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

In the matter of an application for special leave to appeal under and in terms of the High Court of the Province (Special Provisions) Act No.19 of 1990 as amended or the Industrial Disputes Act No. 32 of 1990 made in respect of Order dated 31st May 2019 of the High Court of the Western Province Holden in Colombo.

SC APPEAL 119/2021

SC/SPLA/LA 238/2019

HCALT 43/2018

LT No. 2/565/2015

Lushantha Karunarathna,

No. 112,

D.S. Wijesinha Mawatta,

Katubadda, Moratuwa.

APPLICANT

vs.

Asia Broadcasting Corporation (Pvt) Ltd,

Level 35 and 37, East Tower

World Trade Center,

Colombo 01.

RESPONDENT

AND NOW

Asia Broadcasting Corporation (Pvt) Ltd,

Level 35 and 37, East Tower

World Trade Centre,

Colombo 01.

RESPONDENT-APPELLANT

vs.

Lushantha Karunarathna,

No. 112,

D.S. Wijesinha Mawatta,

Katubadda, Moratuwa.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Lushantha Karunarathna,

No. 112,

D.S. Wijesinha Mawatta,

Katubadda, Moratuwa.

APPLICANT-RESPONDENT-PETITIONER

vs.

Asia Broadcasting Corporation (Pvt) Ltd,

Level 35 and 37, East Tower

World Trade Centre,

Colombo 01.

RESPONDENT-APPELLANT-RESPONDENT

BEFORE : **B. P. ALUWIHARE, PC, J**

S. THURAIRAJA, PC, J

K.P. FERNANDO, J

COUNSEL : Isuru Lakpura for the Applicant-Respondent-Petitioner

Manoj Bandara with Ms. Thamali Wijekoon instructed by Sudath Perera Associates for the Respondent-Appellant-Respondent.

WRITTEN SUBMISSIONS: Written submissions on behalf of the Applicant-Respondent-Petitioner on 16th March 2022.

Written submissions on behalf of the Respondent-Appellant-Respondent on 22nd October 2022.

Further Written submissions on behalf of the Applicant-Respondent-Petitioner on 13th June 2023.

Written submissions on behalf of the Respondent-Appellant-Respondent on 30th June 2023.

ARGUED ON : 23rd May 2023

DECIDED ON : 14th September 2023

S. THURAIRAJA, PC, J.

The instant case concerns the termination of the employment of the Employee Applicant-Respondent-Petitioner namely Lushantha Karunarathna (hereinafter and sometimes referred to as the "Applicant") by the Employer Respondent-Appellant-Respondent Company namely Asia Broadcasting Corporation (Pvt) Ltd (hereinafter sometimes referred to as the "Respondent") based on the alleged charges levelled against him in relation to a hoarding site situated on Maya Avenue, Wellawatte, on grounds of gross misconduct in the form of negligence in executing his obligations as the Senior Manager of Promotions of Shaa FM. Upon application to the Labour

Tribunal by the Applicant, the Learned President of the Labour Tribunal by Order dated 16th March 2018 pronounced the aforesaid termination by the Respondent to be unjustifiable and inequitable, whereby the Applicant was awarded Rs. 936,000 as compensation. This decision was overturned by the High Court by Order dated 31st May 2019, where the Learned High Court Judge held in favour of the Respondent company. Being aggrieved by the decision of the High Court, the Applicant has now preferred this appeal by way of Petition dated 28th June 2019 praying that the Order dated 31st May 2019 of the High Court be set aside and the Order of the Labour Tribunal dated 16th March 2018 be restored.

When the instant case was considered for leave to appeal before the Supreme Court on 13th December 2021, the Court granted special leave to appeal on the following two questions of law.

> *"(i) Did the High Court consider whether the findings of the Labour Tribunal were perverse?*
>
> *(ii) If the findings of the Labour Tribunal were not perverse, did the High Court err in law by allowing the appeal preferred by the Employer Respondent?"*

Facts

The Respondent company is the owner and the operator of several media channels in Sri Lanka including Hiru TV, Hiru FM, Shaa FM, Suriyan FM, Gold FM and Sun FM. The Applicant first joined the Respondent company as a Junior Executive Officer of Promotions on or around 09th August 1999, and, on or around 09th June 2008 while holding the position of Assistant Manager of Promotions, the Applicant had resigned to be employed elsewhere. More recently, the Applicant was re-employed at Shaa FM on 18th September 2012, and was thereafter promoted to the position of Senior Manager of Promotions, which was the position the Applicant held at the time of the termination of employment. As the Senior Manager of Promotions, the Applicant was

required to attend to all promotional activities of the Respondent Company, including the installation and maintenance of hoarding sites of the Respondent Company. The hoardings were owned by the third-party advertising companies, and the Respondent would obtain such hoarding on the basis of an annually renewable contract.

The instant case concerns a hoarding site installed at Maya Avenue, Wellawatta upon the instructions of the Chairman of the Respondent company on or around 19th October 2012, in respect of which the Respondent entered into a contract with Regee Advertising (hereinafter sometimes referred to as the "advertising company"), which was overseen by the Applicant. The Respondent company had an established standard practice in respect of the installation and maintenance of hoarding sites which has been acknowledged by both parties during the cross examination and has been summarised by the Learned President of the Labour Tribunal in the following manner. (vide pg.227 of the High Court brief).

> *"..... එම පරිචය නම් advertising ආයතන තමා සතු ප්‍රචාරණ අවස්ථා ආයතනයට දැන්වීමෙන් පසු ආයතනයේ අවශ්‍යතාවය මත එකී ස්ථාන මිලදී ගන්නවා ද යන්න තීරණය කිරීමට පෙර ඒ පිළිබඳව යම් ගවේෂණයක් සිදු කර ඉන්පසු මිල ගණන් කැඳවා ස්ථානීය පරීක්ෂණයෙන් පසුව ප්‍රවර්ධන නිලධාරියා පත්වන අවස්ථාවක එය සභාපතිතුමාගේ අවධානයට යොමු කර මිලදි ගැනීම සිදු කරයි. එසේත් නැත්නම්, තව ප්‍රචාරක දැන්වීම් පුවරුවක් සවි කිරීම සිදුකරයි."*

I have provided an approximate and unofficial translation of the above extract below.

> *"The practice is that after the advertising agency informs the Respondent Company of its advertising opportunities, and before deciding whether to buy the site, the Respondent company conducts some research to determine whether it would suit the needs of the company, and thereafter calls for quotations, after which, an on-site inspection takes place allowing the relevant manager of the Respondent company to present it to the Chairman of the Respondent company for approval for purchase. If approval is*

received, the parties proceed with the purchase. If not, other hoarding sites will be considered."

Witness for the Respondent company, namely Dilanka de Soysa (hereinafter referred to as the "Witness for the Respondent") gave evidence and during the cross-examination, stated that he was asked by the Chairman of the Respondent company to inspect the hoarding site in question. Having inspected the same, the Witness for the Respondent had not taken photographs of the site, although he had admitted that generally when conducting routine inspections, he would take photographs of the respective sites. In respect of the hoarding site in question, he was asked to inspect the site for the purpose of affirming whether any disturbances were caused to the hoarding site, and he had been given pictures by the Human Resources Department for comparison purposes (vide pg.41-42 of the High Court Brief.)

ප්‍ර: තමාට සභාපතිවරයා යම්කිසි කාර්යභාරයක් දුන්නා ද මේ සම්බන්ධයෙන් යම්කිසි ක්‍රියාමාර්ගයක් ගන්න කියලා?

උ: බලන්න කිව්වා.

ප්‍ර: බලන්න කියලද කිව්වේ ?

උ: ඔව්.

ප්‍ර: තමා එය ඡායාරූප ගත කළාද?

උ: නැහැ.

ප්‍ර: භෞතිකවම පරීක්ෂණ කළාද?

උ: ඔව්.

ප්‍ර: පසුව තමාට මෙම ස්ථානයේ ඡායාරූප ලැබුණා ද?

උ: ඔව්.

ප්‍ර: ඒවා ගත්තේ කවුද?

උ: මානව සම්පත් අංශයට ලැබිලා තිබෙනවා.

ප්‍ර: තමා ඡායාරූප ගත කිරීමක් කළාද?

උ: නැහැ.

ප්‍ර: තමාට ඡායාරූප බලන්න එවලා තිබුණා ද?

උ: ඔව්.

Though the usual practice was to take photographs during inspections, he had not done on that occasion, but instead, used the photographs provided by the Human Resources Department of the Respondent Company to ascertain whether there was an obstacle caused to the hoarding site. Upon arrival at the site, he observed minor disturbances to the hoarding site caused by buildings and trees. The witness also stated that any disturbance resulting from overgrown vegetation could be removed by informing the relevant advertising agency. Further, he states that, as the person who inspected the alleged disturbance to the hoarding, he was not asked to testify before the domestic inquiry held within the Respondent company in relation to this matter.

The Applicant testified before the Labour Tribunal stating that the said hoarding site was selected by the Chairman of the Respondent Company and was instructed to obtain it for advertising and was done so having followed the established standard practice followed by the Respondent company. The hoarding site was initially obtained in the year 2012 and subsequently the contract was extended for another year with the approval of the Chairman of the Respondent Company. In the two years that the hoarding site was in use, there were no concerns raised either by the Respondent Company, or its chairman regarding the visibility of the hoarding site. The issue with the visibility of the hoarding site was raised for the first time when the contract was scheduled to be extended for a second time, and further questions arose as to another hoarding board at the vicinity of the hoarding site in question. The Applicant stated that he had tried to convince the Chairman by using photographs taken from time to time that the so-called new hoarding board had always been there and that it was not

a newly erected one. Not being convinced by the explanation of the Applicant, the Respondent had issued the Petitioner with a Charge sheet, and after having conducted a domestic inquiry, the employment of the Applicant was terminated.

At the end of the inquiry before the Labour Tribunal, both parties filed their respective written submissions together with marked documents. The Learned President of the Labour Tribunal pronouncing the order on 16th March 2018, ordered the Respondent company to pay 12-months' salary as compensation based on the findings that the Respondent Company had unreasonably terminated the services of the Applicant. Among such other findings, the Labour Tribunal stated that though the Chairman of the Respondent company had made such allegations against the Applicant, the Chairman was not available as a witness before the Labour Tribunal, that the witness who testified on behalf of the Respondent before the Labour Tribunal had not been called to testify at the domestic inquiry, that the witness had failed to submit a report with photographs thereby failing to adhere to the standard practice followed when conducting such inspections, that as admitted by the Respondent witness, any disturbances caused by the overgrowth of vegetation could have been cured by informing the advertising company as it was a matter beyond the control of the Applicant.

The Respondent in challenging the Order made by the Labour Tribunal, preferred an appeal before the Provincial High Court of the Western Province holden in Colombo. The Respondent states that the Chairman had merely suggested to the Applicant that there should be a hoarding site in the area and that it was the Applicant's duty to go and inspect the site and determine whether a hoarding would be suitable for advertising, and if so, to proceed to install such a hoarding. It thereafter had come to the attention of the Respondent that the said hoarding was partially obstructed by trees growing from a private property and a light pole, and the Applicant without having considered these obstructions and without notifying the Chairman, has renewed the contract with Regee Advertising up until 10th January 2015.

The matter was argued before the Learned High Court Judge on 26th April 2019, and the question of law arose as to whether the Respondent Company has proved to the satisfaction of the court the negligence of the Applicant with regard to the renewal of the contract of the hoarding site in question. By Order dated 31st May 2019, the Learned High Court Judge found that in light of the facts and circumstances of the instant case the Respondent was right to have terminated the employment of the Applicant, giving emphasis to the importance of a hoarding site to a company such as the Respondent company, and also noted that the Applicant had failed to inspect and maintain the site after its installation which fell within the ambit of the Applicant's scope of the work as the Senior Manager of Promotions. The Learned High Court Judge also observed that the Applicant had failed to disclose in the show cause letter dated 27th January 2015, and failed to tender evidence before the Labour Tribunal as to what he ought to have done to rectify the issue of visibility caused by the overgrowth of vegetation. It was further held that the Labour Tribunal when exercising its just and equitable jurisdiction must ensure that such an order rendered is just and equitable to both parties to the application.

Therefore, the Learned High Court Judge found that in light of the facts and circumstances of the instant case the Respondent was right to have terminated the employment the Applicant, setting aside the Order of the Labour Tribunal.

Being aggrieved by the decision of the Learned High Court judge, the Applicant by Petition dated 28th June 2019 has made an application before this Court praying that the Order of the Labour Tribunal dated 16th March 2019 be restored and the Order of the High Court dated 31st May 2019 be set aside. On 13th December 2021, the Supreme Court granted special leave to appeal on the two questions of law as stated above.

Analysing the existing legal position relevant to the instant case

As statutorily encapsulated within the Industrial Disputes Act No. 43 of 1950 as amended (hereinafter sometimes referred to as the "Industrial Disputes Act"), s.31D (2) provides as follows.

*"An order of a labour tribunal shall be **final** and **shall not be called in question in any court**."*

[Emphasis added]

However, s.31D(2) does not render is impossible for an aggrieved party to prefer an appeal to another court, as this rule is subject to s.31D(3) of the Industrial Disputes Act which reads as follows.

*"Where the workman who, or the trade union which, makes an application to a labour tribunal, or the employer to whom that application relates is dissatisfied with the order of the tribunal on that application, such workman, trade union or employer may, by written petition in which the other party is mentioned as the respondent, appeal from that order on a **question of law**, to the High Court established under Article 154P of the Constitution, for the Province within which such Labour Tribunal is situated"*

[Emphasis added]

In **Kotagala Plantations Ltd. and Lankem Tea and Rubber Plantations (Pvt) Ltd. v Ceylon Planters Society [(2010) 2 Sri LR 299]** by Chief Justice J.A.N de Silva as to what would constitute a question of law for the purposes of s.31D of the Industrial Disputes Act, whereby His Lordship held at page 303 as follow:

*"An appeal lies from an order of a Labour Tribunal only on [a] question of law. A finding on facts by the Labour Tribunal is not disturbed in appeal by an Appellate Court unless the decision reached by the Tribunal can be considered to be perverse. It has been well established that **for an order to be perverse the finding must be inconsistent with the evidence led or that the finding could not be supported by the evidence led** (vide Caledonian Estates Ltd. v. Hillman 79 (1) NLR 421)"*

[Emphasis added]

Further, in **Jayasuriya vs Sri Lanka State Plantations Corporation, (1995) 2 SLR 379** Justice Amarasinghe held that being "perverse" in this context can have a broader meaning than its natural meaning. His lordship held;

> "*"Perverse" is an unfortunate term, for one may suppose obstinacy in what is wrong, and one thinks of Milton and how Satan in the Serpent had corrupted Eve, and of diversions to improper use, and even of subversion and ruinously turning things upside down, and, generally, of wickedness. Yet, in my view, in the context of the principle that the Court of Appeal will not interfere with a decision of a Labour Tribunal unless it is "perverse", it means no more than that the court may intervene if it is of the view that, having regard to the weight of evidence in relation to the matters in issue, the tribunal has turned away arbitrarily or capriciously from what is true and right and fair in dealing even handedly with the rights and interests of the workman, employer and, in certain circumstances, the public. The Tribunal must make an order in equity and good conscience, acting judicially, based on legal evidence rather than on beliefs that are fanciful or irrationally imagined notions or whims. Due account must be taken of the evidence in relation to the issues in the matter before the Tribunal. Otherwise, the order of the Tribunal must be set aside as being perverse.*"

Justice Amarasinghe went on to recognise several grounds on which the appellate courts have intervened with the orders of the labour tribunal and set them aside, which demonstrate the scope of the concept of perversity. These grounds were summarized by Justice Arjuna Obeysekara in the recent unreported case of **R.A. Dharmadasa v Board of Investment of Sri Lanka, (SC Appeal No 13/2019 decided on 16th June 2022)** whereby the findings of a Labour Tribunal were subject to review if it was,

> "• ***wholly unsupported by evidence*** *(Ceylon Transport Board v. Gunasinghe [(1973) 72 NLR 76], Colombo Apothecaries Co. Ltd v. Ceylon*

Press Workers' Union [(1972) 75 NLR 182], Ceylon Oil Workers' Union v. Ceylon Petroleum Corporation [(1978-9) 2 Sri LR 72]), or

- ***which is inconsistent with the evidence and contradictory of it*** *(Reckitt & Colman of Ceylon Ltd v. Peiris [(1978-9) 2 Sri LR 229]), or*

- ***where the Tribunal has failed to consider material and relevant evidence*** *(United Industrial Local Government & General Workers' Union v. Independent Newspapers Ltd [(1973) 75 NLR 529]), or*

- ***where it has failed to decide a material question*** *(Hayleys Ltd v. De Silva [(1963) 64 NLR 130]), or*

- ***misconstrued the question at issue and has directed its attention to the wrong matters*** *(Colombo Apothecaries Co. Ltd v. Ceylon Press Workers' Union [supra]), or*

- ***where there was an erroneous misconception amounting to a misdirection*** *(Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya [(1964) 65 NLR 566]), or*

- ***where it failed to consider material documents or misconstrued them*** *(Virakesari Ltd v. Fernando [(1965) 66 NLR 145]), or*

- ***where the Tribunal has failed to consider the version of one party or his evidence*** *(Carolis Appuhamy v. Punchirala [(1963) 64 NLR 44], Ceylon Workers' Congress v. Superintendent, Kallebokke Estate [(1962) 63 NLR 536]), or*

- ***erroneously supposed there was no evidence*** *(Ceylon Steel Corporation v. National Employees' Union [(1969) 76 CLW 64]) …"*

[Emphasis added]

It has come to my attention that several facts which were admitted by the witness on behalf of the Respondent during the cross-examination have not been taken into

consideration by the Learned President of the Labour Tribunal in his Order, which have been summarized below. First, the charges against the Applicant were raised by the Chairman of the Respondent Company, who was not called as a witness before the Labour Tribunal to testify on behalf of the Respondent. Second, the witness who did testify on behalf of the Respondent was not called to testify at the domestic inquiry held by the Respondent. Third, in determining whether the termination of the Applicant was justifiable, what ideally should have been considered was whether termination was the right course of action on the part of the Respondent instead of construing whether the Applicant was at fault. Even so, the President of the Labour Tribunal held that the Applicant was not negligent in his duties and thereby his termination of employment was unjustified and inequitable.

I am in agreement with the decision of the Labour Tribunal to compensate the Applicant for the termination of employment. However, I do not agree with the finding that the Applicant was not negligent. Had the aforementioned facts been taken into consideration and had the Chairman of the Respondent Company been called to testify before the Labour Tribunal, the Labour Tribunal would have found the Applicant's failure to rectify any disturbances caused to the hoardings to amount to negligence of his part. On this factual point alone, I agree with the findings of the Learned High Court Judge. However, I do not agree with the final decision of the High Court to not compensate the Applicant. Thus, the findings of the Labour Tribunal would be construed as partially perverse on this particular fact on the grounds that the Labour Tribunal has misconstrued the question at issue and had failed to consider the views of the Respondent Company, which falls within the meaning of perversity as summarized by my brother Judge in **R.A. Dharmadasa v Board of Investment of Sri Lanka, (supra)**.

Yet, the length and breadth of the two questions of law cannot be answered if one was to limit the instant case to the question of the alleged perversity of the findings of the Labour Tribunal. Thus, it is my view that the questions of law in instant case can be

addressed in light of the following two factual observations which provides a larger and clearer picture to the issues at hand. First, I find that the Applicant has in fact acted negligently in executing his duties as the Senior Manager of Promotions, since advertising is vital to a company operating in the media industry, and this falls directly within the Applicant's scope of work, which has been to a certain extent identified and elaborated by the Learned High Court Judge. Secondly, I am also of the view that despite the Applicant being negligent, termination of his employment is far too disproportionate a punishment considering the circumstances of the instant case, thereby agreeing with the final decision of the Labour Tribunal that the Applicant should be compensated. The above two factual observations have been expounded on below.

A. Negligence on the part of the Applicant

For the purposes of clarity, I wish to reiterate that the charge of negligence against the Applicant is that the Applicant had failed to properly inspect the hoarding site in question prior to the renewal of the contract with the advertising company to extend the same until 10th January 2015 which has allegedly caused the Respondent company a loss of Rupees Three-hundred thousand (Rs.300,000/-). If the Applicant had in adhering to his obligations as the Senior Manager of Promotions had gone to inspect the hoarding site prior to the renewal, the Respondent states that he would have observed the disturbances caused to the hoarding site in question by the overgrowth of vegetation, and ideally should have notified the advertising company to rectify this issue, which the Applicant had also failed to do.

The facts of the instant case indicate that the Applicant was responsible for ensuring that the hoarding sites within Colombo were installed and maintained, including the hoarding site in question, and further, to ensure that the said sites were visible to passers-by without any disturbance. This has been testified by the Applicant himself during the cross examination on 08th February 2018 (vide pg. 139 of the High Court Brief)

"ප්‍ර: මේ නාම පුවරුව නියම ආකාරයෙන් ප්‍රදර්ශනය වෙනවාද කියල බලන්න වගකීම තිබෙන්නේ කාටද?

උ: මට. (Lushantha)

ප්‍ර: රෙජී ආයතනයෙන් නාම පුවරුව සවිකිරීමෙන් පසුව ඔබගේ රාජකාරිය තමයි එය නියම ආකාරයෙන් තිබෙනවාද කියල බැලීම?

උ: ඔව්.

ප්‍ර: එම නාම පුවරුව දර්ශනය වෙන බවට ආදාළ කාලයේ පරීක්ෂා කිරීමට වගකීම තිබුනේ කාටද?

උ: කොළඹ ඇතුලත තිබුනේ මට.

ප්‍ර: "හිරු මගේ පන වගේ" කියන නාම පුවරුව සම්බන්ධයෙන් දර්ශනයවීම බලන්න වගකීම තිබුනේ ඔබට?

උ: ඔව්. "

In lieu of this, I draw attention to pg.4-5 of the High Court Order of the instant case dated 31st May 2019 (vide pg.236-237 of the High Court brief), whereby the Learned High Court Judge held as follows.

"The Respondent Company needs people's attraction. Therefore, object of installing of hoardings is to attract more viewers. The Applicant who was the Senior Manager (Promotions) has a duty cast on him to promote the business of the institution, which include installing and maintaining of hoardings and monthly inspections. When the Chairman informed him with regard to the visibility of the hoardings what are the steps taken by the Applicant should be consider. For this purpose, this Court has to peruse the evidence of the Applicant and the document marked A1. Though the place was recommended by the Chairman in 2012, 2 years later chairman informed him that the said hoarding did not have the proper visibility at the location where it was installed. As a Senior Manager, has he taken steps to inform the relevant authority to ensure the proper visible condition of the hoardings.

This could have been avoided if the Applicant had visited the seen regularly This is his main duty. Before I analyse the evidence of the Applicant, I am mindful of this following judgment.

In ***Gilbert Weerasinghe Vs. People's Bank - S.C Appeal No. 81/2006 , Decided On:- 31st July 2008*** *J.A.N. De Silva.- held that*

"The Labour Tribunal should act in a just and equitable manner to both parties and not award any relief on the basis of sympathy. Just and equitable order must be fair to all parties. It never means the safeguarding of the interest of the workman alone. Legislature has not given a free licence to a President of a Labour Tribunal to make award as he may please." "

I am in agreement with the above finding of the Learned High Court Judge. As observed above, the Chairman had suggested a hoarding should be installed down Maya Avenue, and it was the responsibility of the Applicant to suggest to the Chairman of a suitable site, whether it be the hoarding site in question or another site down Maya Avenue. The standard procedure within the Company is for the Senior Manager of Promotions to analyse the location of the hoarding sites and to consider several options prior to making a final decision of the most suitable hoarding site, after taking into account the approval or disapproval of the Respondent's Management. The Respondent claims that if it had been notified of the disturbances prior to initially entering into the contract with Regee Advertising or even at the point of renewal, it would have given instructions to not proceed with the contract, or even if they did proceed with the contract, to discontinue the contract, depending on the circumstances. Furthermore, the primary charge against the Applicant in respect of the hoarding site in question is that as the Chairman has raised the issues of visibility and the disturbances caused by the overgrowth of vegetation, the Applicant should have in the least attempted to rectify the issue by notifying Regee Advertising instead of attempting to justify that there are no such disturbances. This was within his ambit of duties as the Senior Manager of Promotions.

Therefore, in considering the first factual observation, the Applicant has been negligent in executing his duties as the Senior Manager of Promotions. However, this does not justify the termination of his employment as will be elaborated further under the second factual observation.

B. Termination of employment was too disproportionate in the given circumstances.

In framing the allegations against the Applicant, the Respondent had failed to take note of the fact that this is an isolated act of negligence, and while it does concern advertising which is of importance to the Respondent, it is not something which ought to be construed as misconduct which would require termination of the employment of the Applicant.

In the Indian case of **Hind Construction & Engineering co. Ltd v Their Workmen [1965] (1) LLJ 462** the employer used to grant a holiday on the next day where a holiday fell on a Sunday. In this case the employer refused to grant a holiday due to pressure of work but promised to do on a later date. Certain workmen who were absent on the day following that Sunday in question were dismissed, and the punishment imposed was held to be one which no reasonable employer would have imposed. **S. Egalahewa** in **'Labour Law'** [Second edition (2020)] states that the courts in fact have jurisdiction to intervene where the termination of the employment is disproportionate to the conduct of the employee, whereby at page. 640 it reads as follows.

> *"Where the punishment awarded by the employer is shockingly disproportionate in the light of the particular conduct and the workman's past record or is such that no reasonable employer would impose in similar circumstances, a court would be justified in drawing an inference of victimization by the employer."*

Thus, in **Sri Lakshmi Saraswathi Motor Transport co. v Labour Court [1966-67] 31 FJR 54** a workman with seventeen years of service and a clean record was dismissed as he was guilty of one day's delay in transmitting a parcel of documents from a branch office to the head office of the employer. The workman was an office bearer of the union. He admitted the lapse but pleaded forgetfulness in mitigation. It was held that his dismissal was so grossly disproportionate to the offence that the tribunal was justified in concluding that the employer had made the incident a pretext to dismiss the workman in view of his union activities.

Further, in the Sri Lankan Shop and Office Employees Act No. 19 of 1954 gives a list of misconducts in a different context. In terms of the **Shop and Office Employees (Regulations of Employment and Remuneration) Regulations 1954**, under **Regulation 18**, employers are authorized to deduct any fines imposed on employees for certain acts of misconduct and these acts of misconduct are listed in the said Regulation, which includes *inter alia* absence from and late attendance at work without reasonable excuse, causing damage to, or causing the loss of goods or articles belonging to the employer, such damage or loss being directly attributable to negligence, wilfulness or default of the employee, Slacking or negligence at work, Wilful failure on the part of the employee to comply with any lawful order given to him in relation to his work. This provides an understanding of what the Sri Lankan legal jurisdiction construes as misconduct, all the while bearing in mind that even the aforementioned acts are not acts which warrant termination of employment. **S. R. De Silva** in **'Law of Dismissal'** [The Employers' Federation of Ceylon, Monograph No. 8, Revised Edition 2004] commenting on the necessity of considering the negligence in light of the relevant context states as follows.

> *"It is not every act of negligence, or even one act of negligence, which would always justify termination. The negligence must either be habitual (vide **Andhra Scientific Co. Ltd. vs. Heshagiri Rao, 1961 (2) LLJ 117**), or else*

sufficiently grave (vide ***Jupiter General Insurance Co., Lid. vs. Shroff, (1937) 3 All ER 67****)."*

[Emphasis added]

It must be noted that the Applicant was issued a Letter of Suspension dated 12th January 2015, whereby several charges were levelled against him, and the Applicant was required by letter dated 19th January 2015 to submit a Show Cause letter, which in fact the Applicant has complied with by submitting the Letter dated 27th January 2015 (vide pg. 210-212 of the High Court brief). It must also be noted that there were no deductions to his salary or other monetary benefits in lieu of the charges levelled against the Applicant nor was his monthly salary discontinued during the term of suspension from 12th January 2015 to the date of termination 12th June 2015.

At present, it is my view that the questions of whether the domestic inquiry was held in a proper manner or what alternative action could have been taken by the Respondent is not relevant to the instant case. The instant case is framed to determine whether the termination of the Applicant could be justified in light of this isolated incident of negligence, and if not, whether the Applicant could be compensated for such a termination. For the purposes of clarity, I wish to emphasize that this Court is not disregarding the negligent conduct of the Applicant as has been previously established but is construing only whether the reparation of termination is too disproportionate in the instant case.

Thus, in answering the second factual observation, I conclude that the termination of the employment of the Applicant is unjustified on the grounds that it was disproportionate in light of the circumstances of the instant case as it was an isolated incident of negligence, and the Applicant could have been reprimanded in a different way such as suspension and/deduction to his salary. It is my view that the termination being the first course of action was unwarranted for.

Decision

In having regard to the facts and the law discussed above, I now turn to consider the questions of law to which leave has been granted by the Supreme Court on 13th December 2021 which have been cited above. In considering the circumstances of the instant case, these questions cannot be answered with a simple yes or no.

In answering the first question of law, pursuant to the definition of "perverse" as set out by Justice Amarasinghe in **Jayasuriya vs Sri Lanka State Plantations Corporation (supra)**, the finding of the Labour Tribunal that the Applicant was not negligent thereby his termination was unjustified and inequitable, would amount to being perverse in the present context. While I agree that the Employee Applicant should be awarded compensation as held by the Learned President of the Labour Tribunal, the reasoning for awarding the same should have ideally been that the termination of the employment of the Employee Applicant was disproportionate to the conduct of the Applicant, thereby amounting to an unjustifiable and inequitable termination of employment. Therefore, only part of the order of the Labour Tribunal would be perverse. It must also be noted that while it has not been provided for under the first question of law, the decision of the High Court judge not to compensate the Applicant would amount to being perverse, and therefore, it can be said that part of the High Court Judgement also can be construed as perverse.

In answering the second question of law, as it is only a single factual finding that the Labour Tribunal has failed to identify, thereby making the Order only partially perverse, an appeal should have been allowed only in relation to this single finding and not the case in its entirety. Even having considered the entire case, the Learned High Court Judge having identified that the Applicant to be negligent, has rectified the lapse in the Labour Tribunal order. Thus, I accept the finding of the Learned High Court Judge that the Applicant was negligent. However, the final decision arrived at by the High Court not to compensate the Applicant is what would render the High Court judgement as perverse. Therefore, while I understand that the second question of law

requires this Court to consider whether the High Court erred in allowing this appeal, in the present context, the High Court did not err in allowing an appeal of the factual finding regarding the negligence of the Applicant but has erred in dismissing the instant case without awarding the Applicant any compensation.

In conclusion, I set aside the Judgement of the Learned High Court Judge and restore the decision of the Labour Tribunal subject to alterations. I am in agreement with the quantum of compensation which has been awarded by the Labour Tribunal. Therefore, the total amount of Nine hundred and thirty-six thousand Rupees (Rs. 936,000.00) is awarded as compensation payable to the Applicant by the Respondent within three months of this Judgement. If money is already deposited at the Labour Tribunal, this amount along with accrued interest, if any, is to be released to the Applicant. If not, the total amount of Nine hundred and thirty-six thousand Rupees (Rs. 936,000.00) plus legal interest applicable is payable to the Applicant.

Appeal Allowed subject to alterations.

JUDGE OF THE SUPREME COURT

B. P. ALUWIHARE, PC, J

I agree.

JUDGE OF THE SUPREME COURT

K.P. FERNANDO, J

I agree.

JUDGE OF THE SUPREME COURT