IN THE SUPREME COURT OF

THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC Appeal 25/2017

SC/HCCA/LA/27/2015

HCALT/23/2014

LT 36/2394/2012

In a matter of an appeal after leave to appeal being granted.

K. Sivasamy
C/o Nikapotha Kanda, Kithalella Road,
Bandarawela

Applicant

Vs.

D.L.Hema Malini de Silva of Uva,
Dikara Watta, Kithalella Road, Heeloya Road, Bandarawela

Respondent

AND BETWEEN

D.L.Hema Malini de Silva of Uva,
Dikara Watta, Kithalella Road, Heeloya Road, Bandarawela

Respondent/Appellant

Vs.

K. Sivasamy
C/o Nikapotha Kanda, Kithalella Road,
Bandarawela

Applicant/Respondent

AND NOW BETWEEN

D.L.Hema Malini de Silva of Uva,
Dikara Watta, Kithalella Road, Heeloya Road, Bandarawela

Respondent/Appellant/Appellant

Vs.

K. Sivasamy
C/o Nikapotha Kanda, Kithalella Road,
Bandarawela

Applicant/Respondent/Respondent

BEFORE: **Priyantha Jayawardena, PC, J.**

L. T. B. Dehideniya, J.

Murdu N. B. Fernando, PC, J.

COUNSEL: Ranga Dayananda for the Respondent-Appellant-Appellant

Kamal Suneth Perera for the Applicant-Respondent-Respondent

ARGUED ON: 25th of October, 2018

DECIDED ON: 31st of July, 2020

Priyantha Jayawardena, PC, J.

This is an appeal filed to have the judgment of the High Court of Uva Province holden in Badulla (hereinafter referred to as the 'High Court') dated 27th of March, 2015 set aside. The High Court has affirmed the Order of the Labour Tribunal holding that the termination of services of the Applicant-Respondent-Respondent (hereinafter referred to as 'the workman') was unlawful and unjustified.

The issue that needs to be considered in this appeal is whether awarding a sum of Rs.390,000/- being five years' salary, as compensation in lieu of reinstatement to the workman is contrary to the evidence led before the Labour Tribunal.

Factual Background

The workman had been employed at the estate of the Respondent-Appellant-Appellant (hereinafter referred to as 'the employer') from the year 1977. While the workman was working as a '*Kankani*' in the said estate, his services had been terminated by the employer on or about the 10th of December, 2004. The workman was 45 years of age and had 27 years of service at the time of the said termination.

The services were terminated on the basis that the workman had set fire to the storeroom which contained property worth Rs. 102,725/- and had stolen property worth Rs. 7,800/- belonging to the employer on the 4th of October, 2004. The workman had filed an application in the Labour

Tribunal on the 7th of March, 2005 stating that the said termination was unlawful and unjustified and sought reinstatement with back wages.

Subsequent to a complaint made to the Police by the employer on the 4th of October, 2004, the workman had been charged for the offences of causing mischief by fire or explosive substance with intent to cause destruction of the storeroom, theft of property in possession of employer and dishonestly receiving stolen property under sections 419, 370 and 394 of the Penal Code, respectively.

The Labour Tribunal had suspended the application filed by the workman under section 31B (3)(b) of the Industrial Disputes Act, No.43 of 1950 (as amended) (hereinafter referred to as "the Industrial Disputes Act") until the final determination of the case against the workman in the Magistrate's Court. Subsequently, the Magistrate's Court, after the trial, had acquitted the workman on the 24th of November, 2011 of all the aforesaid charges.

Thereafter, the Labour Tribunal had proceeded with the inquiry and by its Order dated 8th of March, 2014 held that the employer did not prove the allegations against the workman on a balance of probabilities and as such it was held that the termination under reference was unjust and unlawful. Accordingly, the Labour Tribunal ordered the employer to pay a sum of Rs. 390,000/- as compensation in lieu of reinstatement being five years' salary computed on the basis of Rs. 250/- average daily wages received by him.

The Labour Tribunal had considered the age of the workman, average daily wages drawn by the workman, and the lack of evidence or at least a suggestion that the workman had secured alternative employment since 2005, when computing compensation in lieu of reinstatement.

Being aggrieved by the said Order of the Labour Tribunal the employer had appealed to the High Court against the said Order. The High Court, after hearing the said appeal, had dismissed the same by judgment dated 27th of March, 2015 on the basis that the employer had failed to show that there were grounds to set aside the Order of the Labour Tribunal.

The employer being aggrieved by the judgment of the High Court had preferred an application for Special Leave to Appeal to this court. This court, having heard the parties, granted leave to appeal on the following question of law:

> ***"Did the Honourable Judge of the High Court fail to consider that the Labour Tribunal awarded compensation contrary to the evidence on record?"***

Submissions of the Employer

The learned Counsel for the employer submitted *inter alia* that, the workman continuously changed his position pertaining to his daily wages and that the Labour Tribunal had erred in considering that the workman received a sum of Rs. 250/- as daily wages.

It was further submitted that even though the learned President of the Labour Tribunal and the learned High Court Judge had decided that the workman had drawn a monthly salary of Rs.6,500/-, he had only drawn a monthly salary in the range of Rs.1,500/- to Rs.2,000/-.

Further, the Counsel for the employer submitted that the learned Judge of the High Court had failed to consider the previous acts of misconduct of the workman which should have been taken into consideration when computing the quantum of compensation.

In support of his submission, the Counsel for the employer cited the case of ***Ceylon Transport Board v Wijeratne*** **[1975] 77 NLR 481** where it was held that the past conduct of the workman is a factor to be considered when determining the quantum of compensation and that it should not exceed a maximum of three years' salary.

Submissions of the Workman

The learned Counsel for the workman submitted that when evidence was led before the Labour Tribunal, the workman had clearly answered the questions regarding his daily wages stating that he received a sum of Rs. 250/- for each day of work. It was further submitted that the said evidence of the workman was not challenged by the employer during cross-examination.

Moreover, the learned Counsel for the workman submitted that, in computing the amount of compensation, it was necessary to consider the fact that litigation in the Labour Tribunal was prolonged for nearly nine years.

In view of the fact that the workman had at least eleven more years to work until his retirement, the learned Counsel for the workman further submitted that the compensation granted by the Labour Tribunal is grossly inadequate.

Has the correct 'daily wage' been considered when computing compensation in lieu of reinstatement?

Evaluation of evidence

The Counsel for the employer contended that the Labour Tribunal had erred in considering that the workman received a sum of Rs. 250/- as daily wages. Further, he submitted that there are discrepancies in the evidence of the workman as to the monthly salary that he received from the employer.

The evidence led at the inquiry before the Labour Tribunal shows that when questioned with regard to the monthly salary in the course of evidence-in-chief, the workman had been unable to state his monthly salary with precision. Nevertheless, in response to several questions posed by his Counsel, the workman has stated that at the time of the termination of employment he earned a daily wage ranging from Rs.175/- to Rs.300/-.

Upon perusal of the evidence on record, it is evident that questions put to the workman by his Counsel with regard to his monthly salary and daily wages were vague and unintelligible, and thus, the answers given in response to the said questions cannot be understood and do not have a specific meaning because of the way in which the questions were framed. Further, it is pertinent to note that one such question contained multiple questions within the same question.

In the circumstances, the President of the Labour Tribunal should have ruled out such questions and requested the Counsel to reframe the questions to be more specific or to split the question into several questions depending on the complexity of the questions put to the witness.

The Labour Tribunal or a court has the power to question a witness in order to ascertain proper facts in a case.

Section 31C (1) of the Industrial Disputes Act states that:

> *"31C. (1) Where an application under section 31B is made to a labour tribunal, it shall be the duty of the 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 such order as may appear to the tribunal to be just and equitable".* [Emphasis Added]

The Labour Tribunal's power to make inquiries was considered in the case of ***Merril J. Fernando & Co. v. Deiman Singho*** **[1988] 2 SLR 242**, where the Court of Appeal has stated, **at page 245-246**:

> *"…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".*

Thus, in terms of section 31C (1) of the Industrial Disputes Act, the Labour Tribunal is conferred the power to inquire into the daily wages of the workman.

In the instant appeal, the President of the Labour Tribunal has exercised his power under the said section and inquired as to the daily wages of the workman as the questions put to the workman by his Counsel were vague, unintelligible and contained multiple questions.

In response to the said question posed by the President of the Labour Tribunal, the workman had stated twice that the average daily wages received by him was a sum of Rs. 250/- with precision. Accordingly, the learned President of the Labour Tribunal has used the answers given by the workman to his questions to determine the wages of the workman.

It is pertinent to note that the said answers given by the workman therewith had not been challenged during cross-examination of the workman. Moreover, the employer has failed to produce any document to prove otherwise.

In the circumstances, it is necessary to consider the party who had the burden of proof in establishing the wages of the workman.

Section 36(4) of the Industrial Disputes Act states that the Labour Tribunal "*shall not be bound by any of the provisions of the Evidence Ordinance*". However, in the case of ***Ceylon University Clerical and Technical Association v. University of Ceylon*** **[1968] 72 NLR 84 at page 90** it was held that "*….although Labour Tribunals are not bound by the Evidence Ordinance it would be well for them to be conversant with the wisdom contained in it and treat it as a safe guide*".

Section 103 of the Evidence Ordinance, No.14 of 1895 as amended states as follows;

> "*The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence unless it is provided by any law that the proof of that fact shall lie on any particular person*".

Thus, the burden of proof in establishing that the workman received a daily wage of Rs.250/- was on the workman as it is the workman who wishes the tribunal to believe that he was paid a daily wage of Rs.250/-.

In a civil case or an inquiry before the Labour Tribunal a fact is considered to be proven if a prudent man on a balance of probabilities believes that the facts before it exists. However, once the said evidence is led with regard to the wages of the workman, if the employer wishes to contradict the said sum, the burden of proof shifts to the employer to rebut the evidence given by the workman as to his daily wage.

In the instant appeal, the employer had stated that the documents pertaining to the workman's salary were destroyed by the fire in the storeroom that was allegedly set by the workman. However, under cross-examination the employer had admitted that she failed to mention any damage to documents in the complaint that she made to the Police against the workman with regards to the fire.

Further, even if the said documents were destroyed by the fire, the employer could have obtained the details of the wages paid to the workman from other relevant authorities such as EPF, ETF, etc. to prove the details of the salary paid to the workman.

In the circumstances, I am of the view that the employer has failed to rebut the evidence given by the workman as to his daily wage.

Moreover, I am of the view that in evaluating evidence, the whole of the testimony must be considered together. Further, when considering discrepancies on a specific fact, the entire evidence on the said fact should be considered. When considering evidence, one should not consider part of the evidence given by a witness in isolation from the rest of the evidence given by him/her. Thus, minor variations in evidence shall not be relied upon in the evaluation of the evidence given by the witness.

In the instant appeal, the workman has given evidence after about nine years from the date of the termination of his employment. That leads to the only inference that he had received his

last wages at least nine years prior to the date of giving evidence before the Labour Tribunal. In such circumstances, one cannot expect a witness to have a photographic memory of the facts that had taken place nine years ago. A Labour Tribunal or a Court should take contextual circumstances into consideration when evaluating evidence of a witness that contains minor discrepancies.

Hence, I am of the opinion that the President of the Labour Tribunal has acted in terms of the law in accepting the answer given to him by the workman and disregarding the minor discrepancies in the evidence of the workman in computing the daily wage of the workman. Particularly, in view of the fact that the employer neither challenged the evidence of the workman nor led evidence to contradict the evidence of the workman with regard to his wages. In fact, the evidence of the workman with regard to the said fact of the daily wages has been led at the inquiry before the Labour Tribunal without any contest.

Thus, the Labour Tribunal had not erred in law by accepting the totality of evidence given by the workman with regard to his daily wages and in considering Rs. 250/- as the average daily wages received by the workman.

The criterion applicable for the computation of compensation in lieu of reinstatement

Section 33(1)(d) of the Industrial Disputes Act stipulates the awarding of compensation in lieu of reinstatement.

> "33. (*1) Without prejudice to the generality of the matters that may be specified in any award under this Act or in any order of a labour tribunal, such award or such order may contain decisions-*
>
> *.....*
>
> *.....*
>
> *(d) as to the payment by any employer of compensation to any workman, the amount of such compensation or the method of computing such amount, and the time within which such compensation shall be paid*;"

Further, section 33(6) of the Industrial Disputes Act confers power on the Labour Tribunal "*to include in an award or order a decision as to the payment of compensation as an alternative to reinstatement, in any case where the court, tribunal or arbitrator thinks fit so to do.*"

Even though the Industrial Disputes Act confers power on the Labour Tribunal to order payment of compensation as an alternative to reinstatement, it does not stipulate the manner in which the quantum of compensation should be computed.

I am of the view that the amount of compensation should be computed based on the facts and circumstances of each case by evaluating the financial loss that has been caused to a workman by unjust and unlawful termination.

In the case of ***Ceylon Transport Board v Wijeratne* (*Supra)* at page 498**, Vythialingam, J. discussed the factors that could be considered when determining the quantum of compensation. It was held:

> *"Account should be taken of such circumstances as the nature of the employer's business and his capacity to pay, the employee's age, the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal including the nature of the charge levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights and any other relevant considerations. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place"*

Moreover, the Labour Tribunal is required to make a "just and equitable" order in terms of section 31C (1) of the Industrial Disputes Act in determining the quantum of compensation. However, the said duty of the Labour Tribunal to make a just and equitable order is not cast only towards the workman but also towards the employer as well.

A similar view was expressed in ***Manager, Nakiadeniya Group v. Lanka Estate Workers' Union* [1969] 77 CLW 52 at page 54**, whereby it was held, "*[i]n the making of a just and equitable order one must consider not only the interest of the employees but also the interest of the employers*".

Further in ***Ceylon Tea Plantations Co. Ltd. v. Ceylon Estates Staffs' Union* (SC 211/72, SCM 15/5/74)** [cited in the *'Commentary on the Industrial Disputes Act of Sri Lanka'* published by *Friedrich-Ebert-Stiftung (1989) at page 277*] the court held that "*a just and equitable order must be fair by all the parties. It never means the safeguarding of the interests of the workman alone*".

In the circumstances, I am of the view that the evidence led before the Labour Tribunal should be examined in order to determine the quantum of compensation that should be paid to the workman in lieu of reinstatement.

Has the Labour Tribunal granted an excessive amount of compensation?

The learned High Court Judge has affirmed the Order of President of the Labour Tribunal dated 8th of May, 2014 which awarded the workman a salary amounting to five years as compensation in lieu of reinstatement.

The Counsel for the employer relied on the case of ***Ceylon Transport Board v Wijeratne*** **(supra) at page 498-499**, where Vythialingam, J. held: *"the amount however should not be calculated mechanically on the basis of the salary [a workman] would have earned till he reached the age of superannuation and should seldom if not never exceed a maximum of three years' salary*".

However, I am of the view that the determination of compensation should be based on the facts and circumstances of each case without being restricted to a specific number of years as a ceiling when computing compensation.

A similar view was expressed in ***Hatton National Bank v Perera*** **[1996] 2 SLR 231 at page 237,** where the court considered the said judgment in ***Ceylon Transport Board v Wijeratne*** **(supra)** but, notwithstanding the limitation of three years imposed on the quantum of compensation, awarded the salary amounting to five years as compensation in lieu of reinstatement to the workman.

I am also of the view that the Labour Tribunal was not bound to follow the restriction of three years when computing the quantum of compensation that was imposed by the said judgment ***Ceylon Transport Board v Wijeratne*** **(supra)**.

Now I will consider whether the criteria adopted by the Labour Tribunal and the award of compensation by the Labour Tribunal is just and equitable in terms of section 31C (1) of the Industrial Disputes Act.

Is the awarding of five years' salary to the workman just and equitable?

The employer had made the complaint to the police on the day of the alleged incident, i.e. on the 4th of October 2004, and the workman had made the application to the Labour Tribunal on the 7th of March, 2005.

The delay in concluding the proceedings before the Magistrate's Court

The Labour Tribunal has suspended the application of the workman on an application made by the employer in terms of section 31B (3)(b) of the Industrial Disputes Act which states as follows:

> "*31B (3) Where an application under subsection (1) relates -*
>
> *(a) ……..*
>
> *(b) to any matter the facts affecting which are, in the opinion of the tribunal facts affecting any proceedings under any other law,*
>
> *the tribunal shall make order suspending its proceedings upon that application until the conclusion of the said inquiry or the said proceedings under any other law, and upon such conclusion the tribunal shall resume the proceedings upon that application and shall in making an order upon that application, have regard to the award or decision in the said inquiry or the said proceedings under any other law*".

The delay in concluding the Labour Tribunal inquiry as a result of the application made by the employer to suspend the application of the workman until the conclusion of the proceedings before the Magistrate's Court should not be held against the employer. Further, the employer is entitled in law to make such an application to suspend the workman's application in terms of the abovementioned section of the Industrial Disputes Act.

Hence, the employer cannot be penalized for the delay caused by suspending the application of the workman in accordance with the procedure stipulated in the Industrial Disputes Act.

Nevertheless, it appears that grave injustice and financial loss have been caused to the workman because of the undue delay in concluding the case filed in the Magistrate's Court against him. Particularly, pending criminal proceedings against the workman will make it difficult for the workman to find alternative employment.

In the circumstances, I am of the view that the legislature should consider the implications of the delay caused due to the suspension of applications pending before the Labour Tribunal under section 31B (3) of the Industrial Disputes Act as amended until the conclusion of similar, identical or relevant matters which are pending before other courts or institutions.

In passing, I wish to note that the legislature has taken steps to address the injustices caused to workmen due to delays caused in obtaining relief when employers exercise their right to appeal. Accordingly, section 31D of the Industrial Disputes Act was amended by the Industrial Disputes Act (Amendment) No. 32 of 1990 thereby requiring employers who intend to appeal against the orders of the Labour Tribunal to furnish security in cash before an appeal is lodged.

Thus, I am of the view that new legislation should be enacted to address the delay caused due to suspension of applications in terms of section 31B (3) of the Industrial Disputes Act and to expedite the conclusion of such matters pending before other courts or institutions.

The need to mitigate losses

A workman whose services were terminated is under a duty to mitigate his losses by finding alternative employment. S.R. De Silva in *'**The Legal Framework of Industrial Relations in Ceylon**'* at page 389 states:

> "*No question of compensation properly arises where the termination has caused no loss to the employee, as where the employee has found alternative employment of equal or better prospects soon after termination*".

Further, discussing the duty of a dismissed workman to mitigate damages, it cited the Indian case ***Shri Chatrapati Shivaji Sahakari Ltd. v. Bhokare*** **[1966] ICR 86** where it was held:

> *"Under the general law of master and servant, a servant wrongfully discharged should do all in his power to mitigate damages and endeavour to get other employment and to the extent to which he has got wages elsewhere damages can be reduced."*

However, I am of the view that the adverse implications of pending criminal proceedings before the Magistrate's Court makes it difficult for the workman to secure alternative employment.

Thus, although the delay caused by criminal proceedings should not be held against the employer, it has an adverse impact on the workman in finding alternative employment. This is

especially the case in the instant application, as the workman has worked as a *"Kankani*" which is an employment which naturally requires the trust and confidence of an employer.

A similar position was held in ***Silva v. Kuruppu***, **(SC 182/69, SC Minutes dated 14/10/71),** cited in the *'Commentary on the Industrial Disputes Act of Sri Lanka'* published by *Friedrich-Ebert-Stiftung (1989) at page 375*. In the said case, the court held that the failure of the workman to obtain employment of a suitable nature due to the false allegations of theft made by the employer was relevant in the assessment of compensation.

Further, the Labour Tribunal has also considered the age of the workman in the computation of compensation. The workman had been 45 years old at the time of termination and had been 54 years old at the time the Order of the Labour Tribunal was delivered. Hence, obtaining employment similar to the status of a *Kankani* which is heavily dependent on physical strength is difficult for the workman as he was nearing his age of retirement.

Moreover, in the instant appeal, the workman had worked with the employer for approximately 27 years in total, which is a significant period of service. The employer contended that the workman had, on several occasions during the said service period, cut trees belonging to the employer without obtaining prior permission. In support of the said contention, the employer had produced letters to the Labour Tribunal in which the signatory, that the employer claims to be is the workman, admits the cutting and selling of trees.

However, the said letters have not been considered as the employer had failed to prove the said letters before the Labour Tribunal.

Hence, I am of the view that the Labour Tribunal was correct in not acting on facts in respect of prior misconduct on the part of the workman that have not been proved at the inquiry before the Tribunal.

Conclusion

In the circumstances, considering the implications of having pending criminal proceedings before a Magistrate's Court in securing alternative employment, the age of the workman at the time of termination of employment and the impact it has on securing alternative employment, the type of employment that the workman engaged in, the number of years of service that the workman had provided to the employer, and the age of the workman at the time the inquiry

before the Labour Tribunal concluded, I am of the view that awarding five years' salary as compensation in lieu of reinstatement at an average daily wage of Rs.250/- is not excessive.

Hence, I answer the following question of law in the negative:

> *"Did the Honourable Judge of the High Court fail to consider that the Labour Tribunal awarded compensation contrary to the evidence on record?"*

In the circumstances, I dismiss the appeal with costs.

I order Rs.100,000/- as costs to be paid within three months from today.

The Registrar of this court is directed to forward a copy of this judgment to the Commissioner General of Labour to act in terms of the law.

Judge of the Supreme Court

L.T.B. Dehideniya, J

I agree **Judge of the Supreme Court**

Murdu N. B. Fernando, PC, J

I agree **Judge of the Supreme Court**