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

Hijra Farms (Pvt) Ltd.,
No.12, Darga Road,
China Fort,
Beruwela.
Petitioner

CASE NO: CA/WRIT/292/2014

Vs.

1. Commissioner General of Labour,
   Labour Secretariat, P.O. Box 575,
   Colombo 5.
2. G. W. N. Viraji,
   Deputy Commissioner of Labour,
   Termination of Employment Unit,
   Labour Secretariat, P.O. Box 575,
   Colombo 5.
3. N. S. Athukorale,
   Former Assistant Commissioner of Labour,
   Presently
   Deputy Controller, Travel Unit,
   Department of Immigration and Emigration,
   No.41, Ananda Rajakaruna Mawatha,
   Colombo 10.

4. Inter Company Employees Union,
No. 158/18,
E.D. Dabare Mawatha,
Colombo 5.
And 98 Others.
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Kushan De Alwis, P.C., with Ayendra Wickremesekera for the Petitioner.
Vikum De Abrew, Senior D.S.G., for the 1st and 2nd Respondents.
Udaya Bandara for the 5th-102nd Respondents.

Argued on: 17.02.2020

Decided on: 20.05.2020

Mahinda Samayawardhena, J.

The business of the company by the name of Hijra Farms (Private) Limited was sold as a going concern to the company by the name of Three Acre Farms Limited whilst the 5th-102nd Respondent employees were in the employment of the former company. This happened on or around 30.12.2003. The employees worked as usual until on 01.04.2004 they saw a notice affixed to the gate of the workplace to the effect of "Work Place closed". The employees complained to the Commissioner General of Labour that their services of employment had been terminated abruptly without their knowledge. In the said

application, Hijra Farms Pvt Ltd was named as the workplace, and Ceylon Grain Elevators Pvt Ltd—which appears to be the parent company of Three Acre Farms Limited—as the present owner. On a technical ground in relation to the date of termination stated in the application, the said application of the employees was dismissed by the Commissioner General. The employees made a second application alleging the same, but this time only against Hijra Farms Pvt Ltd. After an inquiry, the Commissioner General held that both Hijra Farms Pvt Ltd and Three Acre Farms Ltd were responsible for the termination of services of the employees. Both Companies by separate writ applications successfully challenged the said decision of the Commissioner General. The Court of Appeal quashed the Commissioner General's decision *inter alia* on the premise that the order particularly against Three Acre Farms Ltd had been made in violation of the principles of natural justice. The order of the Court of Appeal was without prejudice to the right of the Commissioner General to hold a proper inquiry "after calling the necessary parties as party Respondents".[1]

The second inquiry commenced before the 3rd Respondent Assistant Commissioner of Labour, with the participation of Hijra Farms Pvt Ltd and Three Acre Farms Ltd.

There was no issue at the inquiry that (a) the services of the employees had been terminated (b) without the consent of either the employees or the Commissioner General of Labour. These were admitted facts. It is undisputed that termination of employment in such circumstances is in contravention of section 2(1) of the Termination of Employment of

[1] *Vide* page 437 of X.

Workmen (Special Provisions) Act, No.45 of 1971, as amended, which reads as follows:

> *No employer shall terminate the scheduled employment of any workman without –*
>
> *a) the prior consent in writing of the workman; or*
>
> *b) the prior written approval of the Commissioner.*

This was recorded by the inquiring officer without any objection from either company.

The only outstanding issue to be resolved by the inquiring officer was the employer of the applicant employees at the time of the termination of services: was it Hijra Farms Pvt Ltd or Three Acre Farms Ltd? The inquiring officer had correctly identified the issue and demarcated the parameters or scope of the inquiry and placed it on record. It reads as follows:

> පරීක්ෂණ නිලධාරී:
>
> ඉදිරිපත් වී ඇති කරුණු මත සේවකයින්ගේ සේවය අවසන් වී ඇති බවත් එය කම්කරු කොමසාරිස්තුමාගේ අවසරයකින් තොරව සිදුවී ඇති බවත් මෙම පරීක්ෂණයේ මේ දක්වා පැවති කරුණු අනුව අනාවරණය වී ඇති බවයි. කෙසේ වෙතත් එම සේවා යෝජක කවුරුන්ද යන්න නිශ්චිතව දැනගත යුතු අතර මේ වන විට කම්කරු කොමසාරිස්තුමා විසින් ලබා දී ඇති තීන්දුවට විරුද්ධව අභියාචනා අධිකරණයේ අභියාචනා තීන්දුව වී ඇත්තේ එම ගැටළුව විසඳා ගැනීම පිණිස සියලුම පාර්ශවයන් වෙත කරුණු දැක්වීමට අවස්ථාව ලබා දෙන ලෙසයි. ඒ අනුව මේ අවස්ථාවේ දී ප්‍රකාශ කර සිටින්නේ ඉල්ලුම්කරුවන්ටත් වගඋත්තරකාර පාර්ශවයයන් දෙකටම මෙහි දී නිශ්චිතවම සේවා යෝජක කවුද යන්න විසඳා ගැනීමට අවශ්‍ය වන කරුණු තහවුරු කිරීම අවස්ථාව ලබා දෙන බවයි.[2]

[2] *Vide* page 462 of X.

The inquiring officer reiterated the above before adjournment of the inquiry on that day, and recorded it as follows:

> පරීක්ෂණ නිලධාරි:
>
> සේවා යෝජක කවුද යන්න විසඳා ගැනීමට වාචික සාක්ෂි මෙහෙය වීම අවශ්‍ය බව ප්‍රකාශ කර සිටී. ඒ අනුව සාක්ෂි ආරම්භ කිරීමට අවස්ථාව ලබා දෙමි. දෙපාර්ශවය සමග සාකච්ජා කිරීමෙන් අනතුරුව නැවත පරීක්ෂණය 2010.06.09 වන දින පස්වරු 2.00ට යොදන ලදී.[3]

However, before adjournment an unusual application had been made on behalf of the employees to discharge Three Acre Farms Ltd from the inquiry and allow the main application to proceed only against Hijra Farms Pvt Ltd. It appears that the said application had been made to limit the inquiry, which might otherwise have taken considerable time. The relevant part of the inquiry proceedings reads as follows:

> මේ අවස්ථාවේ දී ඉල්ලුම්කාර පාර්ශවය මේ සම්බන්ධයෙන් මෙසේ ප්‍රකාශ කර සිටී.
>
> මේ කරුණ 2004 වර්ෂයේ සිට පවත්වා ගෙන යන හෙයින් ද සේවකයින්ට මෙතෙක් සහනයක් ලබා දී නොහැකි වී ඇති හෙයින් වැඩිදුරටත් සාක්ෂි වගඋත්තරකාර පාර්ශවයන් දෙකෙන් හා ඉල්ලුම්කරුවන් වෙනුවෙන් කැඳවිය හැකි හෙයින් ද ඉල්ලුම්කරු මුල් අවස්ථාවේ සිටම තමන්ගේ සේවය අවසන් කර ඇත්තේ හිජ්රා ෆාම් (ප්‍රයිවට්) ලිමිටඩ් සමාගම විසින් බවත් සඳහන් කර ඇති හෙයින් ද, මේ අවස්ථාවේ දී ඉල්ලුම්කාර පාර්ශවයන් විසින් ත්‍රීඑකස් ෆාම් (ප්‍රයිවට්) ලිමිටඩ් ආයතනය මෙම පරීක්ෂණයෙන් මුදවා හැරීමට ඉල්ලා සිටින බවයි. මෙසේ ඉල්ලුම්කරුවන් ඉල්ලුම් පත්‍රයේ හිජ්රා ෆාම් (ප්‍රයිවට්) ලිමිටඩ් සමාගමට විරුද්ධව පවත්වා ගෙන යෑමට අවසරය ලබා දෙන ලෙසත් වැඩිදුරටත් ඉල්ලා සිටිමි.[4]

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[3] *Vide* page 463 of X.
[4] *Vide* page 462-463 of X.

This application of the employees was allowed by the inquiring officer on the following day in the presence of the employees' Attorney-at-Law.[5] Three Acre Farms Ltd did not participate at the inquiry thereafter.

In my view, the inquiring officer should not have allowed this application because the question to be decided at the inquiry was whether the employer at the time of the termination of employment was Hijra Farms (Pvt) Ltd or Three Acre Farms Ltd, and the direction of the Court of Appeal was that the necessary parties should be called in order to arrive at a fresh decision. This purpose was defeated when Three Acre Farms Ltd was discharged.

The firm position taken up by Hijra Farms Pvt Ltd at the inquiry was that they sold the entire property including the business as a going concern to Three Acre Farms Ltd on 30.12.2003 by deed marked at the inquiry R3, which was long before the termination of employment, and therefore, they (Hijra Farms Pvt Ltd) were not responsible for the said termination.[6]

At the inquiry, evidence was led by both parties—Hijra Farms Pvt Ltd and the applicant employees. However, before the inquiring officer could make recommendations to the Commissioner General of Labour to take a final decision, the said inquiring officer was transferred to a different Ministry.

The 2nd Respondent Deputy Commissioner of Labour was then confronted with this issue. The Deputy Commissioner suggested three options: (a) to make recommendations by the inquiring officer who conducted the inquiry; (b) to make recommendations by another

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[5] *Vide* page 465 of X.

[6] *Vide* the written submission filed by the Petitioner at the inquiry before the Commissioner General of Labour at pages 713-716 of X.

inquiring officer after examining the inquiry notes; or (c) to hold a fresh inquiry. Both parties expressed their views on the matter and the Deputy Commissioner recorded that the decision on that limited question would be notified to the parties by written communication.[7]

Such written communication was not sent and instead the Petitioner received the final decision of the Commissioner General of Labour marked P23. It is this decision which the Petitioner seeks to quash by a writ of certiorari in this application. By this decision, the Commissioner General has ordered the Petitioner (Hijra Farms Pvt Ltd) to pay over Rs.9 million to the applicant employees as compensation. This the Commissioner General has done under section 6A read with section 6D of the Termination of Employment of Workmen Act.

Section 6A of the Act reads as follows:

> *Where the scheduled employment of any workman is terminated in contravention of the provisions of this Act in consequence of the closure by his employer of any trade, industry or business, the Commissioner may order such employer to pay to such workman on or before a specified date any sum of money as compensation as an alternative to the reinstatement of such workman and any gratuity or any other benefit payable to such workman by such employer.*

Section 6D deals with the aspect of computation of compensation.

In the decision P23, under the sub-heading "reasons" for the decision, the only reason given by the Commissioner General is that the employer terminated the services of the applicant employees without written

[7] *Vide* pages 640-642 of X.

sanction of either the employees or the Commissioner General of Labour.

Learned President's Counsel for the Petitioner strenuously contends that this decision of the Commissioner General is unreasonable/irrational/procedurally improper/arbitrary/error of law on the face of the record. I am inclined to agree.

The Commissioner General who took the decision did not hold the inquiry. He was supposed to act on the recommendations of the inquiring officer. There are no recommendations made by the inquiring officer or any other officer. No such recommendations have been tendered to this Court. It may be recalled that there was an issue regarding who should make recommendations to the Commissioner General, as the inquiring officer had been transferred to a different Ministry. Learned President's Counsel for the Petitioner drew the attention of the Court to the date of the application stated in the impugned decision to suggest that the impugned decision is not a considered decision, as the date of the application mentioned therein is also wrong.

The Commissioner General has acted under section 6A, which speaks of closure of business by the employer. At the inquiry, there was no issue whether or not the business was closed. The Petitioner does not dispute the position of the employees that the business was closed on 01.04.2004. The only issue was who closed the business thereby terminating the services of the employees. However, the Commissioner General has not answered this issue, to resolve which alone the inquiry was conducted. The Commissioner General's reason for the decision that the termination of employment was done without the consent of the employees or the Commissioner General was not a disputed fact. It

was so decided by the inquiring officer even before the commencement of the inquiry, without any objection by either company.

I have no doubt that there is an error on the face of the record insofar as the impugned decision is concerned. The Commissioner General has not answered the issue which he was obliged in law to do, thereby making an irrational order.

Error of law on the face of the record is a ground for certiorari.

If the tribunal had no jurisdiction to inquire into the matter, there is no issue that the decision taken is a nullity. On the other hand, even if the tribunal had jurisdiction to inquire into the matter, the decision can still become a nullity if *inter alia* (a) it has identified a wrong issue as the correct issue to be answered or (b) having initially identified the correct issue, ultimately, albeit *bona fide,* answered a wrong issue as the correct issue.

In the leading case of *Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147* at 171 Lord Reid stated:

> *But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which,*

> *under the provisions setting it up it had no right to take into account. I do not intend this list to be exhaustive.*

In *Gunasekera v. De Mel, Commissioner of Labour (1978) 79(2) NLR 409,* where the order of the Commissioner of Labour was sought to be quashed by way of certiorari, the Supreme Court held at 426:

> *Lack of jurisdiction may arise in different ways. While engaged on a proper inquiry the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions or may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. A tribunal which has made findings of fact wholly unsupported by evidence or which it has drawn inferences wholly unsupported by any of the facts found by it will be held to have erred in point of law. The concept of error of law includes the giving of reasons that are bad in law or inconsistent, unintelligible or it would seem substantially inadequate. It includes also the application of a wrong legal test to the facts found taking irrelevant considerations into account and arriving at a conclusion without any supporting evidence. If reasons are given and these disclose that an erroneous legal approach has been followed the superior Court can set the decision aside by certiorari for error of law on the face of the record. If the grounds or reasons stated disclose a clearly erroneous legal approach the decision will be quashed. An error of law may also be held to be apparent on the face of the record if the inferences and decisions reached by the tribunal in any given case are such as no reasonable body of persons properly instructed in the law applicable to the case could have made.*

In *The Board of Trustees of the Maradana Mosque v. Mahmud (1966) 70 CLW 41*, the Appellants successfully challenged the take-over order by the Minister on two grounds: one, in violation of a rule of natural justice—*audi alteram partem*; and the other, as held by the Privy Council, "*in making the order the Minister had not considered the right question which was whether the school was presently being administered in contravention of the Act. The Minister should have considered himself with the present conduct of the school, and not the past. Since he had not considered the right question, he had no jurisdiction to make the order*."

Learned Senior Deputy Solicitor General for the Respondents, relying on *Hassan v. Fairline Garments International Ltd [1989] 2 Sri LR 137*, argues that the impugned decision is flawless, as Hijra Farms Pvt Ltd could not sell the business to Three Acre Farms Ltd with the employees, and therefore Hijra Farms Pvt Ltd was the employer of the applicant employees when the termination of employment took place by the closing of the business on 01.04.2004.

This is not the reason given by the Commissioner General when ordering that Hijra Farms Pvt Ltd shall pay compensation to the employees.

The above submission of learned Deputy Solicitor General is relevant if the Commissioner General had decided who the employer of the applicant employees was at the time of the termination of employment. This was not done.

The Deputy Solicitor General during the course of the argument accepted that there is no express provision in law which prohibits an employer from transferring a business as a going concern while allowing

employees to continue their employment with the same terms and conditions without a break in service. Such a question, he admitted, shall be decided on the unique facts and circumstances of each individual case.

If it is otherwise, i.e. if there is a blanket prohibition in law to sell a business as a going concern with the labour force, then there was no necessity in this case for an inquiry by the Commissioner General of Labour with voluminous evidence led by the parties in order to ascertain who the employer was. On the admitted facts by Hijra Farms Pvt Ltd, which I adverted to earlier (i.e. that they sold the company on 30.12.2003), an order could have been made.

In *Hassan*'s case (*supra*) the employer company, without the consent of the employee, transferred the employee (a) to a different company (a subsidiary of the former), (b) situated in a different place, (c) in a different capacity. The employee refused to go and complained to the Commissioner General of Labour of termination of services and sought reinstatement with back wages. The question to be decided was not who the employer was (as in this case) but whether or not there was a termination of services in such circumstances. The Commissioner General answered that question in the affirmative and the Supreme Court affirmed it.

The facts in the instant case are totally different. The issue to be resolved is different. In the instant case, if I may repeat, the issue is not that there was a termination of services but rather who occasioned it. It is true that the word 'employer' is defined in the Termination of Employment of Workmen Act. Nevertheless, the question 'who the employer is' is not a pure question of law. It is a mixed question of fact and law.

This Court by exercising writ jurisdiction cannot decide disputed questions of fact. That is the task of the inquiring officer on whose recommendations the Commissioner General would ultimately make a final decision. This has not been resolved.

The impugned decision of the Commissioner General of Labour marked P23 cannot be allowed to stand. I quash it by certiorari.

The application of the Petitioner is allowed but without costs.

Judge of the Court of Appeal