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

In the matter of an application for Leave to Appeal from a Judgment of the Provincial High Court of the Western Province holden in Colombo dated 12th May 2016 in HC RA 96/2015, in terms of the Industrial Disputes Act and the High Court of the Provinces (Special Provisions) Act No. 10 read with the Rules of the Supreme Court.

M Ganeshmoorthy
No. 9/10 C New Stage
Grayline Park
Ekala
Ja-Ela

Applicant

SC Appeal No. 187/2017
SC HCLA 28/2016
HC (Revision) No. 96/2015
LT Application No. 1A/56/2014

-VS-

1. John Keells Holdings PLC
   No. 117, Sir Chittampalam A. Gardiner Mawatha
   Colombo 2

2. Jaykay Marketing Services (Private) Limited
   No. 148, Vauxhall Street
   Colombo 2

3. Keells Food Products PLC
   No. 16 Minuwangoda Road
   Ekala

Ja-Ela

Respondents

AND BETWEEN

1. John Keells Holdings PLC
   No. 117, Sir Chittampalam A. Gardiner
   Mawatha
   Colombo 2

2. Jaykay Marketing Services (Private)
   Limited
   No. 148, Vauxhall Street
   Colombo 2

3. Keells Food Products PLC
   No. 16 Minuwangoda Road
   Ekala
   Ja-Ela

Respondent -Petitioners

-VS-

M Ganeshmoorthy
No. 9/10 C New Stage
Grayline Park
Ekala
Ja-Ela

AND NOW BETWEEN

1. John Keells Holdings PLC
   No. 117, Sir Chittampalam A.
   Gardiner Mawatha
   Colombo 2.

2. Jaykay Marketing Services (Private) Limited
   No. 148, Vauxhall Street
   Colombo 2

3. Keells Food Products PLC
   No. 16 Minuwangoda Road
   Ekala
   Ja-Ela
   Respondents-Petitioners-Petitioners

-VS-

M Ganeshmoorthy
No. 9/10 C New Stage
Grayline Park
Ekala
Ja-Ela
Applicant-Respondent-Respondent

Before : Priyantha Jayawardena, PC, J
L.T.B. Dehideniya, J
S. Thurairaja, PC, J

Counsel : Suren Fernando for the Respondents-Petitioners-Petitioners

Chula Bandara with A.M.S. Hemali Atapattu for the Applicant-Respondent-Respondent

Argued on : 27th February, 2019

Decided on : 20th January, 2020

Priyantha Jayawardena, PC, J

This is an appeal to set aside the judgment of the Provincial High Court of the Western Province holden in Colombo which affirmed the order of the Labour Tribunal made in respect of the right to begin the inquiry before the Labour Tribunal.

The applicant-respondent-respondent (hereinafter referred to as the "workman") filed an application in the Labour Tribunal citing John Keells Holdings PLC, Jaykay Marketing Services (Private) Ltd and Keells Food Products PLC as the 1st, 2nd and 3rd respondents respectively for the unlawful termination of his services by the 1st respondent company.

The workman stated that he was appointed by the 2nd respondent-petitioner-appellant (hereinafter referred to as the "2nd respondent company") as a Junior Sales Representative on the 22nd of April, 1991.

The workman further stated that thereafter, on the 1st of May, 1996 he was appointed as an Executive by the 1st respondent-petitioner-appellant (hereinafter referred to as the "1st respondent company") and seconded to the 2nd respondent Company, which is a subsidiary of the 1st respondent company.

Thereafter, the workman had worked for both the 1st and 2nd respondent companies and was promoted as Sales Manager whilst working for the 1st respondent company.

The workman stated that a fresh letter of appointment was given to him by John Keells Foods India Private Limited on the 18th of January, 2010, which is also a subsidiary of the 1st respondent company and he was deployed to work in India as the Head of Sales to work in that company.

However, as the operations of the said company were closed down in 2010, the workman returned to Sri Lanka.

The workman further stated that after he returned to Sri Lanka, he was appointed as a Channel Manager Retail of the 3rd respondent-petitioner-appellant (hereinafter referred to as the "3rd respondent company"). However, he was not issued a letter of appointment for the said post.

By the letter dated 10th of February, 2014, the workman stated that he was suspended from work by the 3rd respondent company.

Thereafter, a letter of show cause was issued by the 3rd respondent dated 3rd of March, 2014 which contained the following charges:

"(1) That during the period December 2013 to February 2014, you did attempt to purchase pork from a Company Supplier, at a higher price, in commercial quantities as morefully set out in the preamble of this letter.

(2) (i) That your conduct as set out in charge (1) above indicates that you have established a business in competition with your employer, Keells Food Products PLC.

or in the alternative;

(ii) That you have attempted to carry on a business in competition with your employer, Keells Food Products PLC.

(3) That by your conduct set out in charges (1) and (2) above, you did blatantly and willfully violate Clause 'C' of the "Code of Conduct" of the company under the caption "conflict of interest" in your contract of employment and the law of the land.

(4) That you did fail to divulge your Spouse's business interests as morefully set out in the preamble of this letter which constitutes a further violation of Clause 'C' of the "Code of Conduct" under the Caption "Conflict of Interest."

(5) That by your conduct set out herein which has caused or intended to cause loss and damage to the company you did act in a manner which is unbecoming of a person holding the post of Channel Manager – Retail, and thereby breach the trust and confidence reposed in you by the Management."

The workman stated that he denied all the charges levelled against him in his response to the letter of show cause. Thereafter, a domestic inquiry was conducted by the 3rd respondent company to inquire into the charges levelled against the workman.

Later, by letter dated 23rd of June, 2014, the 1st respondent company terminated the services of the workman stating that he had been found guilty of the aforesaid charges levelled against him.

The workman stated that however, the termination of his services was unlawful and unjust.

Accordingly, the workman prayed *inter alia:*

(a) for reinstatement with back wages, or

(b) for compensation in lieu of such reinstatement

The respondents filed a common answer and stated that they are related parties of which the 1st respondent is the holding company. It was further stated that at all times material to the application filed in the Labour Tribunal, the workman was employed by the 1st respondent company and seconded to the 3rd respondent company.

In the said answer, it was further stated that the 3rd respondent company being a subsidiary of the 1st respondent company, whom the workman was seconded to, was authorised by the 1st respondent company to conduct the domestic inquiry in respect of the alleged misconduct of the workman. At the conclusion of the domestic inquiry, the workman was found guilty of the charges levelled against him.

The respondents further stated that in the foregoing circumstances, the termination of the workman's services by the 1st respondent company was just and equitable. Accordingly, the respondents prayed *inter alia* to have the application dismissed.

When the application was taken up for inquiry before the Labour Tribunal, the respondents had submitted that there was an ambiguity as to who the employer of the workman was, since two of the respondents had denied employment and termination of the services of the workman.

As the parties were unable to agree as to who should begin the inquiry and lead evidence, the learned President of the Labour Tribunal directed the parties to file written submissions on the right to begin the inquiry.

Thereafter, the Labour Tribunal has held that as the 1st respondent company admitted termination, it should justify the termination. Accordingly, it had been ordered that the 1st respondent company and the other subsidiary companies in the group which had been named as respondents should commence the inquiry.

Being aggrieved by the said order of the learned President of the Labour Tribunal, the respondents invoked the revisionary jurisdiction of the Provincial High Court of the Western Province holden in Colombo.

After hearing the said appeal, the learned High Court judge has held that since the respondents are part of the same group of companies, and as the 1st respondent had admitted the employment and

termination of the services of the workman, the order of the Labour Tribunal directing the respondents to commence the inquiry is not contrary to law.

Being aggrieved by the judgment of the Provincial High Court holden in Colombo, the respondents sought special leave to appeal from this court and special leave to appeal was granted on the following questions of law:

"(a) Did the learned High Court Judge err in failing to interpret and apply the established principles of the law of evidence on the burden of starting?

(b) Did the learned High Court Judge err in law by failing to appreciate that there was no consensus as to the identity of the Applicant's employer and/ or that two Respondents had denied employment and/ or termination?

(c) Did the learned High Court Judge err in law in failing to recognize that, in circumstances where there were more than one Respondent, some of whom had not admitted employment or termination, the burden of starting would be on the Applicant?

(d) Did the learned High Court Judge err in failing to recognize that the learned President of the Labour Tribunal erred in law in directing the Respondents to begin the case?"

Submissions of the respondents

The learned counsel for the respondents submitted that as there are three respondents, the burden is on the workman to prove who the real employer was.

In support of his submission, the learned counsel cited the case of *United Corporations and Mercantile Union v Vos* (Gazette of 6.5.77) referred to in the *Law of Dismissal* by S.R. De Silva at page 122 where it was held: "where an employer denies termination of the services of a worker, the burden of proof is on the worker to establish to the satisfaction of Court that his services had been terminated by the employer."

The learned counsel contended that the only exception to the said rule is where the employer admits termination.

It was further submitted that in the instant appeal, only the 1st respondent had admitted the employment and termination of the services of the workman. Neither, the 2nd nor the 3rd respondents have admitted employment and termination of the services of the workman.

Thus, where there is no agreement as to the identity of the employer, the workman should first establish the identity of his employer. In the absence of an admission, with regard to who the employer of the workman is, the burden is on the workman to prove the same.

Submissions of the workman

The learned counsel for the workman submitted that since the 1st respondent had admitted the employment and termination of the workman, and the 2nd and 3rd respondents were in the same group of companies, it is the respondents who should start the case to justify the termination of the workman.

The learned counsel cited the case of *The Ceylon Mercantile Union v Management Mount Lavinia Hotel CGG* SC Minutes 7th July, 1961 which held: '"In the case of termination of employment burden is on the employer to justify the termination on the principle that "He who alters the status quo, and not he who demands its restoration, must explain the reason for such alteration."' in support of his submission.

Further, the learned counsel cited the case of *The Associated Newspapers of Ceylon Ltd v Merven Perera* [C.A. 391/79] SC Minutes 25th September, 1981 which held; "the burden is on the employer to prove that the termination was justified."

Did the learned High Court Judge err in failing to recognize that the learned President of the Labour Tribunal erred in law in directing the Respondents to begin the case?

Section 31C (1) read with section 33 of the Industrial Disputes Act No. 43 of 1950 as amended stipulates the duties and powers of the Labour Tribunal with regard to an application made under section 31B (1) of the said Act.

Section 31C reads as follows:

> *"(1) Where an application under section 31B is made to a labour tribunal, it shall be the duty of that tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make, not later than six months from the date of such application, such order as may appear to the tribunal to be just and equitable.*

(2) A labour tribunal conducting an inquiry shall observe the procedure prescribed under section 31A, in respect of the conduct of proceedings before the tribunal." [Emphasis added]

The scope of the aforementioned section was considered in *Merril J Fernando & Co v Deiman Singho* (1988) 2 SLR 242 where the Court of Appeal held;

> *"As was submitted by learned counsel for the appellant there is a significant difference between the duties and powers of a Labour Tribunal under Section 31C (1) of the Industrial Disputes Act as amended by Section 6 of Act No. 74 of 1962 and the original provisions as contained in Act No. 62 of 1957. Whereas the original Section required the Tribunal to "hear such evidence as may be tendered ……" **the amended Section makes it the duty of the Tribunal to "hear all such evidence as the tribunal may consider necessary".** The latter indeed is a very salutary provision which the Tribunal should not have lost sight of."*
>
> [Emphasis added]

Accordingly, the Labour Tribunal is required by law to hear all such evidence as the tribunal may consider necessary and make a "just and equitable" order.

The principle of "just and equitable" is based on fairness and justness. Equity ensures that the law does not produce unnecessarily or unintended harsh outcomes which unfairly prejudices a party. It solves an issue not according to the strict legal technicalities, but with the principles of justice and application of the established rules and principles after evaluation of facts and circumstances of a given case. It is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations.

On the contrary, "justice" of an individual case refers to justice objectively and consistently evaluated and applied according to law and established principles, upon definite grounds.

A just and equitable order cannot be made in the subjective eye of the judge. It is not a discretionary judgment. A just and equitable order must be fair to all the parties in any given situation.

As stated above section 31C (1) of the Industrial Dispute Act as amended requires the Labour Tribunal to make a "just and equitable" order. Further, section 33 of the said act specifies *inter alia* the contents of an order.

However, like in any other litigation, before making an order under section of 31C (1) of the said Act there can be several interim orders that are required to be made in an inquiry before the Labour Tribunal. Some orders may be on a pure question of law or a mixed question of law and facts or purely on a factual position. All such interim orders will invariably have an impact on the final order made under the said section. Thus, in order to make a "just and equitable" order at the conclusion of the inquiry, all interim orders made during an inquiry, should also be just and equitable. If the interim orders are not just and equitable, the final order made after an inquiry cannot be a just and equitable.

The procedure applicable to Labour Tribunals are set out in the Regulations published under section 31A of the Industrial Disputes Act. Regulation 30 of the Industrial Disputes Regulations, 1958 states:

> *"At the hearing in regard to any matter before an Industrial Court or an arbitrator or a Labour Tribunal, such Court or arbitrator or the Tribunal may call upon the parties, in such order as the Court or the arbitrator or the Tribunal thinks fit, to state the case."* [Emphasis added]

Thus, Regulation 30 has conferred power on the Labour Tribunal to call upon parties to begin their respective cases in such order as the tribunal thinks fit. However, the discretion conferred on the Labour Tribunal to call upon the parties to begin their respective cases by the said regulation should be applied taking in to consideration; the procedure established by law, the jurisprudence developed by courts and the facts and circumstances of each case with the object of making a just and equitable order at the conclusion of the inquiry before the Labour Tribunal.

Further, in *W.A.A.M. Dharmasena v Superintendent, Kekunagoda Estate* (SC Appeal 142/2010) SC Minutes 13th August, 2015 at page 8, it was held:

> *"[….] Section 31C (1) of the Industrial Disputes Act, the Regulations published thereunder, the provisions of the Judicature Act No. 2 of 1978 as amended and the decided cases show that section 31C (1) of the Industrial Disputes (Amendment) Act No. 62 of 1957 conferred the inquisitorial powers on the Labour Tribunal which*

was later widened by Act No. 4 of 1962. However, section 41 of the Judicature Act as amended, the said Regulations and the requirement to make a just and equitable order in terms of section 31C (1) of the Industrial Disputes Act as amended require a Labour Tribunal to follow certain aspects of the adversarial system too. ***Thus, an inquiry before a Labour Tribunal under section 31C (1) is a mixture of an inquisitorial and adversarial systems.*** *[….]"* [Emphasis added]

Hence, in addition to the powers conferred on the Labour Tribunal by the said Rule, the Labour Tribunal has the power to decide how the inquiry should be conducted as inquisitorial powers are conferred on it, by the Industrial Disputes Act. The inquisitorial power conferred on the Labour Tribunal was discussed in detail in the aforementioned judgement.

In the instant appeal, the learned President of the Labour Tribunal directed the respondent companies to begin their cases on the basis that despite the 2nd and 3rd respondent companies had denied employment of the workman, the 1st respondent company had admitted the employment and termination of the workman and all 3 of the said companies are in the same group of companies. In fact, the workman has been working for all the respondent companies.

A cursus curiae has developed that an employer who admits terminating the services of a workman should commence leading evidence as the burden is on him to justify that termination.

In *Thevarayan v Balakrishnan* (1984) 1 SLR 194 it was held:

"In a case of termination of employment, the burden is on the employer to justify the termination on the principle that "he who alters the status quo, and not he who demands its restoration, must explain the reasons for such alteration."

However, when the employer has denied employment or termination, or in the case of vacation of post or constructive termination, the workman should start the case. Further, it is pertinent to note that even if the employer had admitted employment, the workman should begin the case if malice was pleaded or if the employee was on probation at the time of termination.

In *Anderson v Husni* [2001] 1 SLR 68 it was held:

"Let me add that that principle is the foundation of the cursus curiae in the Labour Tribunal where termination (of confirmed employment) is not admitted. In such cases the appellant must begin. Why? Because if no evidence at all were given on

either side, on the material available to the Tribunal, it is the applicant who would fail."

Further, in *State Distilleries Corporation v Rupasinghe* [1994] 2 SLR 395 it was held:

"What then is the principal difference between confirmed and probationary employment? In the former, the burden is on the employer to justify termination; and he must do by reference to objective standards. In the latter, upon proof that termination took place during probation the burden is on the employee to establish unjustifiable termination, and the employee must establish at least prima facie of mala fides, before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified."

In the instant appeal, as stated above the workman alleged that he was employed by both the 1st and 2nd respondent companies. However, only the 1st respondent company had admitted the employment and termination of the workman. Both the 2nd and 3rd respondents have denied employment of the workman in the common answer filed by the respondent companies.

In *Ceylon Bank Employees' Union v Yatawara* 64 NLR 49, the definition of the word "employer" was considered by Sansoni, J as follows:

*"Apart from these considerations however, when one analyses the definition of the word "employer", one finds that its first meaning is "any person who employs", and the third meaning is "**a body of employers** (whether such body is a firm, **company**, corporation or trade union)"."* [Emphasis added]

Further, the word "employer" was considered in *Colombo Paints Ltd v De Mel* (1973) 76 NLR 381 at page 383 where it was held:

" [….] The legal intricacies that lay between the petitioner and the 3rd respondent have not been so mystifying and so distracting as to prevent me from coming to a clear finding that the 4th respondent's employment was within the same family of Companies. He did the same work under the same conditions at the same place under the same persons, with the petitioner. Whatever changed, the substantial nature and relationship in his employment did not change.

The facts placed before me lead to the only reasonable inference that the petitioner came within the meaning of the term employer as defined by the Act. [….]"

As stated above, the Labour Tribunal is required to make a just and equitable order not only at the conclusion of the inquiry but also with regard to interim orders. Moreover, Regulation 30 empowers the Labour Tribunal to call upon the parties as the Tribunal thinks fit to state their case. Further, the Labour Tribunal exercises inquisitorial powers when conducting an inquiry. Thus, it is entitled to use its discretion in conducting the inquiry in order to make a just and equitable order subject to the aforementioned criteria.

The case of *United Corporations and Mercantile Union v Vos* (supra) cited by the respondents has no application to the instant appeal as the 1st respondent company which is part of the group of companies had admitted termination.

Thus, I am of the opinion that the Labour Tribunal had acted in terms of the law when it made the order directing the 1st respondent company and the other subsidiary companies in the group to commence the inquiry. Further, the High Court did not err in law when it held that since the respondents are part of the same group of companies, and as the 1st respondent had admitted the employment and termination of the services of the workman, the order of the Labour Tribunal directing the respondents to commence the inquiry is not contrary to law.

Further, it is pertinent to note that the respondents had filed a common answer and stated that they are related parties of which the 1st respondent is the holding Company. In light of the above, the following question of law is answered as follows:

Did the learned High Court Judge err in failing to recognize that the learned President of the Labour Tribunal erred in law in directing the Respondents to begin the case?

No

In view of the foregoing answer, the other questions of law set out above, need not be considered.

The appeal is dismissed.

Taking into consideration of the fact that the services of the workman were terminated on the 23rd of June, 2014, the Labour Tribunal is directed to conclude the inquiry expeditiously. The Registrar

of this court is directed to send a copy of this judgment to the Labour Tribunal to take steps in accordance with the law.

I order no costs.

Judge of the Supreme Court

L.T.B. Dehideniya, J

I Agree **Judge of the Supreme Court**

S. Thurairaja, PC, J

I Agree **Judge of the Supreme Court**