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

In the matter of an Application for Special Leave to Appeal in terms of Section 31D of the Industrial Disputes Act No. 43 of 1950 as amended by Industrial Disputes (Amendment) Act No. 32 of 1990, read with Supreme Court Rules 1990

Inter Company Trade Union,
No. 259/9, Sethsiri Mawatha,
Koswatta, Thalangama.

On behalf of
Yakupitiyage Senavirathne,
Kudagama Liyanage Kapila Udayanga,
Sunil Bandara,
Heenpatilage Wimal Premarathne.

Applicants

SC Appeal 66/2018

HCALT/09/2015
LT Colombo Case No.
2/A/3546-3549/2011

Vs,

Trico Maritime (Pvt) Ltd.,
50K, Cyril C. Perera Mawatha,
Colombo 13.

Respondent

And then between

Inter Company Trade Union,
No. 259/9, Sethsiri Mawatha,
Koswatta, Thalangama.

On behalf of
Yakupitiyage Senavirathne,
Kudagama Liyanage Kapila Udayanga,
Sunil Bandara,
Heenpatilage Wimal Premarathne.

Applicant-Appellant

Vs,

Trico Maritime (Pvt) Ltd.,
50K, Cyril C. Perera Mawatha,
Colombo 13.

Respondent-Respondent

And Now between

Trico Maritime (Pvt) Ltd.,
50K, Cyril C. Perera Mawatha,
Colombo 13.

Respondent-Respondent- Appellant

Vs,

Inter Company Trade Union,
No. 259/9, Sethsiri Mawatha,
Koswatta, Thalangama.

On behalf of
Yakupitiyage Senavirathne,
Kudagama Liyanage Kapila Udayanga,
Sunil Bandara,
Heenpatilage Wimal Premarathne.

Applicant-Appellant-Respondent

Before: **Justice Vijith K. Malalgoda PC**
Justice K. K. Wickremasinghe
Justice Arjuna Obeyesekere

Counsel: Kushan De. Alwis, PC with Kaushalya Nawaratne instructed by Santhoshi S. Herath Associates for the Respondent-Respondent-Appellant

Applicant-Appellant-Respondent is absent and unrepresented

Argued on: 16.11.2021

Decided on: 30.03.2022

Vijith K. Malalgoda PC J

The Applicant - Appellant - Respondent (herein after referred to as 'The Applicant') made four applications on behalf of its four members against the Respondent – Respondent – Appellant (herein after referred to as 'The Respondent') to the Labour Tribunal of Colombo alleging that the services of its members had been illegally and unjustifiably terminated by the Respondent Company. In the said applications, the Applicant prayed that the members whom the Applicant had represented before the Labour Tribunal be reinstated with back wages by the Respondent or be granted compensation in lieu of reinstatement and any other relief that the Tribunal may seem meet.

The Respondent whilst filing the answers before the Labour Tribunal, took up the position that the termination of the services of the said employees were due to serious act of misconduct which were established after a formal domestic inquiry. The Respondent stated further, that the said termination on the part of them, was lawful and justifiable and prayed, the applications be dismissed.

All four applications were heard together and after the trial, the Labour Tribunal by its Order dated 30th January 2015 held that two of the said employees have not been proven guilty for the charges made against them, and the other two has directly participated with the incident of assault and thereby committed an act of grave misconduct. However, the Labour Tribunal concluded that the termination of the services of all four employees were just and equitable, and no one has been compensated.

Being aggrieved by the said Orders of the Labour Tribunal, the Applicant appealed to the High Court of Western Province holden in Colombo, and by the Judgment dated 5th of June 2017, the learned Judge of the High Court of Western Province holden in Colombo, allowed the appeal by setting aside the Order of the learned President of the Labour Tribunal and ordered a re-trial before the Labour Tribunal.

Being aggrieved by the said Judgment delivered by the High Court, the Respondent preferred the Petition of Appeal dated 14th July 2017 seeking Special Leave from the Supreme Court. The Supreme Court having considered the submissions made on behalf of the Respondent on 02nd October 2017, granted Special Leave on the question of law set out in sub paragraphs (a) to (f) of paragraph 14 of the said Petition, which states as follows;

(a) Whether the Honourable Judges of the High Court entitled to reverse or set aside the order of the President of the Labour Tribunal and to order a re-trial on the basis of the alleged contradictions when the oral and documentary evidence on record clearly prove and establish that the Applicants have assaulted Josheph Benedict Fernando, Public Relations Officer of the Respondent?

(b) Whether the Respondent has in law justified the basis of the termination of the contract of employment of the Applicants before the Labour Tribunal on a balance of probability or on a preponderance of evidence?

(c) Whether the Honourable Judge of the High Court has erred in law in ordering a re-trial when the Respondent has duly discharged the burden in proving and justifying the termination on balance of probability or on a preponderance of evidence?

(d) Without having any legal basis, did the learned High Court Judge err in law and in fact in holding that the President of the Labour Tribunal has failed to analyze the oral and documentary evidence placed before him?

(e) This the Learned High Court Judge err in law in failing to take into consideration the legal principle enunciated in the case of **The Caledonian (Ceylon) Tea and Rubber Estates Ltd. Vs. J. S Hillman** 79 (1) NLR 421, **Associated Battery Manufacturers (Ceylon) Ltd. Vs. United Engineers Workers Union** 77 NLR 541, **Hemas (Estates) Ltd. & Another vs. Ceylon Workers' Congress** 76 NLR 59, and thereby further err in ordering a re-trial?

(f) Whether the Honourable Judge of the High Court erred in holding that two employees out of several employees involved in an assault incident cannot be found guilty due to the lack of evidence against the other accused employees?

Subsequent to the filing of the instant Special Leave to Appeal Application before the Supreme Court, on several occasions prior and after the granting of Special Leave, notices were issued on the Applicant Union to appear before this Court but the said Union defaulted its duty to represent the employees. As observed by me the Court had issued notice on the Applicant Union on 7 occasions under Registered Post and finally taken up for hearing since the Applicant had not appear before this Court from the time the Special Leave to Appeal Application was filed.

However, this Court is mindful of this fact as well as its responsibility to pronounce a just and equitable order in this case.

Before moving on to the questions of law, on which the leave was granted, it is important to refer briefly to the factual Matrix of this case to have a better understanding of the two contradictory views taken by the Labour Tribunal and the High Court when disposing the cases heard before them.

The Applicant, Inter Company Trade Union, has filed four separate applications in the Labour Tribunal on behalf of the four employees of the Respondent Company Trico Maritime (Pvt.) Ltd, namely Yakupiti Senevirathne De Silva, Kudagama Liyanage Kapila Udayanga, Muruthagahapitiya Ralalage Sunil Bandara and Heenpatilage Wimal Premarathne alleging that the termination of their services was unreasonable and unjustifiable.

In the answers filed before the Labour Tribunal, the Respondent whilst admitting the termination, had taken up the position that the said termination was both lawful and justifiable. It was the position taken by the Respondent, that the termination of the services of the four employees was due to the assault of its Public Relations Officer namely “Josheph Benedict Fernando” at the Hotel “Brighton Rest”, where the Annual General Meeting of the Welfare Society was held. According to the Respondents, after the said incident having recorded the statements of the four employees, they were interdicted without pay with effect from 18th November 2010 and a charge sheet was served on them by registered post, calling for their written explanations. Since their explanation were found unsatisfactory and unacceptable, a domestic inquiry by an outside and independent inquiry officer was held and the said employees had been found guilty by the inquirer.

The four applications before the Labour Tribunal were consolidated with the consent of the parties and had taken up as one trial.

At the trial before the Labour Tribunal, Josheph Benedict Fernando (Public Relations Officer) and Gamage Nishantha Cooray who was an eyewitness gave evidence with regard to the alleged incident of assault. Sidath Mahendra Nagahawatte (Manager, Security Services of the Mobitel), Mrs. Roshini Dilrukshi (Human Resources Officer), Kasun Thivanka Mallawarachchi (Networking Officer), Arachchige Dinesh Priyantha Salgado (Manager, Human Resources) were also called to give evidence and the documents marked as "R1" to "R8", "X", "X1" and "Y" were produced on behalf of the Respondent.

On behalf of the Applicant, Muruthagahapitiya Ralalage Sunil Bandara and Yakupiti Senevirathne De Silva gave evidence marking the document "A1". Although the Applicants have admitted that they participated the event, the alleged assault was denied by them.

At the conclusion of the trial before the Labour Tribunal, the President, whilst concluding that there was evidence of assault on J. B. Fernando, observed further, that the said evidence was insufficient to establish the assault by two employees namely Kapila Udayanga and Wimal Premarathne who were also represented by the Applicant before the Labour Tribunal.

The President of the Labour Tribunal had observed an inconsistency between the evidence of Josheph Benedict Fernando and Nishantha Cooray with regard to the assault as follows;

> "විනිශ්චය අධිකාරියට පැහැදිලි වන්නේ ඉසව්ගත පහරදීමේ සිදුවීම සිදුකල සේවකයන් සම්බන්ධ සාක්ෂිකරුවන් දෙදෙනා අතර පැහැදිලි පරස්පරතාවයක් පවතින බවයි."

and proceeded to conclude,

> "නමුත් ඉදිරිපත්ව ඇති සාක්ෂි මත තහවුරු වන කරුණු කෙරෙහි අවධානය යොමු කිරීමේදී විනිශ්චය අධිකාරියට පැහැදිලි වන්නේ 2/අති/3547/11 නඩුවේ සේවකයා සහ 2/අති/3549/11 නඩුවේ සේවකයා වගඋත්තරකරුගේ සුපරීක්ෂක 'ජෝෂප් බෙනඩික් ප්‍රනාන්දු' යන අයට පහර දුන් ස්ථානයේ සිටි බවට සාක්ෂි ඉදිරිපත් වුවද ඔවුන් 'ජෝෂප් බෙනඩික් ප්‍රනාන්දු' යන අයට පහර දුන් බවට කරුණු තහවුරු වී නොමැති බවයි. ඒ අනුව වගඋත්තරකරු විසින් එකී සේවකයන් දෙදෙනාට එරෙහිව 'ජෝෂප් බෙනඩික් ප්‍රනාන්දු' යන අයට පහර දීම යන විෂමාචාරය මත ඉදිරිපත් කර ඇති චෝදනා මෙම විනිශ්චය අධිකාරිය ඉදිරියේ ඔප්පු කිරීමට අපොහොසත් වී ඇති බව තීරණය කරමි."

but dismissed the Applications filed before the Labour Tribunal on behalf of the said employees for different reasons.

The Superior Courts, when exercising its Appellate powers, are reluctant to interfere with the findings of a Labour Tribunal based on the evidence led before the Tribunal, except acting under Section 31D (3) of ***the Industrial Disputes Act 43 of 1950*** (as amended) on a question of Law.

However, in the case of ***Ceylon Transport Board Vs. N. M. J. Abdeen 70 NLR 407***, this Court held that,

> "Where the President of a Labour Tribunal misdirects himself on the facts, such misdirection amounts to a question of law within the meaning of the Industrial Disputes Act.

In the case of ***Ceylon Transport Board Vs. W. A. D. Gunasinghe 72 NLR 76***, it was further held that,

> "Where a Labour Tribunal makes a finding of fact for which there is no evidence-a finding which is both inconsistent with the evidence and contradictory of it-the restrictions of the right of the Supreme Court to review questions of law does not prevent it from examining and interfering with the Order based on such findings if the Labour Tribunal is under a duty to act judicially."

As observed by this Court, the dismissal of four employees on alleged misconduct, was the subject matter before the Labour Tribunal and was entirely based on an incident of assault by four employees of the Respondent Company on an officer of the same Company. The officer who was assaulted namely J. B. Fernando, in his evidence before the Labour Tribunal had identified those who assaulted him as follows;

ප්‍ර : එතකොට ඔහු හැංගිලාද ගැහුවේ?

උ : එම මේසයේ 5 හෝ 6 දෙනෙක් හිටියා. ඉසිල් කියන තැනැත්තා නැගිටලා ඇවිත් මට ගැහුවාත් සමඟම අනෙක් අය බිම පෙරලාගෙන ගැහුවා

ප්‍ර : ඉසිල් හෝ වෙනත් කවුරු හෝ මොනවා හෝ කිව්වාද?

උ : කිසිම දෙයක් කිව්වේ නැහැ. ඔවුන් එකතු වෙලා මට ගැහුවා. සෙනෙවිරත්න කියන තැනැත්තා බෝතලයකින් මට දමලා ගැහුවා. මම බිමට පාත් වුනා. ඉන් පසුව එම බෝතලය ඇවිත් කුරේ යන අයගේ බෙල්ලට වැදුනා.

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ප්‍ර : තමාට අද උසාවියේ ඉන්න හතර දෙනා පහරදුන්නා?

උ : එසේය.

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ප්‍ර : ඒ සිද්ධිය වුනාට පසු තමා මොකද කලේ?
පොලීසියට ගියාද?

උ : පොලීසියට ගියා.

ප්‍ර : ගිහිල්ලා තමා මේ සම්බන්ධව පැමිණිලි කලාද?

උ : පැමිණිල්ලක් කලා. ඊට කලින් මෙහෙයුම් කලමණාකරු වික්‍රම මහතා සමඟ කතාකලා. ඔහු කිව්වා පොලීසියට පැමිණිල්ලක් දමන්න කියලා.

The said complaint had been produced at the trial marked R-2.

In his evidence before the Labour Tribunal, witness Nishantha Cooray had referred to the incident that took places on the day in question and said that witness Fernando had accompanied him to the 2nd floor in order to show the "Bar" to him and at that time witness Fernando was assaulted by some employees. He identified Applicants Bandara and Senevirathne along with another person assaulting the victim but not seen Kapila and Pemarathne assaulting the victim but they were with the others at that time. He too was hit with a bottle thrown by Senevirathne and he had to bend holding to his face at that time.

That was the only evidence led before the Labour Tribunal with regard to the incident and witness Fernando in his evidence had clearly implicated all 4 Applicants assaulting him along with another person and the 1st Complaint made by him to the Police was marked as R-1 during his evidence. No contradictions were marked with his police statement during the cross examination. Even though witness Cooray had not seen Premarathne and Kapila Assaulting the victim he had seen them with the other three, who assaulted the victim but at one stage he had to bend holding to his face since a bottle which was thrown by Senevirathne hit his head.

In the case of ***Associated Battery Manufacturers (Ceylon) Ltd Vs. United Engineering Workers' Union 77 NLR 541***, it was held that,

> "Where in an inquiry before a Labour Tribunal it was alleged that the reason for the termination of employment was that the workman was guilty of a criminal act involving moral turpitude, the allegation need not be established by proof beyond reasonable doubt

> as in a criminal case. Such an allegation has to be decided on a balance of probability, every element of the gravity of the charge becoming a part of the whole range of circumstances, which are weighed in the balance, as in every other civil proceeding"

In the case of ***Hemas (Estates) Ltd Vs. Ceylon Workers'Congress 76 NLR 59*****,** Sirimane (J) has observed the burden of proof before the Labour Tribunal as,

> "In proceedings before a Labour Tribunal relating to a dispute between a workman and his employer, it is open to the President to accept the more probable version and to decide the case on a balance of probability"

It was also held in the case of ***The Caledonian (Ceylon) Tea and Rubber Estates ltd. Vs. J. S. Hillman 79 NLR 421,***

> "That on allegation of misconduct in proceedings before Labour Tribunal has to be decided on a balance of probability it is not necessary to call for proof beyond reasonable doubt as in a criminal case."

In the said circumstance it is clear, that the standard of proof before Labour Tribunal had been considered by this Court as the more probable version of evidence which can be identified in order to ascertain the termination of the employment is reasonable or not. The required proof is not beyond reasonable doubt as in a criminal case but it is on a balance of probability.

As revealed before this Court, witnesses Fernando and Cooray were the eyewitnesses and their evidence can be used to identify the incident of assault to the Officer "J.B. Fernando" and therefore, the Tribunal should consider the evidence on the standard of balance of probability to come to a reasonable conclusion, or to have a just and equitable Order. It does not need to have more witnesses to prove this. Even the evidence of one witness is sufficient to reach a reasonable conclusion on probabilities if the evidence of the said witness is reliable.

Vythiylingam (J) had observed in the case of ***Associated Battery Manufacturers (Ceylon) Ltd vs. United Engineering Workers' Union (supra),***

> "…. The reason for the termination was connected with the conduct of the workman. The issue before the Tribunal in this case was whether having regard to all the facts and circumstances of the case the termination of the employment of the workman was justified or not, and not simply whether the workman was guilty of theft of the boots or not"

It was held further,

> "In the instant case the Tribunal had to find as a fact whether the workman did commit theft of the boots or not, but this was only incidental to the decision as to whether the termination of the employment was justified or not and not for the purpose of punishing him for a criminal offence. It has been emphasized in a number of cases that the proceedings before a Labour Tribunal are not criminal in nature and therefore the standards of proof required to establish a criminal charge are wholly inappropriate where the Tribunal has merely to ascertain the facts and make an order which in all the circumstances of the case is just and equitable. In doing so the Tribunal is not bound by the rules of evidence contained in the Evidence Ordinance and may base its decisions on evidence which would be shut out from the ordinary courts of law"

In the said circumstances, it is clear that the President of the Labour Tribunal had misdirected himself when analyzing the evidence of the eye witnesses and had come to a wrong conclusion with regard to the act of misconduct committed by two employees namely, "Kapila Udayanga" and "Wimal Premarathne"

However, when the order of the Labour Tribunal was appealed to the High Court, the High Court had failed to observe the above misdirection on the part of the President of the Labour Tribunal, but also misdirected with regard to the burden of proof required before the Labour Tribunal.

In his order the learned High Court Judge had observed;

> "ඒ අනුව මෙහිදී මා හට පෙනී යනුයේ මෙම කරුණ නිසි ආකාරයෙන් විශ්ලේෂණය කර මෙම කම්කරු විනිශ්චය සභාවේ සභාපතිතුමා විසින් නිගමනයකට එළඹීමක් සිදුකර නොමැති බවයි. මෙහිදී මෙම නඩුව තීරණය කිරීමේදී වැදගත්ම කරුණ වනුයේ මෙම පහර දීමේ සිද්ධියයි. මෙම පහර දීමේ සිද්ධිය වගඋත්තරකරුවන් විසින් අධිකරණය හමුවේ ඔප්පු කළ යුතුවනු ඇත. තවදුරටත් සභාපතිතුමාගේ නියෝගය සලකා බලන කල එතුමා ප්‍රකාශ කර ඇත්තේ සේවකයන් දෙදෙනෙකුට පහර දීම පිළිබඳව පරස්පර විරෝධතාවයක් නොමැති බවයි. එය එම නියෝගයේ 9 වන පිටුවේ සඳහන් වේ. එනම් **'ඒ සම්බන්ධව එම සාක්ෂිකරුවන් දෙදෙනා අතර කිසිදු පරස්පරතාවයක් නොමැති බව පැහැදිලි වේ'** වශයෙන් සඳහන් කර ඇත. මෙහිදී මෙම සාක්ෂිකරුවන් දෙදෙනා එක් කරුණක් සම්බන්ධයෙන් පරස්පර විරෝධතා දක්වන්නේ නම් තවත් කරුණක් සම්බන්ධයෙන් පරස්පර නොවූ පමණින් ඔවුන්ගේ විස්වාසදායකත්වය පිලිබඳව විනිශ්චයකාර සභාව සැලකිල්ලට ගත යුතුව ඇත. මේ අනුව මෙම මූලික කරුණ මත මෙම සම්පූර්ණ සිද්ධිය රදා පවතී."

In the said circumstances, it is clear that the said finding of the High Court is erroneous and the Judges of the High Court misdirected themselves when they expected the Respondent to prove the case against the Applicants beyond reasonable doubt. I therefore answer the questions of law on which the leave had been granted by this Court in favour of the Respondent.

As already referred to in this Judgment the Labour Tribunal had dismissed the application filed by the Applicant on behalf of all four employees for different reasons, even though the Tribunal had no legal basis to come to the said finding. However, the finding of the Labour Tribunal to dismiss all four applications which were taken up before the Labour Tribunal as one trial, with the consent of all parties, can be justified for the reasons already referred to in this judgment.

I therefore allow the appeal and affirm the order of the Labour Tribunal dated 30. 01. 2015 for the reasons elucidate in my Judgment.

Appeal allowed.

No cost.

Judge of the Supreme Court

Justice K. K. Wickremasinghe,

I agree,

Judge of the Supreme Court

Justice Arjuna Obeyesekere,

I agree,

Judge of the Supreme Court