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

In the matter of an Appeal from a Judgment of the High Court holden in Homagama, in terms of the Industrial Disputes Act read with the Rules of the Supreme Court, with Leave to Appeal obtained.

Ceylon Cold Stores PLC
No. 148, Vauxhall Street,
Colombo 2.

Respondent – Appellant – Appellant

SC Appeal No. 17/2022
SC/HC/LA 84/2020
HCALT No. 5/2019
LT Application No. 30/1740/2017

Vs.

Inter Company Employees' Union
No. 259/9, Sethsiri Mawatha,
Koswatte, Talangama.
(On behalf of **Kannaariam Nadarajah**)

Applicant – Respondent – Respondent

Before: **P. Padman Surasena, J.**
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardena, J.

Counsel:	Mr. Suren Fernando with Ms. Khyati Wickramanayake for the Respondent – Appellant – Appellant. Mr. Shantha Jayawardena with Ms. Thilini Vidanagamage for the Applicant – Respondent – Respondent [Ms. Thilini Vidanagamage appeared for the Respondent during the hearing stage and made oral submissions.]
Argued on:	13th February 2023
Written Submissions filed on:	7th March 2023 for the Respondent – Appellant – Appellant 14th March 2023 for the Applicant – Respondent – Respondent
Judgment delivered on:	8th May 2025

Yasantha Kodagoda, P.C., J.

Introduction and background

1) This Judgment relates to an Appeal against a Judgment dated 19th August 2020 of the High Court of the Republic of Sri Lanka holden in Homagama (Appeal No. 5/2019) which decided an Appeal presented to that court against an Order dated 8th March 2019 of the Labour Tribunal of Kaduwela (LT Application No. 30/1740/2017).

2) The Applicant – Respondent – Respondent (hereinafter sometimes referred to as the 'Respondent') is a registered Trade Union. It filed an Application in the Labour Tribunal on behalf of one Kannaariam Nadarajah (hereinafter sometimes referred to as the 'employee' or as 'Nadarajah'), alleging that the employee's services were unjustly terminated by the Respondent – Appellant – Appellant (hereinafter sometimes referred to as the 'Appellant' or as the 'Appellant company'). The Labour Tribunal which inquired into the matter held in favour of the Respondent

(giving relief to the employee – Kannaariam Nadarajah), and by its order dated 8th March 2019 ruled that the termination of employment of the employee was unfair and unjustified. The learned President of the Labour Tribunal ordered that (i) the employee (Nadarajah) be reinstated with an appropriate salary adjustment on the assumption that employment was uninterrupted, and (ii) be paid a sum of Rs. 781,050.00 as back-wages in respect of the loss of fifteen (15) months of wages.

3) Aggrieved by that outcome, the Appellant company appealed to the High Court. After an appellate hearing, by its judgment dated 19th August 2020, the High Court dismissed the Appeal.

4) Aggrieved by the afore-said Judgment of the High Court, the Appellant company filed in a Petition in this Court dated 25th September 2020, and sought *Leave to Appeal* to this Court.

5) Sequel to learned counsel for the Appellant company supporting the Petition, a differently constituted Division of this Court has been pleased to grant *Leave to Appeal* in respect of the questions of law, which were contained in sub-paragraphs (a), (c), (d), (g) and (h) of paragraph 10 of the Petition. Those questions of law are as follows:

   a) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunal had* ***failed to evaluate the evidence of the Petitioner Company in its entirety****?*
   b) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunal had erred in law in* ***failing to duly appreciate and apply the law relating to admissibility of confessions in Labour Tribunals****?*
   c) *Did his Lordship of the High Court err in law in* ***failing to properly ascertain and apply the principles of law pertaining to reinstatement****, especially where* ***a loss of confidence*** *reposed in the Applicant has been occasioned?*
   d) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunal had erred in law in* ***failing to duly appreciate that the Applicant did not adduce proof of actual losses or of any attempt to mitigate his losses****, and was thus* ***not entitled to compensation/back wages****?*

e) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunal had* ***erred in law in applying the principles of law pertaining to calculation of compensation****?*

[Emphasis added.]

Proceedings before the Labour Tribunal and Order of the tribunal

6) Kannaariam Nadarajah had been an employee of the Appellant company from 1st September 1998 to 24th November 2017. On or about the 24th November 2017, the Appellant company terminated his employment purportedly due to an incident involving theft of property of the Appellant company, which is said to have occurred on 1st October 2017. Initially, on 4th October 2017, the employee was suspended from employment without pay. The termination of employment was sequel to the conduct of a disciplinary inquiry by an external inquiring officer and based on the findings thereof. As at the time of termination of employment, the employee was serving as a 'Service Bay Operator cum Driver' and was drawing a monthly salary of Fifty-Two Thousand Seventy Rupees (Rs. 52,070/=).

7) By Application dated 15th December 2017, the Respondent (on behalf of the dismissed employee) complained to the Labour Tribunal of unfair and unjustifiable termination of employment by the Appellant company, and sought an order of reinstatement with back wages or in the alternative compensation. The Appellant company filing Answer dated 23rd January 2018, admitted having employed Kannaariam Nadarajah and having terminated his employment. The Appellant company sought to justify the termination of employment on the footing that Kannaariam Nadarajah was *'guilty'* of having committed a serious act of misconduct. It was the position of the Appellant company that Nadarajah was served with a charge-sheet and at the end of an independent domestic inquiry, he was found *'guilty'* of charges contained in the said charge-sheet. In the circumstances, the employment of Kannaariam Nadarajah was terminated. The Appellant company pleaded that the Application filed in the Labour Tribunal be dismissed since the termination of employment was just and reasonable.

8) The Appellant company had placed evidence before the Labour Tribunal to establish that the misconduct of Kannaariam Nadarajah related to (i) throwing away certain goods of the company with the intention of later surreptitiously removing them, (ii) attempting to cause financial loss to the company, and (iii) engaging in conduct unbecoming of an employee of the company. The goods of

the Appellant company which were alleged to have been thrown away by Nadarajah had been six (6) thirty (30) feet long stainless-steel tubes and an aluminum can of 5 litre capacity. The combined value of those goods was estimated at Rs. 14,000.00. However, these good have been recovered, and thus no actual loss had been caused to the Appellant company.

Narrative of the Appellant company presented to the Labour Tribunal:

9) Security services for the premises of the Appellant company situated in Ranaala were provided by an external security service provider (a separate company) named 'Watch Guard Security'. Though it was not a routine working day, on 1st October 2017, Kannaariam Nadarajah worked in the garage of the company. Around 8.00 – 8.30 p.m., a security officer (designated as 'Ordinary Security Officer') named W.A.S. Wijesinghe who was on duty at a security post located in close proximity to the garage, had seen a person wearing a blue colour T-shirt and a white colour cap throwing over the boundary wall to the adjoining land some steel tubes. Wijesinghe rushed to the garage and saw a workman (Nadarajah) present inside the garage. At that time, only that workman was present in the garage. He (Wijesinghe) had identified that workman (Nadarajah) as the person whom he had seen short while ago wearing a blue colour T-shirt and a white colour cap throwing steel tubes over the boundary wall.

10) Wijesinghe initially notified this incident to Senior Security Officer Sanka Jayaruk, who around 8.25 p.m. passed on this information to the Chief Security Officer R.M.A.K. Ratnayake, also of Watch Guard Security. Later, Wijesinghe also directly communicated what he saw to Ratnayake.

11) On the instructions of Ratnayake, some security guards proceeded to the adjacent land (a coconut cultivation), and recovered six steel tubes and an aluminum can and brought them back to the premises of the company and kept at the main security post. Around 9.00 p.m., Ratnayake telephoned the Security Coordinating Officer of the Appellant company U.H.D. Dharmapriya (who was an official of the company) and conveyed to him information relating to this incident.

12) Later, when Nadarajah came to the main security post to sign-off for the day (still wearing a blue colour T-shirt and a white colour cap), Wijesinghe showed him to Ratnayake. In line with directives issued by the Appellant company, as Watch Guard Security was an outsourced firm providing security services to the

Appellant company, Ratnayake did not take any action against Nadarajah. Nadarajah left the premises of the company without being informed of what was seen by Wijesinghe, being questioned in that regard, searched or his statement being recorded.

13) On the advice given by Dharmapriya, Ratnayake made an entry (a note) ("R3") regarding the incident in the Information Book (an official book maintained by security personnel and kept at the security post). Also, on the advice of Dharmapriya, Ratnayake did not include in his entry the identity (the name) of the employee (Nadarajah) who was seen throwing away property of the company. The reason was that Nadarajah was a long-standing employee of the company, and since there were two strong Trade Unions functioning within the Appellant company.

14) By letter dated 2nd October 2017 addressed to the Security Manager of the company, Ratnayake communicated details of the incident which occurred on the evening of 1st October 2017 ("R4"). On the evening of 2nd October 2017, at the security post, Dharmapriya in the presence of Ratnayake, questioned Nadarajah regarding the incident. While crying, Nadarajah admitted the allegation against him of throwing-over the parapet wall, property of the company, namely six iron tubes and the can. On 3rd October 2017 at 10.35 a.m., Dharmapriya made an entry to this effect in the Information Book ("R2"). However, later, when Nadarajah was interviewed by personnel of the Human Resources Division of the Appellant company and his statement was recorded ("R9"), he denied both the allegation against him and that he confessed to Dharmapriya.

15) By letter dated 4th October 2017, the Appellant company conveyed its decision to Nadarajah that he had been suspended from employment due to the afore-stated misconduct. Consequently, by letter dated 9th October 2017, Nadarajah was required to 'show cause' as to why disciplinary action should not be taken against him with regard to his misconduct ("R7"). In response, by a letter submitted to the Appellant company on 11th October 2017, Nadarajah refuted the allegation against him. Following the conduct of a disciplinary inquiry by an external inquiring officer and the findings thereon, the employment of the employee was terminated ("R8").

16) This narrative of the Appellant company was presented to the Labour Tribunal through the testimonies of witnesses U.H. Dayawansha Dharmapriya (Security Coordinator of the company), R.M.A. Kumara Ratnayake (Chief Security Officer) and Anurasiri Nithulpitiya (an official of the Human Resources Department of the company). Documents "R1" to "R9" were marked and produced.

Position of the Employee

17) Employee Nadarajah worked at the premises of the Appellant company in Ranaala. On 1st October 2017 he was on duty. It is his position that he did not throw over the parapet wall any goods of the company. Around 9.00 p.m. on his way out of the premises, when he went to the security post to sign-off for the day, he saw Security Officer Ratnayake. Ratnayake did not question him. The following day, Dharmapriya questioned him in the presence of Ratnayake. Dharmapriya did not explain the allegation of misconduct to Nadarajah. Dharmapriya told Nadarajah that *"A small incident had taken place yesterday. You will lose your job. Therefore, you should admit."* In response, Nadarajah said *"As I have not committed any offence, I cannot admit"*. Basically, he denies having committed any misconduct, whatsoever.

18) According to Nadarajah, he had an unblemished service record of nineteen (19) years at the Appellant company. He was a dedicated and loyal employee, who did not even get late to report for duty. This aspect of Nadarajah's testimony has been conceded by Nithulpitiya who testified on behalf of the Appellant company.

19) This narrative of the employee was presented to the Labour Tribunal by the employee himself testifying. No other witness testified on behalf of the Applicant. Documents "A1" to "A3" were produced on his behalf.

Findings contained in the Order of the Labour Tribunal

20) Following inquiry, the learned President of the Labour Tribunal delivering his Order dated 8th March 2019 (produced marked "X6"), made the following observations and expressed the under-mentioned reasoning and pronounced the following findings:

    a. Though Ratnayake claims that Wijesinghe showed Nadarajah to him when the latter came to the security post to sign-off for the day, when making an entry in the Information Book ("R3"), he has not referred to Nadarajah as the person who was the culprit who threw the tubes and the can over the parapet wall. According to Ratnayake, he refrained from noting

Nadarajah's name in the entry he made in the Information Book, since Dharmapriya advised him not to. However, no clarification was provided on behalf of the company as to how Trade Unions would have reacted, had Ratnayake in his entry in the Information Book referred to Nadarajah by name.

b. Dharmapriya has admitted that the company has no documentary evidence (other than the entry made by himself – "R2") emanating from Nadarajah containing an admission that he threw over the parapet wall the afore-stated property of the company.
c. Though Dharmapriya had advised Ratnayake not to mention in the note the name of Nadarajah, when he (Dharmapriya) made a note in the Information Book ("R2") that Nadarajah admitted to his wrongdoing, he had no reservation in recording the name of the culprit workman.
d. According to Nadarajah's letter of explanation ("A1"), notwithstanding his having been purportedly identified by Wijesinghe and the goods alleged to have been thrown away by him over the parapet wall to the next compound having been brought to the security post, when he came to the security post to sign-off for the day, security officers including Wijesinghe (notwithstanding their being former police officers and members of the armed forces), did not question him regarding what he is alleged to have done.
e. Wijesinghe who was the sole eye-witness to the incident did not testify at the inquiry conducted by the Labour Tribunal. No attempt was made to summon him to testify. Even a written statement of his, was not produced before the Labour Tribunal. No reason was given for not having called Wijesinghe to testify.
f. While testifying, Nadarajah vehemently denied the allegation against him, and adverted to the fact that he had worked for the company for nineteen (19) years, and he had never been accused of any misconduct or other wrongdoing. This aspect of good character of Nadarajah had been admitted by Nithulpitiya who testified for the company.

21) Due to the foregoing findings and reasoning, the learned President of the Labour Tribunal concluded that the company had not established on a balance of probability that the employee had committed any of the wrongdoing contained in the charge-sheet served on him. Therefore, he held that the termination of employment was unreasonable and unjust.

Appeal to the High Court by the Appellant company and the Judgment of the High Court

22) By Petition of Appeal dated 5th April 2019, the Appellant company appealed to the High Court against the Order of the Labour Tribunal.

23) Following the hearing, the learned Judge of the High Court pronounced Judgment dated 19th August 2020. In his Judgment (which was sought to be impugned by the Appellant company in this Appeal), the learned Judge of the High Court observed the following:

a. The company had failed to produce eye-witness testimony (direct evidence) regarding the alleged misconduct on the part of the employee (Nadarajah). The testimony provided in that regard was hearsay.
b. Security officers (including the security officer who had allegedly seen the misconduct) who had met Nadarajah soon after the alleged misconduct (when the latter came to the security post to sign-off for the day) had neither questioned Nadarajah nor apprehended him. Further, they had not informed the police. This conduct on the part of the security personnel is difficult to believe, had they promptly identified the culprit.
c. It is incorrect to place reliance on the purported confession said to have been made by Nadarajah to Dharmapriya.
d. The law of Evidence places restrictions on the use of a confession made to a person in authority.
e. In view of 'c' and 'd' above, it is not possible to act upon the confession said to have been made by Nadarajah to Dharmapriya.
f. The learned President of the Labour Tribunal had correctly determined that "R9" does not serve as evidence against Nadarajah.
g. The finding of the learned President of the Labour Tribunal that the services of Nadarajah had been wrongfully and unjustifiably terminated, is correct.

Submissions of the learned counsel for the Appellant

24) Learned counsel for the Appellant submitted that the learned President of the Labour Tribunal had failed to appreciate the evidence presented on behalf of the Appellant company. He submitted that, notwithstanding the absence of eye-witness testimony regarding the incident, the evidence presented on behalf of the Appellant company was sufficient to establish the identity of the culprit, that being Nadarajah. He also submitted that the Appellant company had sufficiently

explained as to why Ratnayake when making the entry marked "R3" had not stated the name of Nadarajah as being the culprit.

25) Learned counsel also submitted that, notwithstanding the Appellant company not having presented the testimony of Security Officer Wijesinghe (the sole eye-witness), the Appellant company had placed before the Labour Tribunal sufficient circumstantial evidence to establish that Nadarajah was the culprit who threw the property of the company over the parapet wall. He submitted that both the learned President of the Labour Tribunal and the learned High Court Judge had failed to appreciate that aspect of the case for the Appellant company, and had thereby erred in law by failing to correctly appreciate the evidence.

26) Citing sections 17, 18, 21 and 24 of the Evidence Ordinance, learned counsel submitted that the contents of a confession are admissible against the maker of such statement. He emphasised that section 24 is applicable only to criminal cases. He asserted that the Respondent (on behalf of Nadarajah) had not suggested that the confession was made under an inducement, threat or promise. Thus, in any event, section 24 was inapplicable. He submitted that the learned President of the Labour Tribunal had failed to appreciate that the confession made by Nadarajah to Dharmapriya in the presence of Ratnayake and in the circumstances testified to by these two witnesses was cogent and uncontradicted evidence, the value of which had not been correctly considered and appreciated. In this regard, he submitted that Dharmapriya's testimony that Nadarajah confessed to him, was not impeached in cross-examination. Further, in these circumstances, both the learned President of the Labour Tribunal and the learned Judge of the High Court were duty-bound to have considered the admissibility and the evidential value of the confession made by Nadarajah. In this regard, learned counsel cited the *dicta* of this Court in *Ceylon Transport Board v. Gunasinghe [72 NLR 76], Mackwoods Ltd. v. Tea, Rubber and General Produce Workers' Union [74 NLR 183]* and *Ceylon Transport Board v. Ceylon Transport Workers' Union [71 NLR 158].* He alleged that both judges had applied a moral standard which is unknown to the law of this country.

27) Learned counsel for the Appellant company submitted that both the Labour Tribunal and the High Court had failed to correctly apply principles of law relating to ordering of reinstatement of an employee whose services had been terminated on grounds of misconduct when such misconduct had resulted in the employer having lost confidence in the employee. In this regard, learned counsel

cited the judgments of this Court in *Peiris v. Celtel Lanka Limited [(2012) 1 Sri L.R. 170], Bank of Ceylon v. Manivasagasivan, [(1995) 2 Sri L.R. 79], Shirani Wanigasinghe v. Hector Kobbekaduwa Agrarian Research and Training Institute, [SC Appeal 73/2014, S.C. Minutes 02.09.2015], United Industrial Local Government and General Workers' Union v. Independent Newspapers Ltd. [76 NLR 529]* and *Premadasa Rodrigo v. Ceylon Petroleum Corporation [(1991) 2 Sri L.R. 382],* and submitted that as Nadarajah was found *'guilty'* of having committed theft, the Appellant company had lost confidence in him, since he had breached trust. Therefore, the Appellant company should not be compelled to re-employ Nadarajah. He also submitted that, even if the termination of Nadarajah's employment was unjust, still, it would in the circumstances of the case be inappropriate to order reinstatement. In that regard, learned counsel cited the case of *Jayasuriya v. Sri Lanka State Plantations Corporation [(1995) 2 Sri L.R. 379].*

28) Learned counsel also submitted that the learned President of the Labour Tribunal had failed to correctly compute compensation payable to Nadarajah, as the Applicant (Trade Union) had failed to adduce evidence of actual losses suffered by Nadarajah, and had not attempted to mitigate the loss. Learned counsel submitted that Nadarajah had not testified as to how he remained unemployed (following termination of employment by the Appellant company) notwithstanding his attempts to secure alternate employment. In this regard, learned counsel cited *Millers Limited v. Ceylon Mercantile Industrial and General Workers' Union [(1993) 1 Sri L.R. 179].*

29) In view of the foregoing submissions, learned counsel for the Appellant company urged that this Appeal be allowed and the Judgment of the High Court and the Order of the Labour Tribunal be set aside.

Submissions of learned counsel for the Respondent

30) Citing several portions of the Order of the learned President of the Labour Tribunal, learned counsel for the Respondent submitted that, the President of the Labour Tribunal had expressed the view that, given the version of events deposed to by the witnesses of the Appellant company, the conduct of the security personnel and the Security Coordinating Officer of the Appellant company cannot be believed. She submitted that if in fact the culprit had been promptly identified as being Nadarajah, the fact that he was permitted to leave the premises of the company on the night of the 1st October 2017 was highly improbable.

31) Learned counsel for the Respondent submitted that, though section 36(4) of the Industrial Disputes Act provides that a Labour Tribunal shall not be bound by any of the provisions of the Evidence Ordinance, in *Ceylon University Clerical and Technical Association v. University of Ceylon [72 NLR 84]* this Court had held that, it would be well for Labour Tribunals to be conversant with the wisdom contained in the Evidence Ordinance and treat it as a safe guide. She also cited *Dharmasena v. Superintendent, Kekunagoda Estate [SC Appeal 142/10, S.C.M. 13.08.2015]* wherein Justice Priyantha Jayawardena had held that, it is useful to use the Evidence Ordinance as a guide when a Labour Tribunal conducts an Inquiry.

32) Learned counsel for the Respondent submitted that, it was correct for the Labour Tribunal to have excluded from its consideration hearsay evidence given by witnesses Ratnayake and Dharmapriya regarding the identification of Nadarajah as the person responsible for the theft, as their testimonies in that regard were inadmissible. Citing *Colombage v. Ceylon Petroleum Corporation [(1999) 3 Sri L.R. 150]*, she submitted that this Court has held that, hearsay testimony is inadmissible and is excluded on the plainest considerations of fairness and justice, for it is material upon which no reliance could be placed.

33) She submitted that the learned President of the Labour Tribunal had expressed the view that it was unethical to accept oral testimony provided by two witnesses regarding the purported confession said to have been made by Nadarajah to Dharmapriya, particularly since even the Evidence Ordinance imposed severe restrictions on the use of a confession made to a person in authority.

34) Learned counsel for the Respondent submitted that, while an 'admission' may be treated as the 'genus', a 'confession' which is an admission of guilt by an offender, would be a 'species' of the same genus. She also submitted that, while 'admissions' usually arise in civil proceedings, 'confessions' arise only in criminal proceedings. She emphasised that, unlike an admission, a confession would not be admissible unless made voluntarily. Therefore, certain special rules are applicable for the admissibility of confessions, which include section 24 of the Evidence Ordinance.

35) Citing from *Barendra Kumar Gosh v. Emperor [37 Calcutta 467]*, learned counsel submitted that although there can be no surer foundation for a conviction, confessions must always be looked upon with suspicion. Citing *R. v. Mallinson*

[(1977) Criminal Law Review 161], she submitted that evidence of an oral confession of guilt ought to be received with great caution. She also submitted that before acting upon a confession, the court must be satisfied that the confession was voluntary and made without any compulsion. She further submitted that, the court must also be satisfied of the truthfulness of the contents of the confession and the sufficiency of that item of evidence. Citing E.R.S.R. Coomaraswamy on "The Law of Evidence" [2nd Edition, Volume I, page 400], learned counsel submitted that, if a confession is inconsistent, improbable or incredible, or is contradicted or discredited by other evidence, or is an emanation of a weak or excited state of mind, the jury or judge may exercise their discretion and reject it, either wholly or in part. In the circumstances, she submitted that, since the evidence is of a purported oral confession which emanates from the testimonies of Dharmapriya and Ratnayake (who were responsible for the security of the property of the company, and thus were interested witnesses), both the Labour Tribunal and the High Court had rightly doubted their testimony, and therefore rejected the said item of evidence. It appears clearly, that the Labour Tribunal and the High Court had doubted the testimony relating to Nadarajah having purportedly made such a confession and its voluntariness.

36) Quoting from *Premadara Rodrigo v. Ceylon Petroleum Corporation [(1991) 2 Sri L.R. 382]* learned counsel for the Respondent submitted that the Appellant company cannot rely on the concept of 'loss of confidence', as loss of confidence must be based on established grounds of misconduct which the law regards as sufficient. In the instant case, she submitted that the Appellant company had failed to establish that Nadarajah was *'guilty'* of theft of company property. Further she submitted that in *Bank of America v. Abeygunasekera [(1991) 1 Sri L.R. 317]* this Court has held that the mere assertion by an employer is not sufficient to justify the termination of a workman on the ground of loss of confidence. When such an assertion is made, it is incumbent on the Labour Tribunal to consider whether the allegation is well founded. Therefore, it would become necessary for the employer to lead evidence of facts from which such assertion could be proved directly or inferentially.

37) In view of the foregoing submissions, learned counsel for the Respondent urged that this Court be pleased to dismiss the Appeal.

Analysis and evaluation of evidence

38) **Weakness of the evidence relating to the identification of Nadarajah as the offender –** The narrative provided on behalf of the Appellant company as regards the incident involving property of the company having been thrown over the parapet wall on to the next compound and the identification of Nadarajah as the culprit of such misconduct, does stem from the sole purported eye-witness - Security Officer Wijesinghe. He did not testify. Nor was he called to testify. As has been pointed out by the learned President of the Labour Tribunal, not even an attempt had been made to call Wijesinghe to testify. In fact, Wijesinghe had not been called to testify even at the domestic inquiry conducted against Nadarajah. Thus, a doubt looms as to why the evidence of the purported eye-witness was withheld by the Appellant company. This is an ideal instance where the inference contained in section 114(f) of the Evidence Ordinance may be applied – that being, that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it.

The evidence provided with regard to the incident proper stems from that of Chief Security Officer Ratnayake and Security Coordinating Officer Dharmapriya. While Rathnayake's testimony related to what Security Officer Wijesinghe is alleged to have told him, the testimony of Dharmapriya related to what Chief Security Officer Ratnayake is alleged to have told him. Thus, while the evidence of Ratnayake was 'hearsay', the evidence of Dharmapriya as regards the offender being Nadarajah, can be classified as being 'double hearsay'. In fact, under cross-examination, when Dharmapriya testified regarding Wijesinghe having purportedly seen the incident and the subsequent identification of Nadarajah as being the person who committed the act of misconduct, learned counsel for the Applicant – Respondent – Respondent had insisted that this item of hearsay evidence be admitted 'subject to proof'. That appears to be the Applicant's own way of contesting the hearsay testimony provided and instating that direct evidence (eye-witness testimony) be tendered. However, the Respondent – Appellant – Appellant (the 'company') had not proven that item of evidence by calling Wijesinghe to testify.

In ordinary judicial proceedings to which the Evidence Ordinance shall apply, this evidence would have been inadmissible. Furthermore, as held by Chief Justice Wood Renton in ***Korossa Rubber Company v. Silva et. al.*** *[20 NLR 65]*, even in circumstances where the admissibility of 'double hearsay' evidence is not affected,

the impact of 'double hearsay' evidence is one that goes to the evidentiary weight of such evidence. As this Court has indicated in several previous judgments (two of which were cited by learned counsel for the Respondent), though a Labour Tribunal is not obliged to adhere to the rules of evidence or provisions of the Evidence Ordinance, it is advisable that as far as it is reasonably possible, every effort should be made to be guided by the principles of evidence contained in the Evidence Ordinance. That is because the application of such principles would enable the tribunal to be assured of the integrity, admissibility, relevancy, evidential value and weight of the evidence it acts upon. While a Labour Tribunal cannot be faulted for having received testimony which according to provisions of the Evidence Ordinance is either inadmissible or irrelevant, this Court would tend to readily agree with objective and rational findings of fact arrived at by a Labour Tribunal, which has been based on scrutiny founded upon principles of admissibility and relevancy contained in the Evidence Ordinance. That is admirably the situation in the instant case.

As regards the identity of the person who committed the relevant act of misconduct, another pertinent factor is that, according to the testimony of Nadarajah, on the 1st of October 2017, in addition to him, two (2) other employees named Tilak and Lanka had been working in the garage. According to Nadarajah, after completing his work, he had gone to take a wash and had returned to the garage. By the time he returned to the garage, the other two employees had left and a security officer was near the garage. Therefore, even if Nadarajah had committed the act of misconduct, it would have been before taking the wash. Therefore, even if Wijesinghe saw an employee throwing property of the company over the parapet wall, a serious doubt arises as to whether the identification of Nadarajah by Wijesinghe was accurate. Neither Ratnayake nor Dharmapriya refer to or clarify this aspect. Nor were those two employees summoned to testify before the Labour Tribunal.

In view of the foregoing, what can be concluded is that the Appellant company's narrative regarding the identity of the offender being Nadarajah, is quite weak and as the learned President of the Labour Tribunal and the learned Judge of the High Court have observed highly doubtful, as the testimony presented in that regard amounts to hearsay testimony. This is of particular significance since Wijesinghe has not made an entry in the Information Book regarding the incident and the identification of the perpetrator.

39) **Improbabilities of the Appellant company's narrative –** According to the double hearsay testimony of Security Coordinating Officer Dharmapriya and hearsay testimony of Chief Security Officer Rathnayake, Security Officer Wijesinghe had identified the person who wore a blue T-shirt and a white colour cap who threw property of the company over the parapet wall. Such identification had purportedly taken place no sooner Wijesinghe proceeded to the garage immediately after he witnessed the incident. If this position is correct, it is reasonable to expect Wijesinghe to have promptly made the necessary steps to obstruct Nadarajah's conduct of throwing property over the parapet wall and questioned him with regard to his serious misconduct.

As observed above, direct evidence to establish the act of serious misconduct by Nadarajah had not been presented to the Labour Tribunal. Even otherwise, if the narrative of the Appellant company is true, well-before Nadarajah arrived at the security post to sign-off for the day, security personnel knew of Nadarajah's alleged misconduct. If so, as pointed out by the learned President of the Labour Tribunal, it is highly unlikely that they would have permitted Nadarajah to pass through and leave the premises of the Respondent company, without being questioned and searched. In fact, ordinarily, as pointed out by learned counsel for the Respondent, one would reasonably expect the incident to have been reported to the police and Nadarajah to have been handed over to the police.

The purported reason (revealed by Dharmapriya) as to why Ratnayake who made an entry ("R3") in the Information Book regarding this incident did not reveal the identity (the name) of the perpetrator of the serious incident of misconduct in his entry, is extremely doubtful. The position of the Appellant company that Ratnayake did not refer to Nadarajah by name (as being the perpetrator), since personnel of Trade Unions have access to the Information Book and as Nadarajah was a long-standing employee of the company, is improbable. That is because, an 'Information Book' on which security personnel make official entries, would not generally be accessible to other employees of the company. In fact, the evidence is that only security personnel had access to it. In any event, Dharmapriya under cross-examination had admitted that in the past, no Trade Union had resorted to any trade union activity, in respect of action taken against a person who was responsible for committing theft of company property. Therefore, the reason given

by Dharmapriya for having supposedly advised Ratnayake not to reveal the name of Nadarajah in the entry made on the Information Book, is highly improbable.

Furthermore, that entry made by Ratnayake does not indicate that Wijesinghe had identified the perpetrator or that the identity of the person who engaged in the act of misconduct has been established by that time. As pointed out above, the sole purported eye-witness to this incident being Wijesinghe, not having made an entry in the Information Book, further weakens the case for the Appellant company. In fact, Wijesinghe had not even testified at the domestic inquiry.

The position of the Appellant company is that Ratnayake informed Dharmapriya the name of the person who engaged in the act of misconduct, as his identity had been established through Wijesinghe by the time Ratnayake telephoned Dharmapriya. In fact, Dharmapriya in his testimony has specifically said that he was informed by Ratnayake the name of Nadarajah, as being the person who threw the goods of the company over the parapet wall. However, in his e-mail to a fellow officer Irsula Rajakaruna (with a copy being sent to the Chief Executive Officer Gamini De Silva) sent on the following day at 10.54 a.m. for the purpose of ascertaining to which department the property in issue belongs ("R1"), Dharmapriya has stated the following:

> *"Security had found 06 nos. of iron bass* (sic) *and a can which belongs to the company that* ***someone*** *has pass* (sic) *over the perimeter wall behind the garage …"* [Emphasis added by me.]

It would be seen that, the impression being generated by the contents of this e-mail is that, the security had found (and not that a security officer had seen the property being thrown over the parapet wall) certain property of the company outside the premises of the company. Furthermore, if Wijesinghe in fact had seen the property of the company being thrown over the parapet wall, it would not have given rise to a need for Dharmapriya to inquire from Irsula Rajakaruna whether the thrown property belongs to the company. The contents of the e-mail are more in line with some security officer having found these items on the adjacent compound, without having seen an employee throwing over the parapet wall certain goods from within the company premises. Furthermore, if in fact Dharmapriya was told by Ratnayake the identity of the employee who threw the property over the parapet wall, it is highly unlikely that Dharmapriya in this e-

mail would have referred to the perpetrator as 'someone'. Had the identity of the culprit was known at that time, there would have been no valid reason to have withheld the identity when sending this e-mail. This is another factor which casts a doubt regarding the narrative presented on behalf of the Appellant company.

All these factors suggest that on 1st October 2017, the identity of the person who threw property of the company over the parapet wall, had not been known by either Wijesinghe, Ratnayake or Dharmapriya. The conclusion being, the Appellant company's narrative regarding the identity of the culprit (being Nadarajah) had been established promptly on the night of the 1st of October, is false.

40) **Weakness in the evidence relating to the purported confession –** Dharmapriya to whom it is said that Nadarajah made a confession, did not immediately record a statement of Nadarajah (containing such confession). Though Dharmapriya's evidence in that regard is direct evidence (and not hearsay evidence) and he had made an entry in the Information Book to the effect that Nadarajah confessed to him (which being a self-serving entry cannot be treated as corroboration of his oral testimony), the sole corroboration of that testimony stems from only Ratnayake, in whose presence the confession is said to have been made. However, Ratnayake has not made a contemporaneous note in the Information Book regarding his having been present when Nadarajah purportedly made the confession to Dharmapriya. While the purported confession is said to have been made on 2nd October 2017, the entry of Dharmapriya in the Information Book ("R2") had been made on 3rd October 2017. Dharmapriya has not explained why he delayed in making the entry in the Information Book. It is to be noted that Nadarajah while testifying before the Labour Tribunal denied having confessed to Dharmapriya. These aspects of the Appellant company's narrative make the case for the Respondent company weak.

41) **Evaluation of the Appellant's evidence by the Labour Tribunal and the High Court –** It would be seen that, the analysis of the evidence by both the learned President of the Labour Tribunal and the learned President of the High Court coincides with the analysis of the evidence by this Court, as contained in paragraphs 38 to 40, above.

42) **Labour Tribunal's appreciation of the admissibility of the purported confession –** As pointed out in paragraph 40 above, it is highly doubtful that Nadarajah had confessed to Dharmapriya. It is clear that the learned President of the Labour Tribunal had also entertained the same doubt. However, it must be appreciated that, though the learned President of the Labour Tribunal in his Order has referred to the confession purportedly made by Nadarajah to Dharmapriya, as pointed out by learned counsel for the Appellant, the analysis of that item of evidence is rather poor.

Nevertheless, as pointed out by this Court time and again, this Court will not be willing to set aside a finding of a Labour Tribunal, unless the finding on the facts is perverse. When considering the analysis this Court has engaged in as reflected in paragraphs 38 to 40, this Court is not in a position to conclude that the findings of fact arrived at by the learned President of the Labour Tribunal are perverse.

43) Even if it is assumed that Nadarajah had confessed to Dharmapriya in the manner contained in the Appellant company's narrative (which I reiterate is highly doubtful), the purported confession was one made to a person in authority. That is because, in comparison with Nadarajah, Dharmapriya was certainly a person in authority. Thus, it would be correct to apply the principles contained in section 24 of the Evidence Ordinance, which provides that a confession made to a person in authority shall be irrelevant, if it had been made due to a threat, promise or inducement which relates to the charge against the maker of the confession. In other words, if the statement (confession) was not made voluntarily.

Though not so specifically stated, that is the basis on which the learned Judge of the High Court made the following observation regarding the purported confession said to have been made by Nadarajah to Dharmapriya:

> *"It is observable that, it would not be ethical to place reliance on a confession said to have been made to him, following his having questioned the workman, having got him down through two security officers attached to the security unit. According to the law of Evidence of this country, there are rigid limitations in accepting a confession made to a person in authority. Therefore, it is not possible to place reliance on the verbal confession."*

It would thus be seen that the learned High Court Judge had also expressed his reluctance to accept and act upon the purported verbal confession said to have

been made by Nadarajah to Dharmapriya. It is evident from the above quotation, that such reluctance had been founded upon the principles contained in section 24 of the Evidence Ordinance.

44) It has been said time and again that, this Court in the exercise of its Appellate jurisdiction will not lightly interfere with findings of facts arrived at by courts and tribunals which have exercised original jurisdiction. Unless such findings are manifestly perverse, this Court shall permit such findings of fact to remain, and shall consider whether there has been a miscarriage of justice. In ***David Micheal Joachim v Aitken Spence Travels Ltd*** *[SC Appeal 09/2010 (SC Minutes of 11.02.2021)],* this Court has observed that "*the President of the Labour Tribunal had considered all evidence submitted before it with reference to the charges against the Appellant. The High Court has reconsidered the assessment of evidence. The High Court Judge had evaluated the evidence judicially.* ***In any event, the Supreme Court will not arrive at findings contrary to the findings of the original court or tribunal before which the evidence was presented, unless the findings are perverse"*** [Emphasis added].

45) It is to be noted that in the dispensation of justice with regard to an incident involving the termination of employment and the resolution of industrial disputes, the jurisdiction of a Labour Tribunal is much wider than that of the District Court. As pointed out by Justice Tambiah in the early case of ***The Ceylon Workers' Congress v. Superintendent, Kollebokka Estate*** *[63 NLR 536],* the Industrial Disputes Act, as amended, gives discretion to the Labour Tribunal to make an order which may appear under all the circumstances of the case to be just and equitable and such a jurisdiction cannot be whittled away by artificial restrictions. As in the instant case, it is evident that, the Labour Tribunal's findings that the Appellant company **on a balance of probability** had failed to establish that the termination of employment of Nadarajah is just and equitable, is in the view of this Court correct. Certainly, no perversity can be attributed to such finding. Thus, there is no basis to set aside the findings of both the Labour Tribunal and the High Court.

46) **Proof of the allegation –** It would be seen that the core allegation against Nadarajah is that he committed theft of company property (though the property was soon after the impugned act of Nadarajah recovered, resulting in the Appellant company not having suffered an effective loss). Thus, the wrongdoing

said to have been committed by Nadarajah amounts to a crime (offence) having a serious bearing on his moral turpitude. In terms of our law, an employer who alleges such misconduct, and on that footing seeks to justify the termination of employment must prove such allegation **on a balance of probability**.

On a consideration of the totality of the evidence presented to the learned President of the Labour Tribunal, it is my view that, the Appellant company has failed to prove the allegation against Nadarajah on a balance of probability. Though in the instant case the learned President of the Labour Tribunal does not seem to have specifically referred to that requisite standard of proof, it appears that his Order (holding that the company had not established that Nadarajah was guilty of having committed theft) amounts to a recognition of this principle.

47) **Respondent's entitlement to obtain compensation where purportedly there has been a loss of confidence –** The next issue is whether, due to the conduct of Nadarajah, the Appellant company had in fact lost confidence in him.

In ***Hatton National Bank PLC v. M.S.K.A. Peiris*** *[SC Appeal 48/2018, SC Minutes 8th August 2024]* this Court has made the following observation:

> *"It is also important to note that particularly when adjudicating industrial disputes, it is vital that courts and tribunals keep in mind the possibility of an employer who merely dislikes a particular employee or does not any longer require his services, making use of the ground 'loss of confidence' as a means of providing a justification for the arbitrary or unjustifiable dismissal of an employee. This Appeal, appears to be on that point.* ***Termination of employment of an employee on loss of confidence must be supported by cogent evidence.*** *As held in the case of Peiris v Celltel Lanka Limited [SC Appeal 30/2009, SC Minutes of 11.03.2011], "it should not be a disguise to cover up the employer's inability to establish charges in a disciplinary inquiry, but must be actually based on a bona fide suspicion against the employee making it impossible or risky to the organization to continue to keep him in service…"* [Emphasis added].

The first ground on which the Appellant company claims to have lost confidence in Nadarajah, is that the latter was found *'guilty'* of having committed an act of theft. It would be seen from the analysis contained above, that the conclusion arrived at by the company that Nadarajah was *'guilty'* of committing theft is erroneous. It is an incorrect and to say the least an unsafe finding of fact. Thus, the

basis of the Appellant company having allegedly lost confidence in Nadarajah is faulty. Furthermore, at the Inquiry held before the learned President of the Labour Tribunal, the Appellant company had not presented any evidence that due to the impugned conduct of Nadarajah, the company had lost confidence in him.

In ***Tunis v. The Sri Lanka State Trading Corporation (Textiles) Salu Sala*** *[(1990) 1 SLR 369]* this Court has held that, "*… the mere assertion by the employer is not sufficient to justify the termination of a workman on the ground of loss of confidence. When such an assertion is made it is incumbent on the Labour Tribunal to consider whether the employer's apprehension is well founded. In such a situation, in my view, the evidence of loss of confidence must originate from the employer …*". To succeed on this footing, 'loss of confidence' must emanate from the evidence of the employer, and not from the submissions of learned counsel. Furthermore, though learned counsel for the Appellant company insisted that the Appellant had lost confidence in Nadarajah, in the Answer dated 23rd January 2018 filed in the Labour Tribunal ("X2") there is no assertion that the company had lost confidence in Nadarajah. Therefore, the ground of 'loss of confidence' as not proven, should not be a valid ground to have terminated the services of Nadarajah.

Second, the Appellant company claims that even if the termination of services of Nadarajah had been unjustified, and the fraud or dishonesty is '*alleged*', the Appellant would be in a difficult position to entrust Nadarajah with certain responsibilities due to the loss of trust and confidence previously reposed in him. In this circumstance, the Appellant company claims that it is inappropriate to order reinstatement, and therefore, any award should be limited to compensation only. As observed by this Court in the case of ***Jayasuriya v. Sri Lanka State Plantations Corporation*** *[(1995) 2 Sri L.R. 379]*, unjustified termination of employment may not always lead to reinstatement when the employer had 'alleged' a lack of confidence on the employee; instead, compensation, rather than reinstatement would be the appropriate remedy.

This position has been reaffirmed in the case of ***John Keells Ltd. v Ceylon Mercantile, Industrial and General Workers Union and Others*** *[(2006) 1 Sri.LR 48]*, in which it has been held as follows:

> "*There are circumstances, where alternative relief in lieu of reinstatement is granted even if the workman is not found guilty to the charge. Instances include*

where the allegation against the workman is such that it would not promote harmonious relations between parties or by this allegation the employer lost confidence in the workman."

Therefore, as per the above analysis, even though the termination of services is unjustified due to the failure of the Appellant company in proving the guilt of Nadarajah, since the alleged lack of confidence in Nadarajah has hampered the harmonious relations between the parties, reinstatement of Nadarajah in employment would not be the appropriate remedy. Furthermore, due to the lapse of time since the termination of employment in 2017, and considering the best interests and future employment prospects of the employee, with a view to preventing unfavorable repercussions that may emanate from the alleged loss of trust and confidence on the employee if he be reinstated, this Court is of the view that it would not be appropriate to order reinstatement of Nadarajah in service.

48) As held by this Court in the case of ***Sri Lanka State Plantation Corporation v. Lanka Podu Seva Sangamaya*** *[(1990) 1 SLR 84]*, "*Where the termination of service is found to be unjustified, the workman is, as a rule, entitled to reinstatement.*" However, "*…an order for payment of compensation in lieu of reinstatement may be substituted in appeal if reinstatement has become demonstrably impracticable due to changes in the employer's establishment or the closure of the business or by reason of the workmen having reached the age of retirement.*" Therefore, considering the unjustified termination of Nadarajah from employment and the impracticability of reinstatement due to the aforesaid reasons, this Court is of the view that the Appellant company should pay compensation to Nadarajah in lieu of reinstatement.

49) **Calculation of compensation –** The position of the Appellant company is that the learned President of the Labour Tribunal had failed to correctly compute compensation payable to Nadarajah. It is to be noted that neither the learned President of the Labour Tribunal nor the learned Judge of the High Court had ordered the Appellant company to pay Nadarajah any compensation. The relief granted to Nadarajah by the Labour Tribunal was his reinstatement and the payment of back wages. Therefore, the question raised on behalf of the Appellant company with regard to the computation of compensation does not arise.

50) In view of the foregoing, I answer the several questions of law in respect of which *Leave to Appeal* was granted in the following manner:

a) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunal had failed to evaluate the evidence of the Petitioner Company in its entirety?*

The learned Judge of the High Court had not erred, since the learned President of the Court of Appeal had not erred in law in the evaluation of the evidence presented on behalf of the Appellant company.

b) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunals had erred in law in failing to duly appreciate and apply the law relating to admissibility of confessions in Labour Tribunals?*

Though the learned President of the Labour Tribunal had failed to properly apply the law relating to the admissibility of the purported confession, he had arrived at a correct finding that it was extremely doubtful that Nadarajah had made a confession to Dharmapriya in the manner the Appellant company alleges. The learned Judge of the High Court had not erred in law, in the analysis of the admissibility and the relevancy of the purported confession. Thus, no miscarriage of justice had occurred due to the failure on the part of the learned President of the Court of Appeal.

c) *Did his Lordship of the High Court err in law in failing to properly ascertain and apply the principles of law pertaining to reinstatement, especially where a loss of confidence reposed in the Applicant has been occasioned?*

The High Court has not erred in arriving at a finding on whether or not a loss of confidence had occurred. That is due to the failure of the Appellant company in proving loss of confidence in Nadarajah based on the proof of guilt (that being him having committed theft). Nevertheless, due to the afore-stated reasons, the 'alleged' loss of confidence of the employee is a bar for reinstatement of Nadarajah in employment. Compensation shall be ordered in lieu of reinstatement.

d) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunal had erred in law in failing to duly appreciate that the Applicant did not adduce proof of actual losses or of any attempt to mitigate his losses, and was thus not entitled to compensation / back wages?*

This question does not arise, as neither the learned President of the Labour Tribunal nor the learned Judge of the High Court had ordered the payment of any compensation. The order for the payment of back wages was a lawful order, as it was founded upon a finding of fact that the termination of employment was wrongful, unfair and unjust. Therefore, Nadarajah is entitled to receive back wages coupled with reasonable compensation for the unjustified termination of employment.

e) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunals had erred in law in applying the principles of law pertaining to calculation of compensation?*

It is not necessary to answer this question, as neither the learned President of the Labour Tribunal nor the learned Judge of the High Court had ordered the payment of compensation.

51) In view of the foregoing findings, this Appeal stands partially dismissed.

52) Subject to the direction contained in paragraph 53 below, the Appellant company is directed to comply with the order made by the Labour Tribunal.

53) Due to the unfair and unjustified termination of employment, this Court orders the Appellant company to pay back wages to the employee (Nadarajah) in respect of the loss of wages and compensation in a sum equivalent to one fourth of his monthly salary at the time of termination of his employment calculated on a monthly basis up to his scheduled date of retirement. In the circumstances, the Order of the Labor Tribunal relating to the reinstatement of the employee is set-aside.

54) The Respondent shall be entitled to recover costs in respect of participating in the appellate hearing in the High Court and before this Court.

Judge of the Supreme Court

Mahinda Samayawardena, J.

I agree.

Judge of the Supreme Court

P. Padman Surasena, J.

I had the privilege of reading in draft form, the judgment to be delivered by Hon. Justice Yasantha Kodagoda, PC, J. I regret my inability to agree with the course of action taken in the judgment by His Lordship.

In my view, where an Employer seeks to justify the termination of the services of a workman on the ground of misconduct amounting to the commission of a criminal act involving moral turpitude, such misconduct need not be proved beyond reasonable doubt as in a criminal case. It would be sufficient for the employer to prove such misconduct on the balance of probability as in a civil case. This is now well settled law and hence need not be re-visited. Vide *Associated Battery Manufacturers (Ceylon) Ltd v. United Engineering Workers Union [1975]* [1] and *Sithamparanathan v. Peoples Bank [1986]* [2].

The Case of the Employer is that a Security Officer (designated 'Ordinary Security Officer') by the name of W. A. S. Wijesinghe who was on duty at a security post located in close proximity to the garage had seen several steel pipes being thrown over the wall of the premises of the Employer Company by a person wearing a blue colour T-shirt and a white colour cap on 01-10-2017. Although it was not a routine working day, the Employee Kannaariam Nadarajah had worked in the garage of the company on 01-10-2017. Wijesinghe had identified this individual to be the Employee. Wijesinghe had initially notified the incident to Senior Security Officer Sanka Jayaruk, who then passed on this information to the Chief Security Officer Rathnayake Mudiyanselage Ajith Kumara Rathnayake. Wijesinghe has later on directly communicated the incident to Chief Security Officer Ratnayake as well. Although neither the Security Officer Sanka Jayaruk nor Wijesinghe was called to give evidence, Chief Security Officer Rathnayake Mudiyanselage Ajith Kumara Rathnayake and the Security Coordinating Officer Ukwatte Hewage Dayawansha Dharmapriya had given evidence before the Labour

[1] 77 NLR 541

[2] 1986 (1) Sri. L.R 411

Tribunal. While both of them have not seen the incident of the Employee throwing the pipes over the wall, the Employer had placed reliance on a confession made by the Employee.

According to the evidence of Chief Security Officer Ajith Kumara Rathnayake, at about 2025 Hours on 01-10-2017, Security Officer Sanka Jayaruk had reported to him about this incident. Thereafter, he had gone to the place of the incident and had seen the pipes lying on the ground on the outer side of the wall. He had those be brought into the premises of the Employer. Security officer Wijesinghe had also told him that it was the Employee (Nadarajah) who was dressed in a blue t-shirt and a white cap who had thrown the pipes over the wall. Chief Security Officer Ajith Kumara Rathnayake had made a note accordingly and the said note was produced as evidence before the Labour Tribunal marked **R3**. According to **R3** the Chief Security Officer Ajith Kumara Rathnayake had entered that note on 01-10-2017 at 2110 hrs.

Thereafter on the following day, the Chief Security Officer Ajith Kumara Rathnayake has reported this incident to the Security Manager Ukwatte Hewage Dayawansha Dharmapriya by a letter dated 02-10-2017 marked **R4**.

According to Security Manager Ukwatte Hewage Dayawansha Dharmapriya, Chief Security Officer Ajith Kumara Rathnayake had informed him over the phone at about 9 PM on the night of 01-10-2017, about this incident. The Chief Security Officer Ajith Kumara Rathnayake at that time itself had also revealed the identity of the person responsible for throwing the pipes over the wall of the Company as the Employee (Nadarajah).

On 02-10-2017 when the Security Manager Ukwatte Hewage Dayawansha Dharmapriya questioned the Employee, the Employee had confessed to him that he threw the pipes over the wall of the Company. This piece of evidence is as follows:

"ප්‍ර : එම අවස්ථාවේ දී මෙම නඩුවට අදාල සේවකයා ඔබතුමාට කුමක්ද කළ ප්‍රකාශය?

උ : ඔහු ගොඩාක් හැඟීම් බරව කදුලු සලමින් කියා සිටියා ඔහු ඒ සොරකම කළ බවත්, එය ඔහුගේ ගෙදර අවශ්‍යතාවයකට එම භාණ්ඩ එනම් යකඩ බට හය සහ එම කෑන් එක ඔහු සේවය කරන ගරාජයේ කාප්පයෙන් එහා පැත්තේ පොල් වත්තට විසි කර එය නැවත ලබා ගැනීමේ අදහසින් සිදු කළ බව."

Chief Security Officer Ajith Kumara Rathnayake in his evidence has also corroborated the evidence of the Security Manager Ukwatte Hewage Dayawansha Dharmapriya on the fact that the Employee had indeed confessed to the Security Manager that he threw the pipes over the wall of the Company. The said evidence of the Chief Security Officer Ajith Kumara Rathnayake is as follows:

"ප්‍ර : සිද්දිය සිදු වූ දිනට පසු දින ඔබ කිසියම් හෝ ප්‍රශ්නකිරීමකට හෝ විමර්ශන කටයුත්තකට සහභාගී වුණාද?

උ : එසේය.

ප්‍ර : පැහැදිලි කරන්න පුළුවන්ද?

උ : දහවෙනි මාසේ 02 වෙනි දින ආරක්ෂක කළමණාකරු නඩරාජා මහතා ආරක්ෂක කළමණාකරුගේ කාර්යාලයට කැඳවා, මාවත් කාර්යාලයට ගෙන්වා ඔහුගෙන් මේ පිළිබඳව ප්‍රශ්න කළා. ඒ අවස්තාවේ දී ඔහුගේ වරද පිළිගත්තා. ඒ නිසා වරද පිළිගත්තට පස්සේ අපි එතනින් ගියා."

On 03-10-2017 the statement from the Employee was recorded. In that statement the Employee had stated the following:

"උ : ..... මම මගේ විවේකය රජෝර්තු කර ආයතනයෙන් පිටත් වූවා. එවිට වෙලාව 09.00 පමන ඇත.

ප්‍ර : අප මෙම පරීක්ෂණය පවත්වන්නේ යකඩ බට වශයෙන් ආයතනයෙන් අනවසරයෙන් පිට කිරීමට තැන් කිරීමක් සම්බන්දව. එම සම්බන්දව ඔබට යමක් කීමට ඇත්ද?

උ : නැත.

ප්‍ර : එදින ඔබ සමග තවත් සේවකයන් කීදෙනෙක් රාජකාරියේ නිරත වුවාද?

උ : මා සමග ලන්කා සහ තිලක් යන අය.

ප්‍ර : ඔබ සේවය අවසන් කර පැමිනෙන විට ඔබ ඉහත කියූ සේවක මහතුන් දෙදෙනා ගරාජ් අන්ශයේ සිටියාද?

උ : නැත. ඔවුන් වෙනත් වැඩකට ගියාද කියා මම දන්නේ නැත.

ප්‍ර : ඔබ මාගේ කාර්යාලයේ දී ඊයේ සවස ප්‍රකාශ කර සිටියා මෙම සිදුවීම සම්බන්දව ඔබට දැනුම්දීමෙදී ඔබ ඉහත යකඩ බට ආයතනයෙන් ඉවත් කිරීමට කටයුතු කළා කියලා. එය ප්‍රකාශ කලේ ආයතනයේ ආරක්ෂ අන්ශ භාරව සිටින රත්නායක මහතා ඉදිරියේ. එම ප්‍රකාශය සම්බන්දව දැන් ඔබ පවසන්නේ කුමක්ද?

උ : **ඊයේ කියපු එක මට මතකයක් නැත.**

ප්‍ර : දැන් ඔබහට මතකයක් ඉහත යකඩ බට ඉවත්කිරීම සම්බන්දව ඇත්ද?

උ : මම ඒ සම්බන්දව කිසිවක් දන්නේ නැත.

ප්‍ර : ගරාජය ලග සිටි ආරක්ෂක නිළදාරියා සමග ඔබ කොපමන දුරක් පැමිණියාද?

උ : ආපන ශාලාව දක්වා."

I observe that the Employee, in the course of the cross examination of the Security Manager Ukwatte Hewage Dayawansha Dharmapriya, had focused only to establish that this witness was giving evidence on what he was told by the Chief Security Officer Ajith Kumara Rathnayake as he had not seen the incident.

The charges framed by the Employer against the Employee are as follows:

1. *That on 1st October 2017, at or about 8.20 P. M., you did throw certain items belonging to the Company, valued at approximately Rs. 14,000.00, over the garage wall, with the dishonest intention of surreptitiously removing the said items, in the circumstances more fully set out in the preamble of this letter.*
2. *That by your conduct referred to in Charge (1) above, you did attempt to cause a financial loss to the Company in a sum of approximately Rs. 14,000.00.*
3. *That by your conduct set out herein, you did act in a manner which is unbecoming of an employee of this Company.*

Subsequent to an inquiry conducted by an independent inquiring officer the Employee was found guilty of all the charges as per letter marked **R8**, dated 24-11-2017. It was on that basis that the Employer Company had terminated the service of the Employee.

The learned President of the Labour Tribunal, by her Order dated 08-03-2019, had proceeded to hold that the termination of the services of the Employee is unjustifiable, primarily on the basis that there is no written document made by the Security Officer Wijesinghe and that the Employer had failed to call the said Security Officer Wijesinghe who had seen the incident to give evidence on behalf of the Employer. Learned High Court Judge by his judgment dated 19-08-2020, had affirmed the Order pronounced by the President of the Labour Tribunal on the basis that it is improper to rely on the confession and hearsay evidence against the Employee.

In this appeal, this court had granted Leave to Appeal in respect of the following questions of law:

(a) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunal had failed to evaluate the evidence of the Petitioner Company in its entirety?*

(c) *Did his Lordship of the High Court err in law in failing to recognise that the learned President of the Labour Tribunal has erred in law in failing to duly appreciate and apply the law relating to admissibility of confessions in Labour Tribunals?*

(d) *Did his Lordship of the High Court err in law in failing to properly ascertain and apply the principles of law pertaining to reinstatement, especially where a loss of confidence reposed in the Applicant has been occasioned?*

(g) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunal has erred in law in failing to duly appreciate that the Applicant did not adduce proof of actual losses or of any attempt to mitigate his losses, and was thus not entitled to compensation/backwages?*

(h) *Did his Lordship of the High Court err in law in failing to recognize that the learned President of the Labour Tribunal has erred in law in applying the principles of law pertaining to calculation of compensation?*

Section 36 (4) of the Industrial Disputes Act is 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.*

The jurisdiction to be exercised by the Labour Tribunal as per Section 31 (C) of the Industrial Disputes Act is to make an order which appears to the tribunal to be just and equitable. Thus, the question to be decided here in this appeal is whether there was sufficient evidence before the Labour Tribunal which would have warranted it to hold that the termination of the services of the Employee on the charges of the specified misconduct have been proved on the balance of probability. Although the nature of misconduct may amount to the commission of a criminal act involving moral turpitude, as stated before, even such misconduct need not be proved with proof beyond reasonable doubt as in a criminal case. Thus, the evaluation of evidence to ascertain whether the allegations have been proved must be done while keeping the provisions in Section 31 (C) and Section 36 (4) of the Industrial Disputes Act in mind. In my view, it would be erroneous to evaluate and come to a conclusion on the basis that such misconduct should be proved beyond reasonable doubt as in a criminal case.

As I have already stated above, the Employee has merely stated that he did not know anything about the confession he had made to the Security Manager Ukwatte Hewage

Dayawansha Dharmapriya in the presence of the Chief Security Officer Ajith Kumara Rathnayake on 01-10-2017 when he was questioned on the same incident on the following day. Against the aforesaid denial, both the Security Manager Ukwatte Hewage Dayawansha Dharmapriya and the Chief Security Officer Ajith Kumara Rathnayake had given evidence under oath. There is not even a suggestion made on behalf of the Employee that they were giving false evidence against the Employee. Therefore, one needs to weigh the evidence adduced by the Employer against the Employee, against the evidence of only a bare denial made by the Employee when ascertaining whether the Employer has proved in the above circumstances that the Employee was concerned with this theft on a balance of probability.

Section 3 of the Evidence Ordinance defines the term 'proved' in the following manner.

> *"A fact is said to be proved when, after considering the matters before it,the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."*

H N G Fernando Chief Justice had the occasion to advert to the above definition in section 3 of the Evidence Ordinance in the case of L Edrick De Silva Vs. Chandradasa De Silva.[3] Although the issue to be dealt with by the Chief Justice in that case was an issue concerning the standard of proof required of a petitioner presenting an election petition, he had proceeded to discuss the meaning of the word "proved" in section 3 of the Evidence Ordinance. Thus, the following excerpt from the judgment where H N G Fernando Chief Justice had made reference to the standard of proof in a civil action would be relevant for the purposes of the instant case. It is reproduced below;

> *"…..But where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional "matter before the Court", which the definition in Section 3 of the Evidence Ordinance requires the Court to take in to account, namely that the evidence led by the plaintiff is uncontradicted.…"*

Similar sentiments were expressed by Sisira De Abrew J in the case of K. A. Chandralatha Vs. Keeralage Parakrama.[4] In Chandralatha's case, the Plaintiff Respondent had filed that case against the Defendant Appellant seeking a declaration that he is the lawful permit holder of the lands described in the 1st and 2nd Schedules of the plaint in that case. The

[3] 70 NLR 169.

[4] SC Appeal 188/2011, decided on 18-07-2018.

learned District Judge dismissed that case on the basis that the corpus had not been identified. Sisira De Abrew, J who took into account, the fact that the evidence of the son of the Plaintiff was not cross examined by the Defendant had the following to say in that judgment:

> *"The son of the Plaintiff-Respondent gave evidence and also produced the permit marked P1 which describes the land by reference to physical metes and bounds. His evidence was not challenged by the Defendant-Appellant. The son of the Plaintiff-Respondent was not cross-examined by the Defendant-Appellant. This shows that the Defendant-Appellant has admitted the boundaries of the land of the Plaintiff-Respondent."*

I have already adverted to above, the Employee has only put forward a bare denial while not even suggesting that the Employer's witnesses were giving false evidence against him. Therefore, the mere bare denial in my view has not been capable of negating the effect of the evidence adduced by the Employer. Thus, in the above circumstances, I am of the view that on a balance of probability, the Employer has proved that the Employee was concerned with this theft.

In the above circumstances, I hold that there is no justification for the learned President of the Labour Tribunal to have concluded that the termination of the service of the Employee was unjustified on the above evidence. Therefore, I answer the first three questions of law in respect of which this court has granted Leave to Appeal in the affirmative. Next two questions of law would not arise since I have held that the termination of the service of the Employee is justifiable. I set aside the order dated 08-03-2019 pronounced by the learned President of the Labour Tribunal and also the judgment dated 19-08-2020 of the learned Judge of the Provincial High Court. The application filed by the Employee before the Labour Tribunal must stand dismissed.

Appeal is allowed.

Judge of the Supreme Court