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

In the matter of an application for Leave to Appeal made in terms of Section 31DD of the Industrial Disputes Act No. 53 of 1950 (as amended) and the Supreme Court Rules.

Balage Padmarupa.
Near the Rail Gate,
Welhengoda,
Ahangama.

APPLICANT

VS

1. P.P. Gunawardena.
Sarath Gunawardena Mawatha,
Wewala,
Hikkaduwa.

2. Sidath Charuka Gunawardena.
Sarath Gunawardena Mawatha,
Wewala,
Hikkaduwa.

RESPONDENTS

AND

SC APPEAL NO.29/2023

SC HC LA No. 72/2020

Galle H.C. Case No. LT/AP/1219/2017

L.T. Case No. LT4/G/87/2015

1. P.P. Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

2. Sidath Charuka Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

RESPONDENTS-APPELLANTS

VS

Balage Padmarupa.

Near the Rail Gate,

Welhengoda,

Ahangama.

APPLICANT-RESPONDENT

AND NOW BETWEEN

1. P.P. Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

2. Sidath Charuka Gunawardena.
   Sarath Gunawardena Mawatha,
   Wewala,
   Hikkaduwa.

   (Appearing through his Power of Attorney holder Buddhika

Nilushan Ukwatta at C/FO 03 98/62, Richmmond Hill Residencies, Wekunagoda, Galle.)

RESPONDENTS- APPELLANTS-APPELLANTS

VS

Balage Padmarupa.

Near the Rail Gate,

Welhengoda,

Ahangama.

APPLICANT-RESPONDENT-RESPONDENT

BEFORE : S. THURAIRAJA, PC, J;

A.L. SHIRAN GOONERATNE, J &

JANAK DE SILVA, J.

COUNSEL : Chathura Galhena with Viduri Sulakkana instructed by Dharani Weerasinghe for the Respondent-Appellant-Appellant.

Chamara Nanayakkarawasam for the Applicant-Respondent-Respondent.

WRITTEN SUBMISSIONS: Respondent-Appellant-Appellant on 31st May 2010.

Applicant-Respondent-Respondent 25th September 2023.

ARGUED ON : 03rd October 2023.

DECIDED ON : 15th February 2024.

S. THURAIRAJA, PC, J.

The Applicant-Respondent-Respondent (hereinafter "the Applicant") filed an application in the Labour Tribunal on 14th August 2015, alleging the Respondent-Appellant-Appellant (hereinafter "the Respondent") to have unjustly terminated his services. The Appellant sought *inter alia* reasonable compensation against the unjust termination, gratuity for a service period of 15 years, cost and such other reliefs as the Court deems fit and reasonable. The Respondent pleaded that no relief should be granted to the Applicant as no termination of services had taken place and moved that the application be dismissed.

The Labour Tribunal following an inquiry, by its order dated 28th September 2017 decided the case in favour of the Applicant and granted compensation equivalent to the salary of 36 months. Being dissatisfied with the said order, the Respondent invoked the appellate jurisdiction of the Provincial High Court of Southern Province holden in Galle (hereinafter referred to as "the High Court") under section 31DD of the Industrial Disputes Act (as amended) and the High Court pronounced its judgment on 22nd July 2020. The learned High Court Judge in his judgment, *inter alia,* upheld the order of the President of the Labour Tribunal on the basis that the findings of the Tribunal were correct. Being dissatisfied with the said order the Respondent filed a leave to appeal application and after the matter was supported, leave was granted on the following questions of law:

"

(a) Did the President of the Labour Tribunal and the Provincial High Court misdirected themselves in deciding that the Respondent-Appellant-Petitioners had unjustly terminated the services of the Applicant-Respondent-Respondent?

(b) Did the Provincial High Court misdirected in deciding that the learned President of the Labour Tribunal has correctly calculated the quantum of compensation?"

[sic]

Factual Matrix

The Applicant's position was that he was employed in a business named 'Hotel Francis' managed by the Respondents since the year 2000, and in the year 2015, the said hotel was closed down, whereupon the Applicant was deemed to have been terminated from the employment. The position of the Respondents was that there was no termination but due to the ill health of the 2nd Respondent who managed the hotel, they were compelled to close down the business and all other employees except the Applicant had accepted compensation, but the Applicant without accepting the compensation has gone to the Labour Tribunal alleging unlawful termination of his services.

The learned President of the Labour Tribunal has based his entire finding on the basis that the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as amended (hereinafter sometimes referred to as "TEWA") should apply in the event a business was closed down, and the termination of the Applicant amounts to an unlawful termination due to the Respondent's failure to comply with the Act before closing down the business.

> "සේවකයන් සිටින ආයතනයක් වසා දමන්නේ නම් ලංකාවේ වලංගු නීතියට කළ යුතු ක්‍රියා පටිපාටියක් හඳුන්වා දී ඇති අතර එනම් අනුව එය සේවකයන්ගේ සේවය අවසන් කිරීමේ පනත යටතේ කම්කරු කොමසාරිස් වරයාට දැනුම් දී අදාළ ක්‍රියා මාර්ග ගැනීමයි
>
> *[When closing a business with employees, a procedure has been introduced by the prevailing law in Sri Lanka and that is to inform the Commissioner of Labour and follow the relevant procedure under Termination of Employment of Workmen Act]*"
>
> "ආයතනය වසා දැමීම නිසා ඉල්ලුම් කරුගේ සේවය අවසන් වී ඇති බව ද එසේ වසා දැමීමට ක්‍රියා කිරීම කාලයක සිට සිදු වූ ක්‍රියාවක් වීම මත ක්ෂණිව පාලනයෙන් තොරව සිදු වූ සිද්ධියක් නොවන බැවින් (පූර්වාපේක්ෂණය කළ හැකි ක්‍රියාවක් බැවින්) එසේ වසා දමන්නේ නම්

මා මුලින් සඳහන් කරන ලද පරිදි සේවකයන්ගේ සේවය අවසන් කිරීමේ පනත යටතේ ක්‍රියා කළ යුතු නමුත් එසේ ක්‍රියා නොකරමින් ආයතනය ඒක පාර්ශ්වික ව වසා දමා ඉල්ලුම්කරුගේ සේවය අවසන් කිරීම සිදු කිරීම අසාධාරණ හා අයුක්ති සහගත බවට තීරණය කරමි

[The applicant's employment has ended due to the closure of the establishment and the said closure is an action that has taken place over a period of time and is not an abrupt uncontrolled event (as it was a foreseeable act). I am of the view that it is unfair and unjust to unilaterally close down the institution and terminate the service of the applicant without acting under the Termination of Employment of Workmen Act.]''

[Approximate translations added]

It is submitted by the Respondent that the learned President of the Labour Tribunal in applying the TEWA, has failed to consider the limitation imposed by the provisions of the Act itself. In that, Section 3(1)(a) of the Act becomes relevant insofar as the applicability of the Act is concerned.

Section 3(1)(a) of the Act provides;

"*The provisions of this Act, other than this section, shall not apply to an employer by whom less than fifteen workmen on an average have been employed during the period of six months preceding the month in which the employer seeks to terminate the employment of a workman.*"

It is to be noted that the learned President of the Labour Tribunal has failed to give due consideration to the provision of the Act where it states that the TEWA applies only to a business in which there were more than fifteen (15) employees on an average during the period of preceding six (6) months. According to the evidence of the

Applicant himself, there have been less than fifteen (15) persons employed by the business of the Respondents.

ප්‍ර: කවුද හිටියෙ?

[Q: who was there?]

උ: සේවකයින් හිටියා.

[A: There were workers]

ප්‍ර: කී දෙනෙක් හිටියාද?

[Q: How many were there?]

උ: 5 ක් 6 ක්.

[A: 5 or 6]

ප්‍ර: ඔක්කොම සේවකයින් කීයක් විතර ඉන්නවා ද ඔය ආයතනයෙ ?

[Q: In total, how many workers were there in that business?]

උ: ඒ කාලයේ සිට 40 ක් විතර.

[A: About 40 from those days]

ප්‍ර: ඒ අවුරුද්දෙ?

[Q: In that year?]

උ: 7 ක්

[A: 7]

According to the evidence of the 2nd Respondent the said position has been confirmed.

ප්‍ර: හෝටලය වහන අවස්ථාව වන විට සේවකයන් කීයක් සේවය කළා ද?

[Q: At the time of closing the hotel, how many workers were there?]

උ: 5 ක් හෝ 6 ක්

[A: 5 or 6]

In this backdrop, the Counsel for the Respondent submitted that the learned President of the Labour Tribunal has applied the TEWA without considering the applicable

provisions in the Act. The entire finding of the Labour Tribunal President is based on this incorrect legal application and, hence, the finding of the President of the Labour Tribunal regarding the unlawful termination cannot stand. Accordingly, I answer the 1st question of law in the affirmative.

In the second ground of appeal, it was contended the calculation of compensation to be neither rational nor justifiable due to the following reasons:

i. At the time of giving evidence in the year 2016, the Applicant was 73 years old and the closing down of the business took place in the year 2015 when he was 72 years old.
ii. The Applicant in his evidence has stated that he could have worked for a few more years despite his old age.
iii. Soon after the closure of the business, he had found alternative employment with a higher salary.

As I observed, in the judgment of the Provincial High Court, the learned High Court Judge has also made the same erroneous findings regarding the applicability of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 as well as the calculation of compensation. Furthermore, I am of the view that, even though the judgment of ***Up Country Distributors (Private) Limited v. Subasinghe*** **(1992) 2 SLR 330** has been cited in the judgment of the Provincial High Court, the factors that need to be considered in calculating compensation have been misapplied.

The parameters set out in the said case, namely:

a. the nature of the employer's business and his capacity to pay,

b. the employee's age, and

c. the nature of his employment,

have not been properly applied in justifying the calculation of compensation.

In ***Ceylon Transport Board v. A.H. Wijerat*ne (1975) 77 NLR 481** at 498, Vythialingam J., after careful analysis of the law and the just and equitable concept, held as follows:

> *"The Labour Tribunal should normally be concerned to compensate the employee for the damages he has suffered in the loss of his employment and legitimate expectations for the future in that employment, in the injury caused to his reputation in the prejudicing of further employment opportunities. Punitive considerations should not enter into its assessment except perhaps in those rare cases where very serious acts of discrimination are clearly proved. Account should be taken of such circumstances as the nature of the employer's business and his capacity to pay, the employee's age. the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal including the nature of the charge levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights and any other relevant considerations. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place.''*

The calculation of compensation is subjective and it depends on several factors such as the type and nature of employment, period served, past conduct of the employee, contribution to the employer/establishment, future prospects, type of offence committed or the reason for termination. Moreover, when computing the compensation, the Tribunal should be mindful of the age of the Applicant, the service he had rendered as well as his capacity for future employment.

As discussed in this case, when the age of the employee is considered, he is far beyond the age of retirement of a public or private sector employee. Where the nature of the business and ability to pay compensation is considered, it was established that the business has been closed down and the 2nd Respondent is terminally ill even at the time of giving evidence which itself was the reason to close down the business. Where the present employment of the Applicant was considered, he is already employed elsewhere for a higher salary which makes him further disqualified for compensation since he has not sustained a financial loss by not being employed by the Respondents.

When all the totality of the above facts are taken into account, it shows that the learned High Court Judge has dismissed the appeal without taking into consideration the proper legal and factual merits of the case. Hence, I answer the 2nd question of law, too, affirmatively.

Furthermore, as I have previously noted, the question of law concerning the applicability of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 (as amended) to the business of the Respondents has not been duly analysed by the learned High Court Judge. The Respondents-Appellants-Appellants, having had 6 or 7 employees during the time of closure and several months before that, cannot be placed within the ambit of the Act. The said error or failure in analysis by the learned High Court Judge is an error which goes to the root of the case. Accordingly, the said decision cannot stand.

Decision

In the said circumstances, for the foregoing reasons, I am of the view that the findings of the learned President of the Labour Tribunal and the learned High Court Judge of the Provincial High Court of Galle with regard to the applicability of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 (as amended) is erroneous. Further, I am of the view that the learned Judge of the Provincial High Court has misdirected himself in deciding that the learned President of the Labour Tribunal has correctly calculated the quantum of compensation.

As such, both questions of law are answered in the affirmative.

However, in altering the aforementioned errors committed by the learned President of the Labour Tribunal and learned High Court Judge, this Court must, too, give an order that is fair, just and reasonable in the eyes of a reasonable man. It would not be desirable nor would it be fair, just and reasonable for employers to simply terminate the services of an employee without prior notice where such termination is plainly foreseeable as was in the instant case.

I accordingly alter the order made with regard to the compensation directing the Respondents-Appellants-Appellants to pay the Applicant-Respondent-Respondent, *ex gratia*, a sum equivalent to the salary of one month at the time of termination.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

A.L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I agree.

JUDGE OF THE SUPREME COURT