

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application for Leave to Appeal to the Supreme Court from an Order of the Provincial High Court under and in terms of section 31DD of the Industrial Disputes Act (as Amended) .

Peoples' Bank, Head Office,
12th Floor,
Sri Chittampalam A. Gardiner Mawatha,
Colombo 02.

Respondent – Appellant- Petitioner

SC Appeal No. 33/2012
SC (HC) LA 93/2011
UVA/HCCA/BD/52/2009
LT No. 05/18458/02

Vs.

H.L. Ariyapala
No. 85/2, Bandarawela Road,
Badulla.

Applicant-Respondent-Respondent

Before : Priyasath Dep, PC. J
Sarath de Abrew, J &
Priyantha Jayawardana, PC J

Counsel : Ms. Manoli Jinadasa with Tharanga Ambepitiya
for Respondent-Appellant-Petitioner

Geoffery Alagaratnam, PC with Subashini
Samaraarachchi for Applicant-Respondent-
Respondent.

Argued on : 05.06.2014

Decided on : 10.12.2014

Priyasath Dep, PC, J

The People's Bank, the Respondent -Appellant-Appellant (hereinafter referred to as the 'Appellant Bank') filed a leave to appeal application and obtained leave against the judgment dated 27th July 2011 of the Provincial High Court of Uva held in Badulla in Case No. HCA/LT 52/2009.

The Applicant-Respondent-Respondent (hereinafter referred to as the 'Applicant') was a Branch Manager of Passara Branch of the Appellant Bank. The Applicant was interdicted on 23-11- 2000 and a domestic inquiry was held against him and was found guilty of all charges and his services were terminated with effect from on 23.-11-2002.

The Applicant filed an application in the Labour Tribunal of Badulla in Case No. LT/ 05/18458 /02 alleging that his services were unlawfully terminated by the Appellant Bank and claimed reinstatement with back wages ,compensation and statutory benefits. The Learned President of the Labour Tribunal held that the Applicant was guilty of count 2 of the charge sheet but held that the termination was unlawful and unjustified. The Learned President did not order reinstatement due to the fact that the Applicant had already passed the retirement age. At the time of termination of the Applicant's employment he had only 9 ½ months to reach his retirement age and the Labour Tribunal ordered the Appellant Bank to pay 9 ½ months salary amounting to Rs. 2,57, 475/- as compensation without any prejudice to his statutory benefits.

The Applicant appealed against the finding of the Labour Tribunal which held that the Applicant was guilty of Count 2 of the charges framed against him and also claiming pension rights which was not granted by the Labour Tribunal. The Appellant Bank also appealed against the findings of the Labour Tribunal that the Applicant was not guilty on acts of misconduct alleged in Counts 1,3 and 4 of the charge sheet and the finding of the Labour Tribunal that the termination of the employment is unlawful and unjustified.

The High Court consolidated both appeals and after hearing the submissions of both parties and considering the written submission filed by the parties held that the Applicant was not guilty of all counts and made order to pay back wages up to the date of retirement and also held that the Applicant is entitled to pension rights in addition to other statutory benefits. The

Appellant Bank appealed against this order to the Supreme Court and obtained leave. The Court granted leave on following questions of law.

1. Did the Provincial High Court err in law in granting relief by way of pension, which has not been prayed for in the Application to the Labour Tribunal and which is not supported by sufficient evidence ?
2. Did the Provincial High Court and the Labour Tribunal err in law in the evaluation of evidence with respect of charges 2 and 3 ?

This appeal was argued on 05-06-2014 and order was reserved and both parties were given time to file written submissions in addition to written submissions already filed. Accordingly both parties filed written submissions.

Second Question of Law

I will first deal with the second question of law as to whether the High Court and the Labour Tribunal erred in law in evaluating evidence pertaining to charges 2 and 3.

It is the position of the Appellant Bank that there was sufficient evidence to find the Applicant guilty of misconduct and those acts of misconduct are considered to be serious or grave acts of misconduct that justified the termination of his employment.

The question that arises is whether Appellate Court in reviewing the orders of the Labour Tribunal could disturb the facts and substitute its findings. This matter was considered by Sharvananda J. (as he then was) in the *Caledonian (Ceylon) Tea and Rubber Estates Ltd. vs. J.S. Hilman* (1977) 79(1) NLR 421. It was held

“ that in as much as an appeal lies from an order of a Labour Tribunal only on a question of law an Appellant who seeks to have a determination of facts by the Tribunal set aside, must satisfy the Appellate Court that there was no legal evidence to support the conclusion of facts reached by the Tribunal, or that the finding is not rationally possible and is perverse even with regard to the evidence on record”.

This judgment was followed in *Jayasuriya vs Sri Lanka State Plantation Corporation* (1995) Sri.L.R 379 and several other cases.

Therefore it is necessary to consider the charges and the evidence led to establish the charges to ascertain whether the conclusions of the Labour Tribunal was based on legal evidence.

The following charges were framed against the Applicant.

1. The Applicant contrary to the bank circular No 533/99 without prior approval or covering approval of the regional manager granted temporary over draft facilities to 24 customers amounting to Rs. 9, 729,831/86 and thereby placed the Bank funds at a great risk.
2. The Applicant contrary to bank circular No 541/99 granted temporary overdrafts to 4 customers whose accounts are not satisfactory maintained and thereby risking Bank funds amounting to Rs. 1, 363,029/55.
3. The Applicant contrary to the Bank circulars No 388/84 and 541/99 in 11 instances had granted sum of Rs. 2,530,691.91 as loans without adequate security to settle temporary over drafts and thereby placing Bank funds at a great risk.
4. The Applicant contrary to the above circulars by giving over draft facilities failed to safe guard bank funds which resulted in overdrafts to extend of Rs 9,729,831/86 rendering overdue and not recoverable and thereby causing losses to the Bank and making the Bank Branch unprofitable .
5. By committing the acts mentioned in Counts 1 - 4 the Applicant placed the bank funds amounts to Rs. 12, 260,523.77 at a risk.

In order to justify termination the Appellant Bank relied on the evidence of A.N.S.Amaraweera, Senior Manager, Audit Inspection Department. This witness inspected and conducted an audit of the accounts of the Passara Branch of People's Bank, where the Applicant was the manager during the relevant period. He submitted the audit report to the Bank and the Bank framed charges against the Applicant based on the audit report.

Thereafter a domestic inquiry was held and the applicant was found guilty of all charges and his services were terminated.

The witness Amaraweera filed an affidavit and produced the audit report marked R1. The relevant documents were annexed to the audit report. This witness was cross examined at length by the learned Counsel for the Applicant. He admitted that in respect of over draft facilities given by the Applicant referred to in charge 1, though the Applicant did not obtain the prior approval of the Regional Manager he had obtained covering approval by submitting a prescribed form No.593. The Regional Manager had given the covering approval. He has not made adverse remarks nor given warnings to the Applicant. Both the learned President of the Labour Tribunal and Learned High Court Judge held that this charge was not proved.

The witness Amaraweera gave evidence in relation to the 2nd charge and stated that the Applicant had given over draft facilities to 4 customers referred to in the schedule whose accounts are not satisfactorily maintained. These accounts are also referred to in charge 1. The unsatisfactory Accounts referred to in the charge sheet are accounts within the preceding six months had debit balances or cheques issued by the account holder were returned. This witness gave evidence to the effect that there were four accounts where the applicant had granted over draft facilities in spite of the fact that the accounts were not satisfactorily maintained.

The charge No.2 mentioned above refers to 4 accounts under account numbers 2672, 2588, 2601 and 2590. In account No. 2672 during the relevant period had two dishonored cheques and during the period the account was in operation 12 cheques were dishonored. In account No. 2588 there were 32 cheques dishonoured during the preceding six months and in the entire period 55 cheques were dishonoured. In account No. 2601 there were 13 cheques dishonoured during the relevant period and 21 cheques during the entire period. In account No. 2590, 2 cheques were dishonoured during the relevant period and 16 cheques were dishonoured during the entire period.

The learned President of the Labour Tribunal held that even if overdraft facilities were granted to such accounts with or without approval there is a violation of bank circulars. In respect of count 2 the learned President of the Labour Tribunal held that the Applicant had violated the circulars

when overdraft facilities were given to the Account holders whose accounts were not satisfactorily maintained

The Learned President held that the Applicant is guilty of charge 2. However, the learned High Court Judge found the accused not guilty of charge 2 on the basis that the Regional Manager and Deputy/Assistant Regional Manager has given covering approval for granting of over draft facilities to the accounts which were not satisfactorily maintained. He observed that there was lack of supervision and control on the part of higher authorities. There was a dereliction of duties by the regional manager and the bank management had failed to take appropriate action against them.

I disagree with the findings of the learned High Court Judge. I agree with the findings of the Labour Tribunal that the Applicant is guilty of charge 2. The fact that the regional manager granted covering approval will not absolve the Applicant as the accounts referred to in the charge were not satisfactorily maintained.

In charge 3 it was alleged that the Applicant had given loan facilities without sufficient security to over drawn accounts which were used by some account holders to settle overdrafts taken by the them. However it was revealed that the approval was granted by the Loan Committee of the Passara Branch. Therefore, it was held that Applicant alone is not responsible for granting of such loans. Further the main witness admitted that there is no bar/prohibition in the circulars to grant loans to customers to settle over drafts. The learned President of the Labour Tribunal as well as the Learned High Court Judge found the Applicant not guilty of this charge.

The learned President of the Labour Tribunal having come to the conclusion that the Appellant Bank had proved charge 2 against the Applicant proceeded to consider what is the appropriate punishment that could be imposed on the Applicant. According to the circulars, if the Bank Manager exceeded the limit and grants over draft facilities which he should not have granted in terms of the circular , following punishment could be meted out to such a violator.

a) He could be transferred out from the branch as a disciplinary action .

- b) His financial limit regarding overdraft facilities to be reduced and permitted to remain in the branch until 50% of such over drafts are recovered.
- c) His financial limit to be reduced until he recovers 75% of the overdraft facilities.

The Learned President of the labour Tribunal held that the termination of employment is a severe form of punishment and in the circumstances of this case the termination of the services of the Applicant was unreasonable and unjust. When arriving at this conclusion he considered the cases of similar nature where Bank Managers who had given overdraft facilities in similar circumstances were allowed to retire with back wages and also given retirement benefits. Witness Jayaratne, former Bank Manager who was summoned by the Applicant gave evidence to the effect that he was interdicted for granting overdraft facilities in excess of his limit and was allowed to retire with back wages.

The learned President of the Labour Tribunal held that termination was unlawful and unjustified but did not order reinstatement as the Applicant had already passed his retirement age and ordered the bank to pay compensations computed on the basis of his salary from the date of termination up to the date of retirement. This order is without prejudice to the statutory rights of the Applicant. I agree with the findings of the Labour Tribunal that the termination of employment of the Applicant is unlawful and unjustified. The finding is based on legal evidence and on proper evaluation of evidence placed before the Labour Tribunal.

First Question of Law

I will now deal with the first question of law regarding the legality of the order of the Provincial High Court in granting relief by way of pension which has not been prayed for in the application and not supported by evidence. The learned Counsel for the Appellant Bank strenuously argued that as the Applicant did not pray for pension rights, the tribunal has no power to grant pension rights. The learned counsel for the Applicant submitted that in the course of the inquiry at page 19, the Applicant pleaded for pension rights and in his evidence at page 284, he testified to the effect that he had opted to join the pension scheme and he produced his letter of appointment marked X1 to show that that he is entitled to

pension rights according to the contract of employment. In the course of the inquiry, the Applicant as a settlement suggested that he will forego reinstatement and back wages if he is given his Pension. Appellant Bank was not amenable to a settlement.

The learned Counsel for the Appellant Bank relied on the case of *People's Bank Vs. Gilbert Weerasinghe* 2008 BLR pages 133- 135. In that case it was held that

‘in terms of 31C, the Labour Tribunal has jurisdiction to inquire into only in respect of the matters stated in that application. The Labour Tribunal under the said Act does not have the jurisdiction to determine the matters that have not been pleaded and sought in the Application’.

It is appropriate at this stage to draw a distinction between a plaint in a civil case and an application in the Labour Tribunal. Civil cases are regulated by the Civil Procedure Code and has provisions regarding contents/requisites of plaint, answer and replication and provisions to amend pleadings. It is settled law that in civil cases the court could not grant relief not prayed for. In case of Labour Tribunals there is no procedure prescribed and the Tribunal has the power to adopt a suitable procedure. Therefore Labour Tribunal is not fettered by stringent and a rigid procedure as in a civil cases. The learned President's Counsel for the Applicant in support of his position cited the case of *Associated News Papers Ceylon Ltd vs National Employees Union* 71NLR 69. It was held that:

‘that the statements filed by the parties in applications before a Labour Tribunal are not pleadings in a civil action and it is the duty of the President to consider all the facts relative to the dispute placed in evidence before him at the inquiry even though those facts may not be expressly referred to in the statements’

In the circumstances the question that will arise is as to whether it is permissible for the Applicant to pray for a relief in the course of the inquiry(not specifically pleaded in the application) which is relevant to the scope of the application and falling within the just an equitable jurisdiction of the Tribunal. I am of the view that there is no such impediment .

The learned counsel for the Applicant distinguished between the facts of this case and the facts in *Peoples Bank vs Gilbert Weerasinghe* (supra). In that case the learned President of the Labour Tribunal while justifying termination ordered the People's Bank to pay the pension. In other words the Labour Tribunal awarded pension rights to a dismissed employee who was at the time of dismissal was 48 years of age which is contrary to the criteria in the Pension Scheme. The criteria for granting pension was discussed in that case. According to the People's Bank's Pension Scheme, pension is granted to an employee who is in service at the age of 55 years. Pension will not be granted to an employee who is under the age of 55 years except on recommendation of a Medical Board approved by the General Manager. Employees who leave the Bank before reaching the age of 55 and those who are dismissed from service are not entitled to pension under the pension rules.

In the case before us, the Applicant was not dismissed from the Bank. The Labour Tribunal and the High Court both held that the termination is unlawful and unjustified. He was not reinstated for the reason that he had passed the retirement age. The effect of the orders are that he had retired upon reaching the age of 55 years.

The main issue is whether the order of the High Court granting pension is contrary to law. The Applicant prayed for reinstatement with back wages. If reinstatement is prayed for and granted by the Tribunal does it include retirement benefits.? It is necessary to consider the definition of reinstatement. In *L.B. Curzon – Dictionary of Law 6th Edition Page 360*, reinstatement was defined as

“Restoring of an employee to the position he occupied prior to the dismissal. An order for reinstatement, stating that employer shall treat the former employee in all respects as if he had not been dismissed may be made after hearing a complaint against unfair dismissal.”

In his written submissions the learned Counsel for the Applicant drew our attention to section 33 (1) (e) of the Industrial Disputes Act as amended and emphasis the fact that the Labour Tribunal has wide powers to grant pension even if it is not specifically pleaded. The Section 33 (1) reads thus;

Without prejudice to the generality of the matters that may be specified and any award under this Act or in any order of a

labour tribunal, such award or such order may contain decisions.

(a)-----

(b)-----

(c)-----

(d)-----

(e) as to the payment by any employer of a gratuity(except where a gratuity is payable under the Payment of Gratuity Act, 1983) or pension or bonus to any workman, the amount of such gratuity or pension or bonus and the method of computing such amount, and the time within which such gratuity or pension or bonus shall be paid.

In the instant case reinstatement was not ordered due to the reasons that the employee had passed the retirement age when the order was made. The dismissal was held to be unlawful and unjustified and according to the order of the Labour Tribunal his salary to be paid by way of compensation and by the High Court as back wages up to the date of retirement. He had retired upon reaching 55 years and he is entitled to the retirement benefits provided he had joined the Bank's Pension Scheme and had contributed to the scheme and he had satisfied the other criteria. I am of the view that if the Applicant has satisfied the criteria the Bank is obliged to pay the pension even without an order of the Tribunal.

I find that according to letter of appointment marked X1 employer has to contribute 10% to the Pension Fund and the employee has to contribute 5%. As he had opted to join the Pension Scheme he is not entitled to the Provident Fund. The Bank's allegation that the applicant has caused loss to the bank was not established in the inquiry. The Labour Tribunal and the Provincial High Court held that there is no evidence to establish that the Applicant acted fraudulently or misappropriated Bank's funds. This Court granted Special Leave in respect of findings regarding charges 2 and 3 and according to the findings financial loss was not established.

I agree with the findings of both the Labour Tribunal and the Provincial High Court that the termination is unlawful and unjustified. In the circumstances back wages should be paid up to the date of retirement as ordered by the Provincial High Court as opposed to compensation ordered by the Labour Tribunal.

The next question is whether the Applicant is entitled to pension rights. In the course of the inquiry the Applicant had prayed for pension rights and produced his letter of appointment. However the Applicant had failed to produce the rules of the Pension Scheme to enable the Labour Tribunal to decide whether he has satisfied the requirements or criteria pertaining to the granting of pension rights. The Applicant has failed to establish to the satisfaction of the Tribunal that he is entitled to pension rights. In view of that fact the order of the Provincial High Court to the effect that the Applicant is entitled to pension rights is wrong in the absence of proof and for that reason I amend that part of the order of the Provincial High Court to read thus 'the Applicant is entitled to pension rights if he had satisfied the requirements/criteria laid down in the Pension Scheme'.

The Appellant Bank should consider the Applicant as a person who had retired from service upon reaching the age of retirement and there were no findings against him for cheating or misappropriating Bank's funds. If the Applicant satisfy the requirements/ criteria he is entitled to his pension and the Bank is legally and morally obliged to pay the Pension.

Subject to the above variation Appeal dismissed.

No Costs.

Judge of the Supreme Court

Sarath de Abrew, J.

I agree.

Judge of the Supreme Court

Priyantha Jayawardena, P.C. J.

I agree.

Judge of the Supreme Court

