

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

*In the matter of an Application for
mandates in the nature of Writs of
Certiorari and Mandamus in terms of
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka*

C A (Writ) Application No. 300 / 2013

Ceylon News Papers (private) Limited.,
No. 101,
Rosmead Place,
Colombo 07.

PETITIONER

-Vs-

1. V P K Weerasinghe,
Commissioner General of Labour,

Department of Labour,
Colombo 05.

2. K D M Priyantha,
Commissioner of Labour
(Industrial Relations)
Department of Labour,
Colombo 05.

3. G W N Viraji,
Deputy Commissioner of Labour
(Termination of Employment Branch)
Department of Labour,
Colombo 05.

4. K G Asanka Indrajith,
No. 07/11
Parakandeniya Road,
Imbulgoda.

RESPONDENTS

Before: Vijith K. Malalgoda PC J (P/CA)

P. Padman Surasena J

Counsel : Kushan de Alwis, PC with Ayendra Wickremasekara for the

Petitioner

Suranga Wimalasena, SSC for the 1st, 2nd and 3rd

Respondents,

4th Respondent is absent and unrepresented.

Argued on : 2016-06-29

Decided on : 2016-09-13

JUDGMENT

P Padman Surasena J

Upon 4th Respondent making an application to the Commissioner of Labour on 2012-09-24 alleging that his service was unlawfully terminated by the Petitioner, the 3rd Respondent (Deputy Commissioner of Labour) has held an inquiry in terms of the provisions of the Termination of Employment of

Workmen (Special Provisions) Act (hereinafter sometimes referred to as the "Act"). In the course of the inquiry the Petitioner has raised two preliminary objections. They are as follows:

- I. that the 4th Respondent's employment has been terminated on disciplinary grounds and hence, the provisions of section 2 (4) of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 as amended, will not apply and therefore the Commissioner of Labour does not have jurisdiction to hear and determine the application made by the 4th Respondent.
- II. that the Commissioner of Labour does not have jurisdiction to hear and determine the said application made by the 4th Respondent, as the 4th Respondent had only been in employment for approximately 09 months and hence, the provisions of the Act do not apply to the Petitioner in terms of section 3 (1) (b) of the Act.

The 3rd Respondent having afforded an opportunity for the Petitioner to be heard, has overruled both preliminary objections. It is those two orders of the 3rd Respondent marked respectively as **P 13** and **P 15** that are being challenged in these proceedings.

Section 2 (4) of the Act is as follows:

"For the purposes of this Act, the scheduled employment of any workman shall be deemed to be terminated by his employer if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer, and such termination shall be deemed to include -

- (a) non-employment of the workman in such employment by his employer, whether temporarily or permanently, or
- (b) non-employment of the workman in such employment in consequence of the closure by his employer of any trade, industry or business."

Admittedly the Petitioner has not issued a letter when he terminated the service of the 4th Respondent. Learned President's Counsel for the Petitioner relied on the document marked **P.02** in which the 4th Respondent is reported to have confessed to a misconduct committed by him. This letter has been written by the 4th Respondent on 2012-07-04. However, in the subsequent complaint the 4th Respondent had made to the

Commissioner of Labour on 2012-09-24, he explains the circumstances under which he was forced to make the previous statement. In the document marked **P 03 (b)** (which is the complaint the 4th Respondent has made to the Commissioner of Labour) he has also stated that he made a complaint to the Cinnamon Gardens Police station with regard to the situation he had to face at the hands of the Petitioner. The 4th Respondent has further stated in that complaint that the Cinnamon Gardens Police station inquired into his complaint after which he withdrew the said complaint on the promise that his job would be given back.

No evidence other than the purported confession has been placed before the inquiring officer by the Petitioner to establish that the 4th Respondent's service was terminated on disciplinary grounds.

As has been mentioned before, the Petitioner has not issued any letter of termination of service to the 4th Respondent. Therefore, in the face of two rival positions taken up respectively by the Petitioner and the 4th Respondent, it is not possible for the inquiring officer to hold with the Petitioner as there is no basis to prefer the Petitioner's position to that of the 4th Respondent. Indeed, this question would be a question that the inquiring officer may have to decide in the course of the inquiry as it has

become a disputed fact. Therefore this court is unable to accept the submission of the learned President's Counsel who appeared for the Petitioner, that the ruling given by the 3rd Respondent in respect of the 1st preliminary objection cannot stand and hence should be quashed by a writ of Certiorari.

It is the submission of the learned president's counsel for the Petitioner with regard to his other preliminary objection, that the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, as amended will not apply to the 4th Respondent as in terms of the provisions of section 3(1)(b) of the Act, the employee concerned, should have been in employment for a period of 180 days in a Continuous period of 12 months. As the 4th Respondent had only been in employment for approximately 09 months, his submission is that the 3rd Respondent has no jurisdiction to hear and determine the aforesaid application made by the 4th Respondent.

Section (3) of the Act is as follows:

- 1) The provisions of this Act, other than this section, shall not apply-
 - (a) to an employer by whom less than fifteen workmen on an average have been employed during the period of six months

preceding the month in which the employer seeks to terminate the employment of a workman; or

(b) to the termination of employment of any workman who has been employed by an employer a period of less than one hundred and eighty 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 his employment;
- iii. every day of absence due to anthrax or any occupational disease specified in Schedule III of the Workman's Compensation Ordinance;
- 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 thirty 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,

in the continuous period of twelve months commencing from the date of employment if such termination takes place within that period of twelve months; or"

The requirements set out in section 3(1)(b), which must exist for the Act not to apply, could be listed as follows,

- i. the workman should have been employed for a period less than 180 days, inclusive of the days described in limbs (i) - (vi) in that section.
- ii. the above 180 days must be within a continuous period of 12 months commencing from the date of employment.
- iii. termination should have taken place within that period of twelve months which is described in No. (ii) above.

It is clear, from the way section 3(1)(b) is worded, that all of the above 3 requirements must exist for the Act not to apply.

Purpose of section 3 (1) of the Act is to clearly specify a minimum period that an employee should have worked under an employer within a period

of twelve months. The phrase that "if such termination takes place within that period of twelve months " in section 3 (1)(b) shows that a termination could take place "within" "that period of twelve months." This means that it is not open to interpret this section to require that an employee should have worked for a continuous period of twelve months to be eligible for the protection under this Act.

Indeed the 4th Respondent would have worked for more than one year if not for abrupt termination of his service by his employer. Thus it would not be logical to say that the 4th Respondent would have protection under the provisions of this Act only after he completes one year of service. If such an interpretation is possible then "a period of less than 180 days" in section 3 (b) would become redundant. In these Circumstances the second argument of the learned President's Counsel should also fail.

In view of the above, it is clear that the provisions of the Act would apply to this incident of termination of service as the 4th Respondent has a service of more than 180 days in the continuous period of twelve months defined in section 3(1)(b) of the Act. In these circumstances, this court is unable to agree with the submission made by the learned President's Counsel who appeared for the Petitioner that the decision made by the

inquiring officer on the 2nd preliminary objection should be quashed by a writ of Certiorari.

The inquiry before the Commissioner of Labour is yet to proceed. All the relevant questions could be considered in detail at the said inquiry if such a need arises.

In these circumstances, we see no basis as to why the decisions made by the 3rd Respondent contained in the documents marked **P 13** and **P 15** should be quashed by a Writ of Certiorari. Therefore we decide to dismiss this application. No cost is ordered.

Application is dismissed.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL