

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

Ceylon Homes International (Lotus  
Tower) Limited,  
No. 79, Hyde Park Corner,  
Colombo 02.

Petitioner

C.A. (Writ) No. 546/2010

Vs.

1. W.J.L.U. Wijeweera,  
Commissioner General of Labour,  
Labour Secretariat,  
PO Box 575, Narahenpita,  
Colombo 5.
2. P.L.S. Lekamge,  
Labour Officer,  
The Termination of Employment  
Unit, Labour Secretariat,  
PO Box 575, Narahenpita,  
Colombo 5.
3. S.A.D.M.E. Jayathillake,  
No. 558, Heenkenda,  
Ragama.
4. T.G. Upali Jayathillake,  
No. 359, Wallahagoda,  
Gampola.
5. M.S.T. Chathuranga,  
No. 145, Maakumbura Watta,  
Badullawa.

Respondents

Before : **SRI SKANDARAJAH, J. (P/CA) &  
H.N.J. PERERA, J.**

Counsel : Caniska Vitharana for the Petitioner

Ruwanthi Herath Gunaratne, SC for the 1<sup>st</sup> and  
2<sup>nd</sup> Respondents

Nirosh Bandara for the 3<sup>rd</sup>- 5<sup>th</sup> Respondents.

Argued on : 27.07.2011.

Written Submissions on : 02.08.2011- 1<sup>st</sup> & 2<sup>nd</sup> Respondents  
29.08.2011- Petitioner

Decided on : 24.10.2011.

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**H.N.J. Perera, J.**

The petitioner filed this application seeking writ of Certiorari to quash the order dated 22.7.2010 made by the 1<sup>st</sup> respondent, the Commissioner General of Labour directing the petitioner to pay Rs. 2,380,670.50 to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents were admittedly employees of the petitioner company Ceylinco Homes International (Lotus) Limited, a duly incorporated company under the Act No. 7 of 2007 and having the capacity to sue and be sued in such name and engaged in the business of constructing and sale of luxury houses and apartment. The 2<sup>nd</sup> respondent is a Labour Officer attached to the termination Unit of the Labour Secretariat, who was

authorized by delegation of powers by the 1<sup>st</sup> respondent to inquire into the application made by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents against the petitioner.

In paragraph 7 of the petition the petitioner claims that in the year 2003, the petitioner company was granted a land on a 99 year term lease by the Urban Development Authority (UDA) which preceded by the Government tender published calling for prospective investors for the development of the said land at Colombo 3. The petitioner successfully achieved the award by proposing the implementation of Ceylon Celestial Residencies Project.

In paragraphs 8 and 9 of the petition the petitioner claims that the petitioner designed the entire project in conformity with the statutory requirement and obtained necessary approvals from all the relevant state agencies and statutory bodies and that the petitioner had to invest about 266 million Rupees for the payment of the lease premium to the UDA and another 5 billion Rupees to obtain necessary approvals and carry out further development as at to date.

In paragraph 10 and 11 of the petition, the petitioner states that the construction work was commenced in 2006 with over 500 workers working at the site and in June 2008 when the building

construction was progressing, officers of the Urban Development Authority unexpectedly and suddenly and without adducing any reason whatsoever ordered the petitioner to immediately stop construction work of the facades facing the Temple Tree premises and strong directions were received by the petitioner from the UDA to stop completely the entire construction work of the project.

The petitioner was further informed that the construction of a high-rise building in the vicinity of the temple trees premises would inflict and bring about security threats to the life of VIPs and endanger the national Security. The petitioner made serious effort to convince the relevant authorities to re-commence work but managed only to proceed with work for a short period and thereafter the security authorities refused to renew entry permits for concrete truck mixture and accordingly the UDA prevented the Colombo Municipal Council from extending the building permit. And further the UDA did not consent for a secondary mortgage of the project for the Finance Company PLC (TFC) to secure loan facilities for the petitioner company.

In the circumstances it is the position of the petitioner that it was confronted with a situation "**force majeure**" resulted by coercion and irresistible suspension of business activities of the Company

which amounting to intervening circumstances which were beyond the control not foreseeable and not preventable by the petitioner company. It is the position of the petitioner that the petitioner is entitled in law to have excused from further performing all the contracts entered in connection with the projects, including those contracts of employment that has been entered between the petitioner and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.

It is also the position of the petitioner company that such circumstances are also amounting to instances of supervening impossibility and frustration whereby the petitioner is entitled in law to treat all the contracts performed in connection with such projects including those contract of employment that had been entered between the petitioner and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents as ended discharged or terminated.

The petitioner further states that in the circumstances the petitioner offered compensation packages for the employees, who volunteered to resign from the petitioner company. Six employees, including the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, whose services the petitioner was incapable of further obtaining, were granted leave with pay with effect from 1<sup>st</sup> April 2009 during and for the temporary period suspension of the two projects and as the petitioner was unable

termination is due to closure of a trade or business, to make order awarding compensation as an alternative to reinstatement and the compensation that could be awarded has been set out in Gazette Extraordinary 1384/07 dated 15<sup>th</sup> March 2005.

It is the contention of the respondents that in view of the statutory provisions contained in the Termination of Employment of Workmen (Special Provisions) Act (TEWA), if the petitioner wished to terminate the services of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents as a result of a vis major or supervening impossibility as claimed, the prior consent of the said workmen and the approval of the Commissioner of Labour should have been obtained and instead the petitioner issued letters marked P4, P5 and P9 unilaterally terminating the services of the respondents.

The petitioner has claimed that the order and the findings of the 1<sup>st</sup> respondent containing in the said order is ex facie not within the power conferred on the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Section 5 of the Termination of Employment of Workmen (Special Provisions) Act provides, where an employer terminate the scheduled employment of a workmen in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be no effect whatsoever. The Deputy Commissioner in his order P27

has come to the conclusion that the 1<sup>st</sup> respondent has terminated the employment of the employees in contravention of the provision of the said Act. Therefore the termination is illegal, null and no effect whatsoever. However the 1<sup>st</sup> respondent had concluded inter alia that stoppage of work of the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> respondents was consequent to compulsion to stop main operation of the petitioner company for reasons beyond control of the petitioner company. If the employer was unable to continuously employ his employees due to a reasons beyond control of the petitioner company, petitioner should have brought the facts to the notice of the Commissioner of Labour and obtained his permission before terminating the services of the employees. In this case the evidence had been clearly led before Commissioner of Labour to show that the petitioner has terminated the services of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent without obtaining prior approval of the Commissioner of Labour by the documents marked P4,P5 and P9. The Commissioner in his order P27 has come to the conclusion that the petitioner (employer) has terminated the employment of the 3<sup>rd</sup> , 4<sup>th</sup> and 5<sup>th</sup> respondents in contravention of this provision of the said Act. Therefore the termination is illegal, null and void and no effect whatsoever. And as the 1<sup>st</sup> respondent has concluded that the stoppage of work of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent was consequent to compulsion to stop main operation of the petitioner company for reasons beyond

control of the petitioner company, the 1<sup>st</sup> respondent has proceeded to act under section 6A of the Termination of Employment of Workmen (Special Provisions) Act TEWA to grant compensation to the said 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. In the event that the termination had been effected in contravention of the section 2, the Act also contains provisions in section 6 and 6A empowering the Commissioner to make order compelling the employer to continue the employment of the workman and to pay wages and all other benefit or in a case where the termination is due to closure of a trade or business, to make order awarding compensation as an alternative to re-instatement. In view of the statutory provisions contained in the Termination of Employment of Workmen (Special Provisions) Act (TEWA), if the petitioner wished to terminate the services of 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents as a result of a vis major or supervening impossibility as claimed the prior consent of the said workmen and the approval of the Commissioner of Labour should have been obtained, instead the petitioner has issued letters marked as P4, P5, P9 unilaterally terminating the services of the respondents. The facts support the contention of the respondents that the petitioner has terminated the services of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in contravention of the provisions of the Termination of Employment of Workmen (Special Provisions) Act TEWA. Therefore

the Commissioner is empowered to make an order under section 6 or 6A of the Act.

Although the petitioner has alleged that this is not a matter which come within the provision of section 6A since the commissioner has not come to a definite finding of a closure of the petitioner company this court observes as pointed out by the respondents in their written submissions in the submissions made by the petitioner before the 2<sup>nd</sup> respondent and from the contents of documents marked P4,P5 and P9 and counter submissions, it has been repeatedly stated that since the petitioner's buildings project have been suspended indefinitely the petitioner cannot continue to employ the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Respondents and to pay their wages. This is clearly stated in the order of the 1<sup>st</sup> respondent marked P 27. The 1<sup>st</sup> respondent has concluded that inter alia that stoppage of work of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent has been consequent to compulsion to stop main operations of the petitioner company and for reasons beyond the control of the petitioner company, but the petitioner has failed to make an application under section 2 of the Act No. 45 of 1971 and further that the petitioner company has failed to state a definite date on which the company is able to open up for business.

Section 6 A deals with the situation where the employment of any workmen is terminated in contravention of the provisions of the Act in consequence of the closure by his employer of any trade, industry or business. In these circumstances the Commissioner is empowered to award compensation to the employees whose services are terminated in contravention of the said Act as an alternative to re-instate of such workmen.

In **L. Nishantha Kumara de Silva Vs. Road Construction and Development Company (Pvt) Limited** and two others C.A. (Writ) Application No. 1317/2003 the court after considering the case **K.D.C. Predeep and 16 Others Vs. Skyspan Asia (Pvt) Limited and 4 others** C.A.(Writ ) Application No. 2045/2003 C.A. Minute 22.6.2005 held that where there is no provision in law to deal with a situation where the employer has become incapable of providing employment to the employees not due to closure but due to various circumstances that has arisen at the time of the determination of the Commissioner, on an application of the employees in relation to the termination of the employment applying the rationale of the above judgment, not only the employee but also the employer becomes incapable or not in a position to continuously employ an employee due to various circumstances other than closure in the opinion of the Commissioner at the time

of the determination of the Commissioner; that the employer had terminated the services of the employees in contravention of the Act, the word "may order" in section 6, could be interpreted, that it empowers the Commissioner to order compensation instead of ordering the employer to continue to employ the workmen.

Even if one is to argue that the said order P27 is not specific as to whether the determination of 1<sup>st</sup> respondent does fall within the interpretation of closure by the employer, as it has been repeatedly stated by the petitioner that since the petitioner's building project has been suspended indefinitely the petitioner cannot continue to employ the workmen and pay their wages, it could be said that Section 6 empowers the Commissioner to order compensation instead of ordering the employer to continue to employ the workmen. Therefore this Court cannot agree with the contention of the petitioner that the 1<sup>st</sup> respondent had no jurisdiction to act either under Section 6 or 6A of the Termination of Employment of Workmen (Special Provisions) Act (TEWA).

The petitioner has in paragraph 37(a) (i) alleged that the Commissioner has failed to act in conformity with the rules of natural justice. It is stated that the petitioner was not given an opportunity to cross examine the 3<sup>rd</sup>- 5<sup>th</sup> respondents.

On perusal of the proceedings marked P16 it is seen that the petitioner and the respondents have consented to the Commissioner deciding the matter upon written submission to be filed by them. Therefore this court see no merit in the argument of the petitioner. It is further alleged that the Commissioner has acted arbitrarily and in bias in favour of the 3<sup>rd</sup> - 5<sup>th</sup> respondents holding that the workmen are exempted from any responsibility for the situation faced by the petitioner company. The Commissioner in his order marked P7 has clearly held that the workmen are not responsible for the situation faced by the company. It is clearly seen that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents are in fact not in anyway responsible for this situation faced by the petitioner. The contention of the petitioner is that the contracts of employment with the said respondents were frustrated as a result of vis major and supervening impossibility as claimed. Therefore this allegation of bias on the part of the 1<sup>st</sup> respondent has no valid basis In law.

The section 11 ( 2 ) permits the commissioner to delegate to any officer of the Labour Department any power, function or duty conferred and imposed on him under the Termination of Employment of Workmen (Special Provisions) Act (TEWA). It has been held that the commissioner can delegate his power to an Assit.

Commissioner to hold an inquiry and in this case to the 2<sup>nd</sup> respondent.

Although the petitioner alleged that the computation of the amount awarded as compensation and the duration for which it has been awarded is erroneous this court find that matter has been raised by the petitioner for the first time at the argument stage before this court.

For the above reasons this court finds no merit in the application filed by the petitioner accordingly dismisses the same with costs payable by the petitioner to the 3<sup>rd</sup> , 4<sup>th</sup> and 5<sup>th</sup> respondents. \*

*Application is dismissed.*

**JUDGE OF THE COURT OF APPEAL**

**S. Sriskandarajah, J.(P/CA)**

I agree.

**PRESIDENT OF THE COURT OF APPEAL**

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