BLANKA DIAMONDS (PVT) LTD.
V.
COEME

COURT OF APPEAL.
H. W. SENANAYAKE, J.
C. A. No. 202/94.
29 SEPTEMBER, 11 DECEMBER, 1995.
AND 8 JANUARY 1996.

Certiorari - Vacation and abandonment of post - Termination of Employment of Workmen (Special Provisions) Act, ss. 2(1), 6 - Commissioner of Labour's nomination of inquirer - Necessity to give reasons - Order under section 6 of the - Termination of Employment of Workmen (Special Provisions), Act - Jurisdiction to hold inquiry in the absence of termination - Requirement of affording party to present his case - Natural Justice - Fair hearing.

Held:

(1) Other than in exceptional cases, reasons must be given. As reasons were in fact given though late there was no lapse here.

(2) Although under section 6 of the Termination of Employment of Workmen (Special Provisions), Act the order that the Commissioner could make is an order to re-employ the workmen, in view of the words of the section being 'may order' and not 'shall order' the Commissioner is vested with a discretionary power. As the employee was an ex-patriate and his visa was for a specific period the circumstances justify the Commissioner in his discretion ordering compensation rather than re-employment. Hence the order is not *ultra vires*.

(3) In arranging for a replacement for the employee the employer had constructively terminated the services of the employee. Hence the Commissioner was within his rights in appointing an officer to hold an inquiry and the officer so appointed had jurisdiction to hold the inquiry.

(4) The facts do not support the plea that the petitioner was not given an opportunity to present his case. A witness had been cross-examined on his behalf on the facts and an opportunity to tender a counter affidavit was also given though not availed of. There was a fair hearing given to the petitioner.

Case referred to:

1. *Reg. v Home Secretary Ex parte Doody H/L, 1993 3W.L.R. p.169.*

APPLICATION for a Writ of Certiorari to quash orders of the Senior Assistant Commissioner and Commissioner of Labour.

Faiz Mustapha P.C. with *Gomin Dayasiri* and *Sanjeewa Jayawardena* for Petitioner.

V. C. Mothilal Nehru P.C. with S. Mahenthiran and Mrs. Joseph for 1st Respondent.

Adrian Pereira S.C. for 2nd and 3rd Respondents.

Cur. adv. vult.

March 22, 1996.
H. W. SENANAYAKE, J.

The Petitioner filed this application invoking the jurisdiction of this Court to issue a Mandate in the nature of a Writ of Certiorari to quash the orders contained in 'P-23' and 'P-33' made by the 2nd and/or 3rd Respondents.

The relevant facts briefly were, the Petitioner was a duly incorporated Company under Law relating to Companies in Sri Lanka. It was an Associate Company fully owned by Vanden Eynde and Zonen (Sons) Ltd., situated in Antwerp in Belgium. The 1st Respondent in response to an advertisement appearing in the News Paper in Belgium was selected and given an assignment in Sri Lanka where he was appointed as the Managing Director of the Petitioner Company and the 1st Respondent accepted the appointment on or about February, 1991. The Petitioner averred that the 1st Respondent abruptly vacated and or abandoned his post of the Petitioner Company on or about 2nd June, 1992. The 1st Respondent made an application to the 3rd Respondent in terms of the Termination of Employment of Workmen (Special Provisions) Act (hereinafter referred to as T.E. Act). The 3rd Respondent nominated M. R. Kannangara, Assistant Commissioner of Labour to inquire into this application; due to certain objections taken by the Petitioner to the hearing of the inquiry by Mr. M. R. Kannangara, the 3rd Respondent appointed the 2nd Respondent to hear the inquiry.

At the commencement of the inquiry on 10th November, 1992 the Counsel for the Petitioner raised a preliminary objection that the 3rd Respondent did not have jurisdiction to hear and determine the complaint of the 1st Respondent on the grounds-

(a) the Petitioner did not terminate the services of the 1st Respondent as he vacated and or abandoned his post.

(b) the Petitioner is not the employer,

(c) the 1st Respondent is not a workman within the schedule of the T.E. Act.

The 2nd Respondent had indicated that evidence should be led before a determination is made on the objections. The 1st Respondent tendered an affidavit and at a subsequent stage tendered the correct translation acceptable to both parties marked 'P-12' and 'P-13'. In addition to the affidavit also the said evidence of the 1st Respondent and the Counsel for the Petitioner had confined his cross-examination to the question of jurisdiction in view of the order made by the 2nd Respondent. After the 1st Respondent's evidence was concluded the Petitioner called a witness and also tendered the affidavit marked 'P-14'. Thereafter, the 1st Respondent and the Petitioner tendered written submissions and the 2nd Respondent by order 'P-23' dismissed the objections raised by the Petitioner and held that the 1st Respondent's services had been terminated by the Petitioner contrary to the provisions of section 2(1) of theT.E. Act. The Petitioner had requested to file objections to the order made by the 2nd Respondent. The 2nd Respondent made order that objections be filed with regard to the salary and other benefits claimed by the 1st Respondent in the document marked 'A-X'.The Petitioner's objections were –

(a) the undated order was bad in law,

(b) the scope of the inquiry on which the said order was based was restricted to the preliminary objections raised,

(c) the Petitioner was denied the opportunity to cross-examine the 1st Respondent on his affidavit including the averments in paragraphs 7 and 12 including the document 'a-x' marked 'P-23',

(d) the 2nd Respondent has failed to consider that the Petitioner has reserved his rights to cross-examine on matters in the affidavit of the 1st Respondent and that the Petitioner has been denied the right to lead the evidence from Vanden Eyned and Zonen Ltd., by reason of the order of the 2nd Respondent in respect of the scope of the inquiry,

(e) there has been denial of natural justice. The 3rd Respondent by document 'P-30' made order in terms of section 6 of the T.E. Act to deposit a sum of Rs. 7,349,580.50 cts. on or before 15.02.1994.

The Petitioner further averred, as the scope of the inquiry was restricted to the determination of the preliminary issue, the Petitioner was denied the opportunity to lead the evidence or cross-examine the 1st Respondent on aspects which was the subject matter and also matters relating to section 2 and 6 of the T.E Act. They further averred that the 2nd and 3rd Respondents made order in 'P-30' based on the affidavit of the 1st Respondent without giving the Petitioner an opportunity of presenting evidence or cross-examining the 1st Respondent on his affidavit. They further averred that the 2nd and 3rd Respondents had failed to give reasons when so requested.

The learned Counsel for the Petitioners first submission was that no reasons had been adduced by the 3rd Respondent for the order 'P-30'. In going through the record I find that the 2nd and 3rd Respondents had not filed a statement of objections. He relied on the submissions as no reasons were given for the order in 'P-30'. The said order was in breach of principles of natural justice. During the course of submissions the State Counsel indicated to Court that the reasons were available in his file and the Court directed to file a copy of the reasons and give a copy to the Petitioner's Counsel and the 1st Respondent's Counsel. Therefore, even at the late stage the reasons were made available. Therefore one cannot hold that 'P-30' was made without any reasons. This court has taken the view, that the duty to give reasons is yet another aspect of the requirements of procedural fairness. The beneficial effect of a duty to give reasons are numerous. To have to provide the explanation of the basis for their decisions is a salutary discipline for those who have to decide anything that adversely affect others. The giving of reasons is regarded as one other principle of good administration. The giving of reasons may protect the body

from unjustified challenges because those adversely affected are more likely to accept decisions if the reasons are available. In addition fundamental fairness and respect for the individual often requires that those in authority over others should give reasons. As Lord Mustiff observed in the case of *Reg. v. Home Secretary exparte Doody H/L.* [1] "I find in the more recent cases on judicial review a perceptible trend towards the insistence on greater openness or if one prefers the contemporary jargon 'Transparency' in the making of administrative decisions. This tendency has been an increasing recognition both in the requirement of statute and the decisions of the Court".

In a land mark decision of the Court of Appeal in *R. v. Civil Service Appeal Board exparte Cunninghan*[2] held that the Civil Service Appeal Board a judicialised' tribunal established under the Royal prerogative was under a duty to give reasons for its decisions, sufficient to show what it has directed its mind and to indicate whether its decisions are lawful and a failure to do so is a breach of natural justice".

This Court has taken the view that there are exceptional cases and situations where reasons need not be given especially when the security of the State is involved. However, I am of the view, the concept of natural justice should not be viewed in a narrow perception, the form of the determination is part of the procedure of the hearing and is no less subject to the requirements of natural justice than any other part.

But however in this instant even at a late stage reasons had been adduced though there was no opportunity available for the Petitioner to satisfy that the determination on 'P-30' was based on the reasons which was filed in Court at a subsequent stage on direction of Court. However, there was a duty on the part of the 2nd and the 3rd Respondents to file a statement of objections attaching a copy of the reasons tendered to Court. This was a very serious lapse on the part of the 2nd and 3rd Respondents, in my view it is a short fall not expected from the Head of the Department. As reasons were tendered even at the late stage I am of the view, the submission of the learned Counsel for the Petitioner has no force.

The second submissions of the learned Counsel was that the order

'P-30' made under section 6 of the T.E. Act was *ultra vires*. His submission was that the 3rd Respondent had acted without jurisdicton when he ordered compensation in terms of section 6 of the T.E. Act. His submission was that the only order that the Commissioner could have made under section 6 to order the Petitioner to employ the workmen with effect from a date specified in such order in the same capacity in which the workman was employed prior to such termination . . . and it shall be the duty of the employer to comply with such order. And the order in 'P-30' was an order for payment of compensation which is *ultra vires* and was of no avail or effect in law.

I am unable to accept the submissions of the learned Counsel for the Petitioner. The Commissioner in terms of section 6 of the T.E. Act has a discretion in view of the word used in section 6. The words used are 'may order' and not 'shall order'. The Legislature in its wisdom had given the Commissioner a discretionary power as each case has to depend on various factors and circumstances. The word 'may order' was considered in an unreported case the *Ceylon Mercantile Union v. Messrs Vinitha Limited and the Commissioner of Labour*,[3] decided on 29th March, 1976 Tennakoon, C.J. observed "the words in the section are 'may order' and not 'shall order' the legislature obviously did not contemplate that in every case of Termination of Employment without the permission of the Commissioner of Labour, it would be mandatory on the Commissioner to order reinstatement or continuance of employment upon a complaint being made to him under section 6 "I am bound by the interpretation given by a Bench of three Judges of the Supreme Court. In the instant case the 1st Respondent was an ex-patriate and his visa was granted for a specific period. Therefore, it is my view the circumstances and facts of each case have to be considered on its own merits and the Commissioner in those circumstances considering section 6 exercised his discretion without making an order for continuance of service. Therefore I am of the view that the submissions of the learned Counsel for the Petitioner giving a restrictive interpretation to section 6 of the T.E. Act has no merit.

The third submission of the learned Counsel for the Petitioner was that the 2nd and the 3rd Respondents had no jurisdiction to inquire into this matter as there was no termination of the services of the 1st Respondent as contemplated in terms of the provisions of section '2(1)'

of the T.E. Act. The document 'A-2' establishes that the 1st Respondent was employed as a Managing Director of Blanka Diamonds Pvt. Ltd., and 'A-3' establishes that he was in receipt of a salary of 3000 U.S. dollars per month. The document 'A-6' dated 20th May 1992 written by the 1st Respondent to Mr. Vanden Eyn de informing him that he was shocked that a new Managing Director had arrived on 21.03.92 to replace him at Blanka Diamond Ltd. and document 'A-9' the reply of P. Vanden Eyn de clearly shows that he wanted the 1st Respondent to teach the incoming person Mr. Wilfried who was to take the place of the 1st Respondent's position as the Managing Director and teach the knowledge of production and administration. This document clearly established that the intention of the Petitioner was to replace the 1st Respondent by a New Managing Director. The Petitioner did not obtain the written authority of the Commissioner to take the steps or the prior consent in writing of the 1st Respondent. The Petitioner's action was a constructive termination of the services of the 1st Respondent. Therefore, I am of the view that the Commissioner had jurisdiction to inquire into the complaint made by the 1st Respondent.

The Petitioner had not tendered all the documents that were filed by the 1st Respondent before theTribunal.They had filed only part of the documents. I am unable to accept the contention of the learned Counsel that the Commissioner did not have jurisdiction to hear the complaint of the 1st Respondent. The contention of the learned Counsel was that since the 1st Respondent has vacated and had abandoned his work place the Commissioner had no jurisdiction under the T.E. Act to a hold an inquiry for the reason that the workman had tendered his resignation to vacate or abandon his post. But the documents tendered clearly indicate that the Petitioner's action amounted to constructive termination of the services of the 1st Respondent.

The fourth submission of the learned Counsel for the Petitioner was that he was not given an opportunity to present his case. I am unable to accept his submission; in fact the Petitioner had called Wilfried de Van Els was examined and cross examined by the Petitioner's Counsel and the 1st Respondent's Counsel and the 1st Respondent was examined and cross-examined at great length; he was cross-examined regarding his salary and other allowances and regarding the various perks that he was entitled to. Therefore, I am unable to accept the

position that the Petitioner was not given an opportunity to present his case. The Petitioner's Counsel attempted to show that the inquiry was limited to the question of jurisdiction. In view of the 2nd Respondent's order dated 03.12.92 if that was so there was no necessity to cross-examine the 1st Respondent regarding his salary and other emoluments and perks that he received from the Petitioner. Furthermore, the Petitioner was given an opportunity to counter the specific paragraphs of the affidavit tendered by the 1st Respondent regarding his salary and other emoluments. The Petitioner had the opportunity to tender a counter affidavit but he had failed to do so. Therefore I am of the view, there was no breach of principles of natural justice as the Petitioner was heard and was given every opportunity to present his case. The inquiry had proceeded for a number of dates. Therefore, I am of the view, there was a fair hearing given to the Petitioner. In view of the above reasons, I am unable to accept his submissions that there was a violation of principles of natural justice.

I do not see any merit in this application. In the circumstances, I dismiss the application with costs fixed Rs. 20,000/- to be paid to the 1st Respondent.

Application dismissed.