Labour.

It is the position of the learned SSC appearing for the 1st and 2nd Respondents that on the complaint of the 3rd Respondent, an inquiry was held by the 2nd Respondent and the recommendations of the 2nd Respondent upon the findings at the inquiry were approved by the 1st Respondent on the Inquiry Report dated 24.01.2020 marked as 1R4 and

thereafter the 1st Respondent has made the impugned Order dated 14.02.2020 marked 1R5/P-14 upon the recommendations approved by him on 1R4.

The learned Counsel appearing for the Company argues that in the impugned Order marked as P-14, the 1st Respondent has failed to make any reference to the inquiry held by the 2nd Respondent and has failed to give reasons as to why the decision of the Company to retire the 3rd Respondent could not be made effective. Upon referring the Inquiry Report marked as 1R4 to the 1st Respondent he has approved the recommendations of the 2nd Respondent on the 1R4 itself on 29.01.2020 before P-14 was sent on 14.02.2020. Since the 1st Respondent has approved the recommendations of the 2nd Respondent on the 1R4 itself I hold that a necessity does not arise to refer to the Inquiry conducted by the 2nd Respondent in the impugned Order marked as P-14. Further, the reasons are given considering 1R4 for the conclusions of the 1st Respondent mentioned in P-14. Hence, I hold that the above-stated arguments of the learned Counsel appearing for the Company are devoid of merits.

It is the view of this Court that the Company has failed to satisfy the Court that the 1st Respondent has violated any provisions in the Act in arriving at the decision mentioned in the Order marked P-14 to be unlawful. Under the said circumstances, it is clear that in the guise of a Writ Application, the Company is attempting to challenge the correctness of the P-14 by invoking the Appellate jurisdiction of this Court. When deciding Writ Applications, the Court has to see whether the decision sought to be

quashed is lawful or unlawful and it is not ought to exercise Appellate powers and decide whether the impugned decision is right or wrong.

H.W.R. Wade and C.F. Forsyth on Administrative Law (11th edn) at page 26, states thus;

> *"The system of judicial review is radically different from the system of appeals. When hearing an appeal Court is concerned with the merits of a decision; is it correct? When subjecting some administrative act or order to judicial review, the Court is concerned with its legality, is it within the limits of the powers granted? On an appeal the question is 'right or wrong'. On review the question is lawful or unlawful."*

In *Best Footwear (Pvt) Ltd., and Two Others Vs. Aboosally, Former Minister of Labour & Vocational Training and Others*[1], F. N. D. Jayasuriya, J. held that,

> *"The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically different from appeals. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. In judicial review, the court is concerned with its legality. On appeal the question is right or wrong. On review, the question is whether the act or order is lawful or unlawful. Instead of substituting its own decision for that of some other body as happens when an appeal is allowed, a court*

[1] (1997) 2 SLR 137.

on review is concerned only with the question whether the act or order under attack should be allowed to stand or not."

Since the Application at hand is a Writ Application, the Court can only consider the legality of the Order of the 1st Respondent marked as P-14 and whether it should be allowed to stand.

Sub-section 1 of Section 2 of the Act provides that;

"*No employer shall terminate the scheduled employment of any workmen without-*

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

(b) prior written approval of the Commissioner."

Accordingly, it is clear that if an employment of a workman is terminated without obtaining prior consent of the workman or the prior approval of the Commissioner, such termination is illegal, null and void and will have no effect whatsoever. In the instant Application, the Company has neither obtained the consent of the 3rd Respondent nor the approval of the 1st Respondent to terminate the employment of the 3rd Respondent.

Section 5 of the Act reads as follows;

"*where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever.*"

In the case of *Onally Holding PLC Vs. Minister of Labour*[2] where an employee of a Public Leasing Company made an application to the Commissioner General of Labour alleging that his employment was unjustly terminated by the company, Sriskandarajah J. (P/CA) held that, if the position of the company is that the employee has reached the age of 67 and that he is unable to carry out his duties as Maintenance Manager, and if the responsibility warrants him to be of sound mind and memory and be physically competent to manage several employees, and that he cannot at his age satisfactorily carry out these responsibilities, and that it will severely prejudice the company to continue to permit the employee to serve in the company, it would have presented these facts to the Commissioner and would have obtained prior written approval of the Commissioner to terminate his services. The fact that there is no retirement age mentioned in the letter of appointment does not mean that the services of the employee cannot be terminated at a given time when he reaches an age where he cannot serve the company efficiently. As I have observed above, it is the duty of the company to comply with the provisions of the Termination of Employment of Workmen (Special Provisions) Act in terminating the services of an employee.

As per the above-mentioned legal provisions and the decision of the Court, it is clear that the termination of employment of the 3rd Respondent in the instant Application is illegal, null and void and accordingly will have no effect whatsoever.

[2] CA. (Writ) Application No.843/2010, CA Minutes dated 27.09.2012.

Section 6 of the Act reads thus;

> *"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."*

In the case of *Lanka Multi Moulds (Pvt) Ltd Vs. Wimalasena, Commissioner of Labour and Others*[3] where a British national was employed on a contract basis for 3 years, the employer terminated the employment of the workmen before the expiration of 3 years and the Commissioner ordered reinstatement with back wages for 17 ½ months. The Court of Appeal affirmed the order that the termination of employment is illegal for want of prior consent of the workman under Section 2(1)(a) of the Act. The court quashed the order for reinstatement and reduced the back wages to 13 months (the balance period of the contract of three years). Fernando J. held that,

> *"I hold that "may" in section 6 confers a discretion on the Commissioner; that "and" must be interpreted disjunctively; and that the Commissioner had the power to order payment of wages and benefits for the balance period of the 2nd*

[3] (2003) 1 SLR 143.

Respondent's contract without making an order for reinstatement. The Court of Appeal was therefore entitled to order such payment when setting aside the order for reinstatement."

In the instant Application, since the termination of employment of the 3rd Respondent is illegal, null and void and accordingly has no effect whatsoever, in terms of Section 6 of the Act the 1st Respondent is legally entitled to order to pay the salary of the 3rd Respondent for the period mentioned in the impugned Order.

After considering all the above-stated facts, legal provisions and the authorities, I hold that the impugned Order marked as P-14 is legal and should be allowed to stand.

In terms of Section 17 of the Act, the proceedings at any inquiry held by the Commissioner for the purposes of the Act may be conducted by the Commissioner in any manner, not inconsistent with the principles of natural justice, which to the Commissioner may seem best adapted to elicit proof or information concerning matters that arise at such inquiry. The Company do not argue that the principles of natural justice were violated at the Inquiry held by the 2nd Respondent. When considering the Inquiry Report marked as 1R4 and the Inquiry proceedings marked as P-7 it is clear that opportunities had been given to both parties to present their respective cases. Therefore, the Court can be satisfied that the impugned Order marked as P-14 has been made according to law.

Considering all the above-stated facts and circumstances, I hold that the impugned Order marked as P-14 of the 1st Respondent is in conformity with the provisions of the Act and cannot be considered unreasonable, unfair and *ultra vires* and therefore it should not be quashed. Since this Writ Application is without merits, I dismiss the Application. No costs ordered.

Application dismissed without costs.

JUDGE OF THE COURT OF APPEAL

M. T. Mohammed Laffar, J.

I agree.

JUDGE OF THE COURT OF APPEAL