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

In the matter of an Appeal from the judgment dated 10.06.2013 of the Provincial High Court of Colombo HCALT 96/2010 under and in terms of Article 128(2) of the Constitution.

S.C. Appeal No. 73/2014

S.C.Spl. LA No. 175/2013
HC. Case No. HCALT/96/2010
LT. Application No. 02/1511/2008 Colombo

Kosgolle Gedara Greeta Shirani Wanigasinghe,
Alupatha, Ussapitiya.

Applicant

Vs.

Hector Kobbekaduwa Agrarian Research and Training Institute,
No. 114, Wijerama Road,
Colombo 07.

Respondent

And Between

Kosgolle Gedara Greeta Shirani Wanigasinghe,
Alupatha, Ussapitiya.

Applicant-Appellant

Vs.

Hector Kobbekaduwa Agrarian Research and Training Institute,
No. 114, Wijerama Road,
Colombo 07.

Respondent-Respondent

And Now Between

Kosgolle Gedara Greeta Shirani Wanigasinghe,
Alupatha, Ussapitiya.

Applicant-Appellant-Appellant

Vs.

Hector Kobbekaduwa Agrarian Research and Training Institute,
No. 114, Wijerama Road,
Colombo 07.

Respondent-Respondent-Respondent

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BEFORE : **S. Eva Wanasundera, PC.J .**

Buwaneka Aluwihare, PC.J. &

Priyantha Jayawardena, PC.J.

COUNSEL : Pulasthi Hewamanne instructed by Mr. R. Navodayam for the Applicant-Appellant-Appellant on behalf of Legal Aid Commission.

N. Wigneswaran SSC. for the Respondent-Respondent-Respondent.

ARGUED ON : **29.05.2015**

WRITTEN SUBMISSIONS FILED: By the Applicant-Appellant-Appellant. on 18.06.2015
By the Respondent-Respondent-Respondent on 16.06.2015

DECIDED ON : **02.09.2015**

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S. Eva Wanasundera, PC.J.

This matter was considered by this court in the first instance on the 23rd May, 2014 and prior to granting leave to appeal stated thus; "we see no reason to disturb the findings of the President of the Labour Tribunal and also the Judge of the High Court. However we find that the learned President of the Labour Tribunal and the learned High Court Judge have not addressed their minds regarding the proportionality of punishment imposed by the Employer having regard to the act of misconduct, in the Labour Tribunal".

This court then granted leave to appeal on one question of law contained in paragraph 9(d) of the Petition dated 23rd July, 2013. It reads,

> "Have the learned High Court Judge of Colombo and the learned President of the Labour Tribunal failed to consider the Doctrine of Proportionality in entering their decision to terminate the services of the Appellant ?"

Facts in this case are quite pertinent to be considered since this court has to decide on the proportionality by weighing out the incidents with the punishment imposed on the Appellant. In the circumstances, I would like to narrate the facts as follows.

The Applicant- Appellant- Appellant (hereinafter referred to as the Appellant) joined the Hector Kobbekaduwa Agrarian Research Institute, which is named as the Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) on 10.01.1990. She was scheduled to be on probation for three years. Due to complaints by her supervising officers at that time, with regard to her attitude and behavior, the increments were delayed and warnings were given by the Respondent and finally, after 9 years, she was confirmed in the post of Statistical Assistant Grade 1 on 15.02.1999. Due to numerous incidents which took place between the Appellant and the co - workers, and also between the Appellant and the superiors, the Appellant was interdicted and a charge sheet was served on her. A domestic inquiry was held on the charge sheet dated 16.06.2006.The Appellant was found guilty. Her services were terminated on 06.03.2008.

The Appellant challenged this decision in the Labour Tribunal by filing an application on 30.10.2008. Only the Appellant gave evidence on her behalf. The Respondent, Employer led the evidence of three witnesses who were Research Officers. The Labour Tribunal delivered the order on 03.09.2010 with the finding that the termination of the Appellant's services was just and equitable. Thereafter the Appellant appealed against the order of the Labour Tribunal to the Provincial High Court of the Western Province holden in Colombo on 07.10.2010. By judgment dated 10.06.2013 the High Court too agreed that the termination of the services of the Appellant was just and equitable and dismissed the Appeal. The Appellant being dissatisfied with the decision of the High Court has sought relief and has come before the Supreme Court.

The Appellant argued that the charges taken together were as simple as, leaving the work place without authorization, not accepting the letter of interdiction, not accepting letters issued by the Head of the Department and acting in a manner which has caused a loss of trust and confidence in the Appellant by the employer Respondent. The Respondent submitted that the services of the Appellant were terminated on several grounds set out in the charge sheet which included inter alia , (a) failure to fullfill and/or negligence and/or incompetence in carrying out her duties (b) persistent absence from the work place without obtaining prior permission and in violation of the rules imposed regarding the same, (c) insubordination demonstrated by the failure to accept the letters served on the Appellant by the Respondent, (d) disturbing the functions and/or instituting and/or threatening and/or causing mental and physical distress to the fellow employees of the Respondent which results in the welfare of the Respondent institution being compromised , (e) failing to abide by the advice and/or instructions given to the Appellant by the Respondent Institute and (f) the Appellant being wholly unfit for service at the Respondent Institute and retaining the Appellant in service would cause difficulties and disrepute to the Respondent Institute. In view of these misdemeanours, the Respondent employer had conducted a preliminary investigation prior to serving a charge sheet, specifically on a complaint made against the Appellant by a co-worker. It had been with regard to the aggressive behavior by the Appellant towards the said employee. The officer who conducted the said preliminary investigation had testified before the Labour Tribunal.

I observed when reading the evidence led before the Labour Tribunal that 29 letters given to the Appellant were marked in evidence. It is of interest to see what it is all about regarding the proportionality of punishment which is the core issue in this case. Hence, I decided to enumerate the said letters herein as follows:-

1. Letter dated 06.06.1997 – Complaint letter from Head/IAR Division to the Director about the Appellant.

2. Letter dated 12.11.1997 – Head of IAR Division requesting the Registrar to transfer the Appellant to another division **due to her arrogant manner and indiscipline.**

3. Letter dated 14.07.1998 – The registrar requested the **Appellant to give reasons for not allowing a senior officer to use the computer for an official purpose.**

4. Letter dated 17.07.1998 – Complaint against the Appellant **by 7 others** in the ARMD Division to the Director and **requested her to be transferred to another Division.**

5. Letter dated 26.08.1998 – Complaint letter about the Appellant from Dr. Tennekoon Head – ARMD to the Director and requested her to be **transferred immediately due to her misconduct.**

6. Letter dated 10.12.2000 and letter dated 08.11.2000 Dr. Tennekoon , Head of the Division ARMD requested the Director to transfer the Appellant to another Division **due to her incapability in attending to her routine duties and failed to follow his directives to use the common facilities.**

7. Letter dated 04.05.2001 – Complaint letter from the Head of ARMD to the Director/HARTI and requested her to be transferred. The reasons for this letter are that **the Appellant's performance was not satisfactory and not up to the standards, therefore the Research Officers was reluctant to assign her any duties. Also the Appellant was not willing to obey the office rules and regulations, and she continued to leave the office without making an entry in the Movement Register.**

8. Letter dated 04.05.2001 – Dr. W.G.Somaratne, Head / ARMD has requested the Director/HARTI **to transfer the Appellant to another division in order to create a pleasant working atmosphere at the division.**

9. Letter dated 12.07.2001 – Complaint letter from Dr. W.J. Somaratne Head of Division to the Director because **the Appellant had been refusing to follow the**

directives of the Research Officers they decided not to assign any work to the Appellant at the monthly meeting.

10. Letter dated 11.02.2003 – warning letter by the Registrar –Appellant was **warned not to stay at the canteen during work hours.**

11. Letter dated 03.12.2003 – Warning letter by the Registrar – **warned again not to stay at the canteen during work hours.**

12. Letter dated 11.12.2003 **– warning and transfer** by Registrar**, since all the Division Heads rejected her services, the Appellant had been assigned to the Administrative Branch and warned her to discharge her assigned duties without any misconduct.**

13. Letter dated 29.03.2004 – warning letter by the Registrar. The Appellant had **entered into office of the Head of the Statistic branch, and using his phone she has made a personal call.**

14. Letter dated 28.04.2004 – warning letter by the Registrar. The Appellant **continuously failed to come to work on time and as a result her leave has been reduced and also she was warned not to leave the institute during working hours without permission.**

15. Letter dated 28.04.2004 – warning letter by Registrar. The Appellant had **entered into the Administrative Branch and shouted in a manner disturbing others.**

16. Letter dated 10.06.2004 – warning letter by Registrar. The Appellant had **signed a register in a red pen, even after warned by the Administrative Officers not to use a red pen.**

17. Letter dated 09.09.2004 – warning letter by the Director. Interviews for the post of Static Assistant had been duly completed, but **the Appellant had written** a letter about the interviews **in a manner that damage the image of the Institute**, therefore the Appellant was warned not to do that.

18. Letter dated 22.10.2004 – Warning letter by the Registrar. The Appellant continued to run and walk around the Badminton Court, even after she had been advised not to do so.

19. Letter dated 12.05.2005 – complaint letter from the Head of Division to the Registrar regarding the Appellant. The Appellant **had not reported to him** after she got transferred to his Division on 10.05.2005.

20. Letter dated 01.07.2005 – The Head of the Division requesting the Registrar to transfer the Appellant from his Division, the reasons being **that she had been scolding the others in the Division and her behavior had been in a troubling manner to others in the Division.**

21. Letter dated 01.07.2005 – the Head of the Division requesting the Director to transfer the Appellant from his Division. One of the reasons for the request was **that she had no knowledge or capability to perform the duties.**

22. Letter dated 15.08.2005 – Warning letter to the Appellant from the Registrar. The Appellant had been leaving the institute during working hours without permission and using computers at the institute without permission.

23. Letter dated 09.11.2005 – Complaint letter from the Registrar to the Director **asking to take disciplinary action against the Appellant. Briefing all the misconduc**t the Appellant had caused till the date of the letter.

24. Letter dated 02.12.2005 – Warning letter by the Registrar. The Appellant had been eating in the canteen during the office hours.

25. Letter dated 23.02.2006 – Request from the Head of the Division **not to transfer the Appellant to that Division due to her bad record at the previous Division** he worked and therefore the entire staff in his Division including the senior officers wanted her not to be transferred to this Division.

26. Letter dated 01.03.2006 - Complaint to the Registrar regarding the Appellant by the Assistant Accountant. She had been coming to the Accounting Branch **without any reason and behaving in a disturbing manner** (read newspapers, chat with others very loudly, answer the phone at the branch, bring tea from the canteen and drink at the Accounting branch . **Even after several verbal warnings by the Accountant and Assistant Accountant, she had continued this behavior.**

27. Letter dated 17.03.2006 – Several Research Officers and staff members complained to the Head of the Division not to accept the transfer of the Appellant made to that Division, due to the reason that **her transfer would jeopardize the peaceful atmosphere of the Division.**
28. Letter dated 05.06.2006 – Research Officer, N.K.M. Damayanthi informed the Director that the **Appellant had not completed the assigned work** (after several reminders had been given) and asked him to give an appropriate punishment.

29. Letter dated 06.04.2006 – Warning letter. The Appellant was assigned certain work on 28.03.2006 but **did not complete even after an extension was granted. Most importantly she even failed to start the assigned work on the date of the letter**, but she had been reading news papers and chatting with others during working hours.

I observe that the list of letters as mentioned above, when produced before the Labour Tribunal, the President would have formed an opinion about the extent to which **the Respondent had been tolerant** and how much the Appellant had acted with **consistent negligence, insubordination, incompetence, disobedience, and disruption of the smooth functioning** of the work place. In the evidence, I noted that the vocabulary used by the Appellant at the work place is abusive, foul, offensive and appalling. At times it had been even intimidating.

This court at the time of granting of leave had stated that the findings of the Labour Tribunal and the High Court would not be disturbed by this Court. Yet I find that the reading of the evidence gives a closer picture of the real situation which would facilitate this court to decide on the question of law on proportionality. The behaviour of the Appellant at the work place had been without any discipline whatsoever. Her conduct and attitude regarding the co – workers as well as superiors has led to the interdiction, serving the charge sheet and holding an inquiry against her. At the end of the inquiry her services were terminated.

In this matter both counsel appearing for the Appellant and the Respondent have filed extensive written submissions. I wish to advert some of the judgments referred to in the submissions and analyse them.

In **State Gem Corporation Vs Srima Costa 1998, 3 SLR 191**, an employee was terminated on the grounds of abuse and threat and was reinstated by the Labour Tribunal without back wages but the Court of Appeal stated that **reinstatement is not an appropriate remedy as it would not be conducive to the maintenance of discipline and harmonious industrial relations.** Compensation was ordered instead. In many cases such as **The Electricity Equipment & Construction Company Vs Cooray, 1962, 63 NLR 164, and Reckit & Colman Ltd. Vs Peris 1979, 2 NLR 229 ,** it was held that, as a general rule, refusal to obey reasonable orders justified the dismissal from service. In De Silva Vs Ocean Foods and Trade Ltd. ……. It

has been held that dismissal of a workman for refusal to obey legitimate instructions, insulting and humiliating a superior officer and for refusing to accept a letter given to him was held to be justified. In **Colombo Apothecaries Co. Ltd. Vs Ceylon Press Workers' Union 1972, , 75 NLR 182, Weeramantry J said** ; " The fact that an earlier default had been pardoned or excused does not, in my view, wipe it off the slate so completely as to render that default totally irrelevant. That default assumes relevance and importance in the context of a complaint by the employer of successive and repeated defaults of the same nature. When one is considering how reasonable or unreasonable has been the conduct of each party it would be wrong to view the final act in the series in isolation as though it existed all by itself. Here as elsewhere in the field of Labour Law, **a proper assessment of a dispute can only be made against the background of the conduct and relationship between the parties."**

I observe that in the instant case, the Appellant was admonished, excused, warned right along and the final act of termination of services after a preliminary investigation , then issuing a charge sheet and an inquiry being held and the final act of termination of services after the inquiry, was the end result of her bad conduct, bad relationship with the Respondent employer and co-employees and the work place as a whole. The Respondent had put up with the Appellant's bad behaviour for a considerable time.

The Appellant argued that the President of the Labour Tribunal had not considered the issue of proportionality. In his order he stated thus: "**මෙම නඩුවේ ඉදිරිපත්වූ උත්තරවාද සාක්ෂි ද, ලේඛණ ද, ලිඛිත දේශන ද සලකා බැලීමේදී මා විසින් තීරණය කළ යුතු ප්‍රශ්නය වන්නේ, පහත සඳහන් චෝදනා පත්‍රයේ චෝදනාවලට ඉල්ලුම්කාරිය වැරදිකරු වන්නේද? නිවැරදිකරු වන්නේද? වැරදිකරු වන අවස්ථාවක එම චෝදනා සේවයෙන් පහ කිරීමට ප්‍රමාණවත් වන්නේද? නැත්ද? ඉහත සඳහන් ප්‍රශ්නවලට ඉල්ලුම්කාරියට වාසි සහගත තීන්දුවක් ලැබෙන අවස්ථාවක කුමන සහනයක් ලබාදිය යුතුද? යන්නත්, අවාසි සහගත තීන්දුවක් ලැබෙන අවස්ථාවක ඉල්ලුම් පත්‍රය නිෂ්ප්‍රභා කළ යුතුද යන්නත්ය**."

Accordingly , it is obvious that the President of the LT has considered the question of proportionality in the first instance. As highlighted by me above, the President had identified the question of proportionality. It is in that light that he has considered the cumulative effect of the Appellant's conduct at the work place and after consideration of

the factors before him, he had determined finally that termination of the Appellant is just and reasonable.

Even the Learned High Court Judge in turn has identified that he has to consider the order of the Labour Tribunal and decide whether termination of services is proportionate to the charges proven in evidence. At one point of his order, he says "**මෙම අභියාචනයේදී පැහැදිලිව කියා සිටින නීතිමය කරුණු වනුයේ විනිශ්චය සභාව විසින් උපකල්පන මත යම් යම් නිගමනවලට එළඹීමෙන් නීතිමය වැරදි උගත් සභාපතිවරයා විසින් සිදු කර ඇති බවත්**, **එලෙසටම නිසි ලෙස සාක්ෂි විශ්ලේෂනය කර නැති අතර**, **අභියාචකට එරෙහිව චෝදනා ඔප්පු නොවී තිබියදී මෙන්ම ඉදිරිපත්වූ සාක්ෂි අනුව ඔප්පු වී ඇතැයි සැලකෙන චෝදනා මත වුවද සේවය අවසන් කිරීමට තරම් ප්‍රමාණවත් නොවන බවත්,** කෙසේ වෙතත් ඉල්ලුම්කාරියගේ සේවය අවසන් කිරීමට යුක්ති සහගත බවට **එළඹී නිගමනය වැරදි බවත් කියා සිටින අතරේම චෝදනා පත්‍රය නිකුත් කිරීමෙන් පසුව අභියාචකගේ පසු චර්යාද සැලකිල්ලට ගෙන සේවය අවසන් කිරීම සාධාරණ බවට එළඹී නිගමනය වැරදි බවත් එහි නීතිමය දෝෂ පැහැදිලිව දක්නට ඇති බවත්ය**."

I find that the Labour Tribunal had considered all evidence submitted before it with reference to the charges raised against the Appellant**. The High Court has re considered the assessment of evidence. The High Court Judge had done the evaluation judicially.**

The Appellant argued **that she did not hold a fiduciary position** in the Respondent Institution and therefore the final charge in the charge sheet regarding "loss of confidence" does not apply to her. I see this concept in a different way. All the workers in any institution work for the employer. The employer has employed each and every person having allocated some part of the work of the employer. Let it be the Chief Executive Officer, let it be a clerk or a peon or even a sanitation labourer, they are employed under the employer. The employer trusts that they will do their part of the work properly. The employer thus has trust on them. The CEO is a very highly trusted person. The officers are also trusted with may be a little lesser degree than the CEO. The minor employee also is trusted , may be even to a lesser degree than the officer. No employee is distrusted. Without trust, an employer cannot and will not employ any person. The employee knows that he is trusted not to be negligent in his work, not to be indisciplined, not to be fraudulent, not to work without due care for co- workers etc. They are tied to the employer with the bond of trust. I am of the view that each and every

employee is holding a fiduciary position in relation to the employer**. The employee cannot break this trust and work at his or her free will and leisure.** It is the same with the employer. He cannot act in such a way in breach of the trust placed on him by law towards the employee. Trust works both ways. That is reality.

I am of the view that the employer can at all times bring a charge against the employee for 'loss of confidence', provided that there is proof of the same available.

S.R. De Silva in his book on " The Law of Dismissal" speaks of two aspects of loss of confidence.

1. In appropriate circumstances it may justify the termination of an employee's services. However the claim of an employer that he has lost confidence usually cannot relate to a person who occupies a non- fiduciary position. In other words, **though theoretically there is no restriction as to the class of employee** in respect of whom termination of **employment may be effected on the ground of loss of confidence,** it usually applies in respect of employees who hold positions of trust and confidence such as accountants, cashiers and watchers or who at least perform a certain degree of responsible work.

2. It may be a circumstance from which a court may conclude that reinstatement is not the appropriate relief despite a finding that termination is not justified.

S. R. De Silva further states that whichever way one views the concept, loss of confidence in the integrity of an employee must be supported by cogent evidence. I am of the view that the **Appellant being a Grade 1 Statistical Assistant held a fiduciary position in the Respondent Institution and ' loss of confidence', can very well be a reason for termination of services when proven. That fact was proven through evidence before the Labour Tribunal.**

In meting out the punishment, the bad record of service of the employee has made some impact on the inquiry officer as well as the President of the Labour Tribunal in making an order for her being dismissed from service. I am of the view that in this case, termination was just and equitable since she had been tolerated for a very long time by the employer, Respondent. She had been incorrigible and retaining her services

was considered to have caused a lot of damage to the work place. The charges were proven with evidence. On the Appellant's behalf, only she had given evidence.

In **Colombo Apothecaries Co. Ltd. Vs Ceylon Press Workers' Union 1972, 75 NLR 182, Weeramantry J** observed: " A management which has been considerate enough to excuse an employee repeatedly in respect of such defaults cannot in my view, be penalized for its own consideration. It is true that where defaults are repeated and are excused over and over again, with a warning that they should not be repeated, **the very last default viewed by itself may appear inconsequential and insufficient of its own force to justify drastic action** by the employer. This would however be a **most unrealistic way of viewing the matter**, for before a Labour Tribunal one is not concerned with technicalities. It is to be remembered that in considering disputes of this nature we are not in the technical field of estoppels where by reason of one party's acceptance or forgiveness of another's conduct he is prevented from placing any reliance whatsoever thereon."

" Labour laws must be worked **with justice both to employee and employer** and I do not consider realistic or satisfactory a view of a labour dispute which reduces **an employer to a state of impotence** in the face of repeated defaults of the same nature by the employee. There can very well come a time when the employer makes up his mind that he will not suffer his indulgence to be taken advantage of any longer. **It is then for the Tribunal to see whether in the context of his entire conduct towards his employer, the latter has been reasonable in taking the action he did ".**

" Any other view would seem to be lacking in that broad and general approach to labour disputes which it is the very aim and object of the labour laws to foster ".

I observe that the Respondent did not suddenly decide to terminate the Appellant's services because the Appellant left without authorization on a few days or because the Appellant refused to take delivery of the letters issued by the Head of the Department. The decision to terminate was taken in view of the abysmal record of the Appellant , who had been warned in writing many times regarding numerous misconducts prior to the domestic inquiry being held.

The Labour Tribunal found that the Appellant was guilty of the last charge as well, which was 'loss of confidence '. I am of the view that when loss of confidence is proved, then the termination of services is just and equitable. The Employer cannot keep such a person in his employment as the trust is gone and it is not there anymore.

The Appellant has quoted from **the dissent judgment of Fernando J** which the Appellant claims that proportionality of the punishment imposed was discussed. I do not find that the dissent judgment was on proportionality of punishment by terminating the services of the employee. It is more on an order concerning just and equitable relief and also on **whether the Labour Tribunal has made an order which it is not empowered to make.** On the other hand, the other **two judges S.B. Goonewardena J and Wadugodapitiya J had dismissed the appeal of the workman stating that "the appellant by his own conduct vacated his post and lost his employment".** I hold that this judgment has less relevance to the case in hand.

I have considered all the submissions made by the Appellant as well as those by the Respondent in this case. I answer the question of law raised at the commencement of this judgment in the negative to the effect that both the Labour Tribunal and the High Court have considered the doctrine of proportionality in entering this decision to terminate the services of the Appellant. I hold that there are no grounds to disturb the judgment of the High Court.

The Appeal is dismissed without costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

Priyantha Jayawardena, PC.J.

I agree.

Judge of the Supreme Court