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

C.A 175/2009 (Writ)

Sascon Knitting Company (Pvt) Ltd.,
No. 752, Baseline road,
Colombo 09.

PETITIONER

Vs.

1. Commissioner General of Labour
Labour Secretariat
Narahenpita, Colombo 5

2. Free Trade Zones & General
Services Employees Union,
141, Ananda Rajakaruna Mawatha,
Colombo 10.

3. G. M. Shiromala Gajanayake
"Kapila Sevana" Ihala Dimbulwewa,
Welimada.

4. G. Lilie
Weralugolla, Appalatutawa,
Paludotadeniya.

5. K. Indralatha Jayalath
Andaragollewa, Kahatagasdigiliya,
Anuradhapura.

6. H. M. Niluka Mendis
56, Nawajanapadaya , Ekala.

7. D. A. K. Perera
Ashoka Sevana, Ekala,

And **45** others.

RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: T. M. S. Nanayakkara for the petitioner

Anusha Fernando S.S.C., for the 1st Respondent

Srinath Perera for the 3rd – 52nd Respondents

ARGUED ON: 18.10.2012

DECIDED ON: 14.12.2012

GOONERATNE J.

Sascon Knitting Company (Pvt.) Ltd. the Petitioner has filed an application for a mandate in the nature of writ of certiorari to quash the decision of the Commissioner General of Labour dated 19.8.2008 marked 'X' and the decision of 28.11.2008 marked 'Y'. Both decisions pertains to the orders made by the 1st Respondent under Termination of Employment of Workman (Special Provisions) Act. The case of the Petitioner is that the Petitioner Company is one of the group of companies, and it is described in the written submissions as a company in the conglomerate of St. Anthony's Group of Companies, which has many subsidiary companies. The Petitioner Company and San Fashion Company are two such subsidiary companies

engaged in the Garment industry. It was also submitted that the Directors of these two companies are the same and with one General Manager.

Due to losses incurred by the Petitioner Company the factory at Ja-ela had to be temporarily closed and shifted to Base Line Road, Dematagoda where the St. Anthony's Group, had it's Head Office and the other factory of San Fashion Company. Petitioner contends that without retrenchment of workers, the employees were transferred to the other Company namely 'San Fashion' at Dematagoda. The 3rd to 52nd Respondents being employees of the Petitioner Company refused to accept such transfer and complaints to the Commissioner General of Labour. These facts are not disputed, except on a legal basis. At the hearing of this application the learned counsel for the Petitioner emphasized that it was only a transfer of employees and not a termination of employment which does not offend the termination of Employment of Workmen's Act. He referred to marked letters Z sent to the 3rd to 52nd Respondent employees. Learned Counsel for the Petitioner also drew the attention of this court to the document at folio (182) – A1 which is a copy of the letter of appointment issued to the above, Respondents at the time they were absorbed into the employment of the Petitioner Company and emphasized more particularly to clause 6 of same which reads thus:

"You will be liable to be transferred from one section to another section or from one Department to another Department..."

Learned Counsel for the Petitioner argues that the 1st Respondent despite overwhelming evidence (at the inquiry before him) that it was only a transfer, being oblivious to the intention and scope of the above statute, designed to prevent dismissal of employees made the two orders referred to above and ordered payment of compensation. The main issue as stressed by the learned counsel for the Petitioner is that whether there was a termination of employment of the above Respondent or whether it was a lawful transfer within this organization.

My attention was also drawn to certain items of evidence led at the inquiry.

Assurance by Petitioner that transfer is only temporary and payment of traveling expenses.

"ස්ථාන මාරු සිදුකර ඇත්තේ තාවකාලිකව බවත්"

එමෙන්ම නව සේවා ස්ථානයට සේවයට යෑමට සිදුවන විට දැරීමට සිදුවන ගමන් වියදම්ද සේවා යෝජක විසින් ගෙවීමට සූදානම් බවද දැනටමත් ප්‍රකාශ වී ඇති කරුණුය

Admission of transfer

"ඔය පරීක්ෂණ පවත්වන අවස්ථාවේ ඔබට සාමාන්‍යාධිකාරී ප්‍රසන්න මහත්මයා කිවාද ජාඇල සැක්සන් නිටිං ආයාතනයේ සේවකයින් මෙම ස්ථානයට මාරුකරතිබෙන බව.

උත්තරය: ඒ බව සේවකයින්ගෙන් අනාවරණය වුනා"

Page 220 Line 5 "සේවය අවසන්කිරීමක් සිදුවෙලා නැති නිසා නැවත සැක්සන් නිට්ං ආයතනයේ සේවය ලැබෙනතුරු"

Attendance of employees separately recorded

වැටුප් සහ සියළු ලිපි ලේඛණ ජාඇල කාර්යාලයේ බවයි ප්‍රකාශවුනේ

ඒ දෙකට වෙන වෙනම ලේඛණ පැවැත්වුනා

The learned Senior State Counsel inter alia submitted to this court at the very outset of her submissions to the material and scope of non disciplinary grounds contemplated by the statute and drew the attention of this court to Section 2 and 6 of the said Act.

The learned Senior State Counsel and the learned Counsel for 3rd to 52nd Respondent both emphasized on the findings of the 1st Respondent which incorporate the reasons for the order of the 1st Respondent. The orders 'X' & 'Y' incorporate the following.

1. That the two companies are two separate legal entities
2. There cannot be a transfer from one legal entity to another
3. There had been a closure of the Plaintiff Company
4. Constructive termination of the services of the workmen

There is much emphasis on the site inspection report at folios 198 – 200 (Vol. II). The main ground conveyed in this regard is that a branch of the Petitioner Company (Sascon Knitting) is not located within the premises

of San Fashion. The two forms (48) giving particulars of Directors/Secretaries at folios 332 & 329 shows two distinct companies. Though the Directors are the same, they are two distinct entities. The name board as stated therein is misleading as the Petitioner Company does not have a separate office within the premises. The so called transfer urged by the Petitioner Company was not a termination of workmen has not been established. How does one define or describe an Associate company? Mere reference to such a term cannot give a benefit to the Petitioner to get over the position that two different and distinct legal entities exist? Letters issued to employees (352-363) in the months of May to June 2006 is on another footing indicative of transfer to a branch in the same company. But the field inspection note is to the contrary.

The enacting the Act in question is a need felt by the State to exercise greater degree of control over retrenchment and layoff of employees in the private sector on the ground of loss of business etc. The act imposes a prohibition on the employer in the exercise of his right of termination and make such termination conditional on the workmen's written consent written approval of Commissioner of Labour (Section 2 (1)) – Some concepts of Labour Law – S.R. de Silva pg. 174/175.

The following case law cited by either party has assisted this court to arrive at a conclusion.

Hassan vs. Fairline Garments International Ltd. And Others 1989 (2) SLR 137...

The appellant workman had been appointed as the purchasing officer of the respondent company. When he had functioned in that capacity for several years he was informed by the respondents that he would no longer be required to do purchasing as that function was being delegated to a subsidiary company and he was asked to conclude the existing purchasing assignments. Thereafter the appellant was informed that he had been transferred to Jetro, a subsidiary company of The respondent company, and asked to commence the new assignments there which were different form purchasing. Having refused to discharge those functions the appellant complained to the Commissioner of Labour that the respondents have stopped his work without his or the Commissioner's written consent and asked the Commissioner to restore him in the capacity of purchasing officer as per his letter of appointment which however included a clause inter alia that the appellant should carry out all duties entrusted to him by the respondent company.

Held:

1. 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.
2. (It is reasonable to infer that the appellant's appointment was to a specific post, namely that of purchasing officer, which doubtless would have required skill and experience of some sort. The clause that the appellant should carry out all duties entrusted to him by the respondent company in the context must be construed to mean duties within the ambit of a purchasing officer. It cannot possibly be taken to embrace every kind of duty which the company may decide to assign to him.

3. The proposition that the employer enjoys an implied right, in the absence of contractual provisions or other rules to the contrary to transfer a workman from one establishment to another at a different place within the service of the employer has no application to the present case as here the appellant was transferred to another place of work not within but outside the respondent's service

The above case law is very much in support of the Respondent's case. I cannot arrive at a conclusion that the Appellant has a right to transfer a workman in employment from one company to another company and state that the Directors are the same. The letter of appointment which include some terms of the contract of employment between the parties which was made available to this court, only permits a transfer form one section to another section or from one department to another department. There is no term included as an associate company or from one company to another subsidiary company. It would be very prejudicial or damaging to the status of the employee if an extended meaning is given to clause 6 of the letter of appointment which embody contractual terms. The contemplated alleged transfer by the employer is from one entity to another legal entity. If permitted it would lead to abuse and offend the provisions of termination of employment of workmen (Special Provisions) Act No. 45 of 1971 as

amended. Act envisages a situation of obtaining the consent of the employee or the Commissioner of Labour prior to termination, and to give the workmen statutory protection in case of termination of employment on non-disciplinary grounds.

This being a writ application which is subject to the discretion of court, is another matter, court has to be mindful. The delay as evident is about 7/8 months, thought the Appellant explains that it was due to delay in obtaining the orders of the 1st Respondent marked 'X' & 'Y' . Having examined the facts and the law I cannot with any stretch of imagination state that the 1st Respondent's orders are a nullity. The case cited, Biso Menika Vs. Cyril de Alwis 1982 (1) SLR 368 has no application to the case in hand. The time lapse has not been properly and convincingly explained. As such, this court cannot give the Appellant a benefit to get over delay.

This court cannot exercise it's discretion in favour of the Petitioner. Prerogative writs are not issued as matter of course and it is in the discretion of court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A writ for instance, will not issue where it would be vexatious or futile. P.S. Bus Co. Ltd., Vs. Members and Secretary of the Ceylon Transport Board 61 NLR 491.

In all the above circumstances I see no basis to issue the writs prayed for in this application. This application is dismissed with costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL