In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

The matter of an application under and in terms of Section 31DD (1) of the Industrial Disputes Act as amended by Act No. 32 of 1990.

W.A.A.M. Dharmasena,
Aluketiya,
Hongamuwa,
Ratnapura.

Workman

Vs.

SC. Appeal No. 142/10

Supreme Court Leave to Appeal No. 254/2009

HCCA No: SP/HCCA/RAT/LT/RA/01/2008

Labour Tribunal Ratnapura No: R/6198/05

1. Superintendent,
   Kekunagoda Estate,
   Elapatha,
   Ratnapura.

2. Lal Wasantha Abeywickrama,
   Alevihala,
   No. 252, Main Street,
   Ratnapura.

Respondents

AND

Lal Wasantha Abeywickrama,
Alevihala,
No. 252, Main Street,
Ratnapura.

2nd Respondent- Petitioner

Vs.

W.A.A.M. Dharmasena,
Hapugastanna Plantation Ltd.,
Alukeliya,
Hongamuwa,

Workman-Respondent

And Now Between

Lal Wasantha Abeywickrama,
No. 132/15, Moragahalandha Mawatha,
Pannipitiya.

2nd Respondent-Petitioner-Appellant

Vs.

W.A.A.M. Dharmasena,
Hapugastanna Plantation Ltd.
Alukeliya,
Hongamuwa.

Workman-Respondent-Respondent

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

Counsel : Saliya Pieris with Anjana Rathnasiri for 2nd Respondent-Petitioner-Appellant.

Workman- Respondent- Respondent absent and unrepresented.

Argued on : 5th June, 2014

Decided on : 13th August, 2015

Priyantha Jayawardena, PC. J,

This is an appeal filed to have the Judgment of the learned High Court Judge of Ratnapura dated 30.09.2009 set aside. The High Court affirmed the order of the learned President of the Labour Tribunal of Ratnapura overruling an objection raised during an inquiry to dismiss an application filed by the Workman in the said Tribunal. The main issue to be decided in this application is the validity of the order made by the Labour Tribunal in respect of the maintainability of the application filed before the Labour Tribunal of Ratnapura which was affirmed by the High Court of Ratnapura. The facts of the instant appeal are set out below.

The Applicant-Workman-Respondent (hereinafter referred to as the Workman) made an application to the Labour Tribunal of Ratnapura against the 1st and 2nd Respondents and in his application he stated inter-alia that he was an employee of the Kekunagoda Construction (Pvt.) Ltd since 1990 and that thereafter he served as a field officer in the Kekunagoda Estate belonging to the aforementioned company and his services were unjustifiably terminated.

The Respondents in the said application filed a common answer and in their answer denied the position taken up by the Workman and stated that there is no company named Kekunagoda Construction (Pvt.) Ltd. and that the Workman had entered into a contract with one Ms. K.C. Abeywickrama who is the owner of the Kekunagaoda Estate "C" division to work as an assistant field officer and the said contract was for a period of 4 years and that it had come to an end.

Thereafter, the Workman filing his replication stated that he was in service in the work sites of the said company and denied the fact that he had entered into a contract with one Ms. K. C. Abeywickrama.

At the inquiry before the Labour Tribunal of Ratnapura, the Workman started his case as the employment was denied by the Respondents and while the Workman was giving evidence, the Counsel for the 2nd Respondent raised the following objections and moved that the application of the Workman should be dismissed;

(i) the employer of the Workman is not the 2nd Respondent, and

(ii) Kekunagoda Construction and Development Company (Pvt) Ltd. is not a party to this action.

Thereafter, parties had filed written submissions and the Respondents had annexed documents to the written submission in support of their objections though they were not produced in evidence of the case.

The Respondent in his written submission filed before the Labour Tribunal has stated that the 2nd Respondent namely Lal Wasantha Abeywickrama is not the employer of the Workman but the sister of the 2nd Respondent namely, K.C. Abeywickrama. He has further stated facts proposed by the Workman are irrelevant to the matter.

The learned President of the Labour Tribunal overruled the said objections and delivering his order has stated that the questions had to be determined only after conducting a proper inquiry into all evidence. Further, he has stated that the definition given to the term 'employer' in the Industrial Disputes Act is very wide. Therefore, the question as to who the employer of the Workman is (whether the 2nd Respondent or someone else), has to be decided only after the conclusion of the inquiry and the learned President had overruled the said objections raised by the Respondents.

The 2nd Respondent being aggrieved by the said order of the learned President of the Labour Tribunal has filed a Revision Application in the Provincial High Court of Ratnapura and he had sought to revise the said order on the following grounds;

(i) that the learned President of the Labour Tribunal had considered only one of the two preliminary objections raised by the 2nd Respondent;

(ii) the order made by the learned President is unlawful in view of the ample evidence produced by the 2nd Respondent to show that the employer of the Workman was not the 2nd Respondent; and

(iii) the Workman in his application had stated that he was a permanent employee of a private company and therefore this case cannot be instituted and maintained unless that company is made a party to this case.

Thereafter, the Workman had filed his objections and stated inter-alia that the learned President should conduct a proper inquiry into all the evidence in order to determine the said objections. Further, he stated that the 2nd Respondent has not, with his petition, filed a copy of evidence led up to the point where the learned President was called upon to give a ruling on the objection raised based on the partly led evidence before the Tribunal. This is a flagrant violation of Rule 3(1) (b) read with Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rules 1990 which itself warrants the summary dismissal of the application in limine.

The learned High Court Judge of Ratnapura has held that the objection of the 2nd Respondent is not a pure legal question and that it is a mixed question of fact and law. Thus, the learned President of the Labour Tribunal could not have answered the question in the 2nd Respondent's favour and dismissed the application filed by the workman even before the workman's evidence was concluded. Therefore, the learned High Court Judge has dismissed the said Revision Application and has directed the Registrar to send a copy of his order to the Labour Tribunal of Ratnapura to proceed with the inquiry. Further, the learned High Court Judge held that the said Revision Application is contrary to Rule 3(1) (b) read with Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rules 1990.

The 2nd Respondent being aggrieved by the said order of the High Court Judge of Ratnapura has made a leave to appeal application to this court and court granted leave to appeal on the following questions of law;

(i) Has the learned Provincial High Court Judge of Ratnapura and the learned President of the Labour Tribunal erred in not dismissing the application of the Applicant in the Labour Tribunal since he had failed to make the Company Kekunagoda Construction and Development (Pvt.) Ltd a party to his application?

(ii) On the Workman's own application is he estopped from denying that his employer was Kekunagoda Construction and Development (Pvt.) Ltd and therefore due to the failure to make the said Company a party should his application in the Labour Tribunal be dismissed?

(iii) Did the learned High Court Judge and the learned President of the Labour Tribunal err in holding that the preliminary objections of the Petitioner could not be dealt with at the outset and that the inquiry had to proceed before the Labour Tribunal?

(iv) Did the learned Provincial High Court Judge of Ratnapura err when he determined that the failure to annex a copy of evidence led in the Labour Tribunal was contrary to the rule 3(1) (b) of the Court of Appeal rules whereas, the said evidence was not material to the determination of the objection raised by the Petitioner?

The main issue that needs to be decided in this appeal is the legality of the order made by the learned President of the Labour Tribunal overruling the said objections of the Respondent which were affirmed by the High Court. In order to decide the said question of law, it is necessary to consider the duties and powers of a Labour Tribunal.

Duties and Powers of a Labour Tribunal

The Labour Tribunals were established by an amendment brought to the Industrial Disputes Act No. 43 of 1950 by the Industrial Disputes (Amendment) Act No. 62 of 1957. Under section 31B of the Industrial Disputes Act as amended states inter-alia that a workman can make an application to a Labour Tribunal for relief or redress in respect of the termination of his services by his employer. Accordingly, the jurisdiction of a Labour Tribunal can be invoked by filing an application under this section.

Section 31C of the said Act stipulated the duties and powers of the Labour Tribunal in regard to applications under section 31B. Section 31C (1) of the Industrial Disputes Act provided as follows;

> "31C. (1) Where an application under section 31B is made to a Labour Tribunal, it shall be the duty of the Tribunal to make all such inquiries into that application as the Tribunal may consider necessary, hear such evidence *as may be tendered by the Applicant and any person affected by the application*, and thereafter make such order as may appear to the Tribunal to be just and equitable. [Emphasis added]
>
> (2) Subject to such regulations as may be made under section 39 (1) (ff) in respect of procedure, a Labour Tribunal conducting an inquiry may lay down the procedure to be observed by it in the conduct of the inquiry."

The duties and powers of a Labour Tribunal in regard to applications under section 31B were amended by Industrial Disputes (Amendment) Act No. 4 of 1962. By the said amendment the duties and powers of a Labour Tribunal were enhanced by amending section 31C (1) as follows;

> "Where an application under section 31B is made to a Labour Tribunal, it shall be the duty of the Tribunal *to make all such inquiries into that application and hear all such evidence as the Tribunal may consider necessary* and thereafter make such order as may appear to the Tribunal to be just and equitable." [Emphasis added]

Thereafter, the said section was amended by the Industrial Disputes (Amendment) Act No. 32 of 1990. By the said amendment section 31C (2) was repealed and a new section was substituted.

Later, the said section was further amended by section 5(1) of the Industrial Disputes (Hearing and Determination of Proceeding) (Special Provisions) Act No. 13 of 2003. The amendments made to section 31C (1) by the aforesaid amending Acts have not made any changes to the scope of the inquiry before a Labour Tribunal but only introduced a specified time frame for such an inquiry.

Regulations have been framed inter-alia in respect of the procedure relating to an inquiry before a Labour Tribunal. Regulation 30 states that a Labour Tribunal may call upon the Parties as the tribunal thinks fit to state their case. Further, the said regulations deal with the representation of parties before the Labour Tribunal. This right is given by section 41 of the Judicature Act No. 2 of 1978 as amended. However, the said regulations do not provide a comprehensive procedure that needs to follow by a Labour Tribunal.

Effect of the Amendments

The amendments made to section 31C (1) shows that the legislature has conferred wider powers on the Labour Tribunals with regard to an inquiry before a Tribunal. This was confirmed in the case of *Meril J. Fernando & Co. v. Deiman Singho* (1988) 2 SLR 242, the Court of Appeal commenting on the difference between the duties and powers of a Labour Tribunal under section 31C (1) as contained in the original provisions in amendment Act No. 62 of 1957 which required the Tribunal to "hear such evidence as may be tendered" which was amended by section 6 of amendment Act No. 4 of 1962 to "hear all such evidence as the Tribunal may consider necessary", stated that the latter was indeed a very salutary provision which the Tribunal should not have lost sight of.

In the case of *Indrajith Rodrigo v. Central Engineering Consultancy Bureau* (2009) 1 SLR 248 it was held that a Labour Tribunal, in the process of redressing grievances of workmen in a just and equitable manner, cannot lose sight of procedural propriety and evidentiary legitimacy and that an unduly technical approach should not be adopted towards the equitable remedy provided by

section 31B of the Industrial Disputes Act. In this case Marsoof J. held that it is expressly laid down in section 31C (1) of the Industrial Disputes Act that every Labour Tribunal is bound 'to make all such inquiries into any application filed before it' and 'hear all such evidences as the Tribunal may consider necessary, and thereafter make such orders as may appear to the Tribunal to be just and equitable'.

In this case Marsoof J. further held that the Labour Tribunal is endowed with a wide discretion in regard to the grant of just and equitable relief to any workman invoking its beneficial jurisdiction. As Wijetunga J. observed in *Up Country Distributors (Pvt) Ltd. v. Subasinghe* (1996) 2 SLR 330 at 335, "The legislature has in its wisdom left the matter in the hands of the tribunal, presumably with the confidence that the discretion would be duly exercised. To my mind, some degree of flexibility in that regard is both desirable and necessary if a tribunal is to make a just and equitable order."

The need to make a Just and Equitable Order

In terms of section 31C (1) of the Industrial Disputes Act as amended a Labour Tribunal shall make a just and equitable order. In fact, the sole purpose of an inquiry by a Labour Tribunal is to arrive at a just and equitable order. The nature of a just and equitable order that needs to be made by a Labour Tribunal has been discussed in *Millers Ltd. v. Ceylon Mercantile Industries and General Workers Union* (1993) 1 SLR 179 at 183. In this case G.R.T.D. Bandaranayake J. observed that an award is just and equitable only if it takes into consideration the interest of all the parties.

In the case of *Indrajith Rodrigo v. Central Engineering Consultancy Bureau* (supra) it was held that the equitable nature of the jurisdiction of Labour Tribunals has consistently been recognized in the decisions of our courts. However, in the process of redressing grievances of workmen in a just and equitable manner, one cannot lose sight of procedural propriety and evidentiary legitimacy.

Further, in *Associated Cables Ltd. v. Kalutarage* (1999) 2 SLR 314 it was held that although the Labour Tribunal was required to make a just and equitable order it must not only be just and equitable but the procedure adopted to that end must be legal and every judicial body exercising judicial powers must so arrive at an order only on legal evidence.

Applicability of the Evidence Ordinance

Section 36(4) of the Industrial Disputes Act as amended by Act No. 62 of 1957 provides as follows;

> " In the conduct of proceedings under this Act, any industrial court, Labour Tribunal, arbitrator or authorized officer or the Commissioner shall not be bound by any of the provisions of the Evidence Ordinance. " [Emphasis added]

However, in *Ceylon University Clerical and Technical Association v. University of Ceylon* 72 NLR 84 it was held that although Labour Tribunals are not bound by the Evidence Ordinance it would be well for them to be conversant with the wisdom contained in it and treat it as a safe guide.

Thus, certain limitations have been imposed on the inquisitorial powers conferred on a Labour Tribunal.

Section 9 of the Industrial Disputes (Hearing and Determination of Proceeding) (Special Provisions) Act No. 13 of 2003 provides that;

> "The provisions of the Evidence Ordinance shall not apply to the conduct of proceedings before a Labour Tribunal under this Act." [Emphasis added]

This amendment is similar to section 36(4) of the Industrial Disputes Act. The provisions relating to the non-applicability of the provisions of the Evidence Ordinance shows that the legislature has conferred a wide discretion on a Labour Tribunal in determining the issues before it unrestricted by the rules of evidence. Given the fact that an inquiry before a Labour Tribunal is a mixture of an inquisitorial and adversarial systems it is useful to use the Evidence Ordinance as a guide when conducting an inquiry by a Labour Tribunal. However, a Labour Tribunal may use its discretion where and when necessary in order to arrive at a just and equitable order subject to the principles of natural justice.

The Industrial Disputes Act has introduced a more flexible procedure than the rigid procedure of law applied in the adversarial system. Section 31C (1) of the Industrial Disputes Act, the Regulations published thereunder, the provisions of the Judicature Act No. 2 of 1978 as amended and the decided cases show that section 31C (1) of the Industrial Disputes (Amendment) Act No. 62 of 1957 conferred the inquisitorial powers on the Labour Tribunal which was later widened by Act No. 4 of 1962. However, section 41 of the Judicature Act as amended, the said Regulations and the requirement to make a just and equitable order in terms of section 31C (1) of the Industrial Disputes Act as amended require a Labour Tribunal to follow certain aspects of the adversarial system too. Thus, an inquiry before a Labour Tribunal under section 31C (1) is a mixture of an inquisitorial and adversarial systems. In that context the dicta used in the following cases could be used as guidelines in conducting an inquiry before a Labour Tribunal.

In *Anura Bandaranaike v. Ranasinghe Premadasa* BALR (1983) Vol. 1 Part 1 Page 7 it was held that the court can exercise its discretion only in areas where there is no law relating to civil procedure regulating the order in which witnesses should be called. Where the question is governed only by practice the court may if the circumstances demand it depart from the practice and control the order of calling the witnesses in the exercise of its discretion.

In *Ariyadsa v. Weerasinghe and (Western) Provincial Housing Commissioner* 2005 (2) Appellate Law Recorder 19 it was held that the strict legal approach typical of a Court of Law with respect to the conduct of proceedings is unsuitable for an inquiry conducted by a tribunal or administrative officer and that tribunals should maintain a high measure of flexibility.

It was further held that the issues confronted by tribunals and administrative agencies should not be viewed so much as a *lis inter partes* – a contest between two sides. Consequently, it is sometimes, said that a tribunal, unlike a Court of Law, should adopt an inquisitorial approach and make an inquiry into the case so as to make sure that justice is done by uncovering the truth. I think that it is a well accepted fact that salient and salutary principles adhered to by ordinary Courts of Law should not be jettisoned altogether by tribunals whilst guarding against over judicialisation of procedure in the tribunal system.

In this context a Labour Tribunal shall not disregard the said features of the adversarial system whilst exercising the powers of the inquisitorial system in conducting an inquiry under section 31C (1) of the Industrial Disputes Act as amended. Labour Tribunal should not be bound by strict procedural requirements in the process of making just and equitable awards. However, an inquiry should be held in conformity with the principles of natural justice in order to arrive at a just and equitable order, not only for the employee and the employer but also for the promotion of industrial peace in general. The Tribunal has the power as mentioned above to use its discretion in the absence of specific provisions applicable to an inquiry. However, such discretion should not be unduly fettered.

These wide powers shall be used subject to the supreme duty to see that a fair inquiry should be enjoyed by the parties. A Labour Tribunal shall not use such powers under section 31C (1) to the prejudice of any party or to industrial peace in general. Although a Tribunal has very wide powers in conducting an inquiry such powers shall not be so used as to afford ground for the legitimate criticism that a party has not had the benefit of a fair inquiry before the Tribunal.

In the instant case while the Workman had been giving evidence at the inquiry before the Labour Tribunal the Counsel for the 2nd Respondent had raised two objections namely that the employer of the Workman is not the 2nd Respondent but the sister of the 2nd Respondent; and that the proposition by the Workman that the Kekunagoda Construction and Development Company (Pvt) Ltd is the employer of the Workman is irrelevant to this matter and especially the said Company is not a party to this action.

However, the learned President of the Labour Tribunal had overruled the said objections and had stated that the said objections shall be determined only after conducting a proper inquiry into all evidence.

The said order of the learned President of the Labour Tribunal on the said objections which was affirmed by the learned High Court Judge of Ratnapura is in accordance with section 31C (1) of the Industrial Disputes Act as amended as the said objections are not pure questions of law but a question of law mixed with facts. Thus, the said objections cannot be decided as preliminary objections since they are dependent on facts.

Further, the documents produced by the 2nd Respondent along with his written submission were not led in evidence. The documents that were not led in evidence cannot be considered by a Tribunal or Court unless such documents are admitted by all the parties in a case. An order of a Labour Tribunal or a judgment of a court should be based strictly on the evidence on record and not on other material. Therefore, the documents tendered along with the written submissions cannot be used to decide the objections in the instant case.

There was no evidence before the Tribunal to decide the said objection at the time the learned President was called upon to decide on it. In terms of section 31C (1) of the Industrial Disputes Act (as amended) the President of a Labour Tribunal is required to make all such inquiries into the application before him and hear all such evidence as the Tribunal may consider necessary and thereafter make such order as may appear to the Tribunal to be just and equitable. Thus, the decision of the learned President in overruling the objections is in accordance with section 31C (1) of the Industrial Disputes Act as amended.

Further, an objection which leads to a disposal of an application filed in a Labour Tribunal cannot be decided as a preliminary objection if it involves facts and law. Thus, when the facts are involved a Labour Tribunal is required to hold the inquiry under section 31C (1) in order to decide such objections.

In the circumstances, I hold that the decision to overrule the preliminary objection by the learned President which was affirmed by the High Court is in accordance with the law. Thus, I dismiss the appeal and send it back to the Labour Tribunal to continue with the inquiry and dispose the same at its earliest. Further, the Labour Tribunal is directed to consider the said objections raised by the Respondents after making all such inquiries as required by section 31C (1) of the Industrial Disputes Act.

The other questions of law set out above were not considered as the main issue was dealt in this judgment.

I order no costs.

Judge of the Supreme Court

Priyasath Dep, PC, J

I agree

Judge of the Supreme Court

Sarath de Abrew, J

I agree

Judge of the Supreme Court