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

SC Appeal No. 30/2008
SC/LA (Spl) LA. 17/2007
LT. Application 19/AV/696/93
H.C. Appeal No. 45/2006

Ceylon Estate Staffs Union,
No.06, Aloe Mawatha,
Colombo 03.
"On behalf of
Tissa Nanayakkara"

Applicant

Vs.

1. The Superintendant,
   Sunderland Estate,
   Eheliyagoda

2. Pussellawa Plantations
   Ltd,,
   Tummodera Road,
   Puwakpitiya,
   Avissawella.
3. Pussellawa Plantations
   Ltd, c/o. Free Lanka
   management,Co. (PVT)
   Ltd, 401 1/1, Galle
   Road,Colombo 04.
4. Free Lanka management,
   Co. (PVT) Ltd,
   401 1/1, Galle Road,
   Colombo 04.

Respondents

And Between

Ceylon Estate Staffs Union,
No.06, Aloe Mawatha,
Colombo 03.
"On behalf of
Tissa Nanayakkara"

Applicant – Appellant

Vs

1. The Superintendant,
   Sunderland Estate,
   Eheliyagoda

2. Pussellawa Plantations
   Ltd,,
   Tummodera Road,

Puwakpitiya,
Avissawella.

3. Pussellawa Plantations Ltd, c/o. Free Lanka management,Co. (PVT) Ltd, 401 1/1, Galle Road,Colombo 04.
4. Free Lanka management, Co. (PVT) Ltd, 401 1/1, Galle Road, Colombo 04.

Respondents - Respondents

And Now Between

1. Pussellawa Plantations Ltd, Tummodera Road, Puwakpitiya, Avissawella.
2. Pussellawa Plantations Ltd, c/o. Free Lanka management,Co. (PVT) Ltd, 401 1/1, Galle Road, Colombo 04.
3. Free Lanka management, Co. (PVT) Ltd, 401 1/1, Galle Road, Colombo 04.
4. Konara Mudiyanselage Chasinda Prasan
The Superintendent
Sunderland Estate,
Eheliyagoda.

Respondents – Respondents - Appellants

Vs

Ceylon Estate Staffs Union,
No.06, Aloe Mawatha,
Colombo 03.
"On behalf of
Tissa Nanayakkara"

Applicant – Appellant-Respondent

Before: Amaratunga J,
Marsoof J,
Suresh Chandra J.

Counsel:
Sanjeewa Jayawardane with Ms. Sandamali Chandrasekara Appellants
G. Alagaratnam PC with V.Gunaratne for Respondent

Argued on : 08.03.2011
Decided on : 17.02.2012

Suresh Chandra J,

This is an appeal from the judgment of the Provincial High Court of the Western Province holden at Avissawella. The Applicant-Appellant-Respondent (hereinafter referred to as "the Respondent") had made an application to the Labour Tribunal of Avissawella alleging that his services had been terminated wrongfully by the Respondents-Respondents-Petitioners (hereinafter referred to as "the Petitioners"). The Labour Tribunal had after inquiry dismissed the application of the Respondent and on his appealing to the Provincial High Court the order of the Labour Tribunal had been set aside and the High Court ordered that the Respondent be reinstated with backwages. It is from that judgment that the Petitioners have appealed to the Supreme Court and when the application for Leave to Appeal was supported leave had been granted on the following questions of law , set out in sub-paragraphs (a), (b), (e), (f) and (g) of paragraph 8 of the Petition of the Petitioners:

(a) Did the Hon. High Court misinterpret and misapply the established legal principles, differentiating the standard of proof applicable in a criminal prosecution as opposed to an application under S.31 B (1) of the Industrial Disputes Act?
(b) Did the High Court fall into error by holding that the judgment of the Magistrate's Court is binding on the Labour Tribunal?
(e) Did the High Court err by failing to hold that the conduct of the Respondent including gross insubordination as well as his unsatisfactory service record and the loss of confidence warranted the termination of his services?
(f) Did the High court fail to appreciate the fact that the reinstatement of the Respondent would be subversive of discipline and undermine the authority of the management and as such be prejudicial to the establishment?
(g) Without any form of prejudice whatsoever to the foregoing, did the High Court fail to appreciate that compensation in lieu of reinstatement would be a more appropriate alternative in all the circumstances of the case ?

The Respondent who had been employed in the capacity of a Field Officer, in his application to the Labour Tribunal had stated that his services had been wrongfully terminated on 13th September 1993. The Appellants in their answer took up the position that the termination of the services of the Respondent was justified as he had on 11th September 1993 threatened to assassinate the Superintendent and his family. In the replication filed by the Respondent, he denied the allegation and stated that he was not issued with a charge sheet and that there was no disciplinary inquiry held against him before terminating his services.

Though the application before the Labour Tribunal was filed in 1993 it was laid by at the instance of the Appellants as a Magistrate's Court case was pending regarding the said allegation

against the Respondent. After the conclusion of the Magistrate's Court case, wherein the Respondent was acquitted after trial, the inquiry before the Labour Tribunal commenced on 17th January 2002.

Before the Labour Tribunal the Petitioners led the evidence of the Chief Clerk of the Estate, Suppiah Krishnabavan, Neeta Rajakaruna a Dispensary Assistant and the Superintendent of the Estate at the time of the inquiry before the Tribunal, while the Respondent gave evidence on his behalf. Superintendent Bodinayake, regarding whom the threat and abuse was alleged to have been made by the Respondent, did not give evidence before the Tribunal. He had given evidence before the Magistrate's Court together with Krishnabavan and Doliet, a Clerk of the Estate. Doliet did not give evidence before the Tribunal while Neeta Rajakaruna did not give evidence before the Magistrate's Court. The Magistrate's Court acquitted the Respondent on the basis that the evidence was unsatisfactory and contradictory.

S.31B(5) requires the Tribunal to lay by a case filed before it, if proceedings are being taken in another forum regarding the same matter. It appears that the Labour Tribunal had laid by the case purportedly on the order of the Secretary of the JSC on application of the Appellants that the case since the Magistrate's Court case was pending. The section further states that the Labour Tribunal should consider the decision in such proceedings in arriving at its finding. There can be no doubt that though the Tribunal may consider such decision, it is not bound by same, particularly because the standard of proof in the criminal trial which is beyond reasonable doubt, is different from that required in a matter before a Labour Tribunal which is proof on a balance of probabilities.

In the present case though the complainant was the person against whom the threat was alleged to be held out, he did not give evidence before the Labour Tribunal although he had given evidence before the Magistrate's Court. No explanation had been offered as to the inability to get him as a witness before the Tribunal. The Appellants relied on the witnesses Krishnabawan, Neeta Rajakaruna and the Superintendent who succeeded Bodinayake to justify the termination of services of the Respondent. Krishnabawan was the Chief Clerk of the estate and Neeta Rajakaruna was a Dispensary Assistant who is said to have been in the office when the alleged threat was made out by the Respondent. Doliet who had given evidence before the Magistrate's court did not give evidence before the Tribunal.

An examination of the evidence of Krishnabawan gives the impression that he was not a willing witness as it had taken a lot of persuasion to get him to give evidence and his evidence under examination in chief is not very convincing and had been cross examined at length and his evidence reveals that he had made a statement to the Police at the instance of the Superintendent two days after the alleged incident and that he had signed a statement written in Sinhala by Neeta Rajakaruna as he could not write in Sinhala. Neeta Rajakaruna too had made a statement to the Police only after two days and that too at the instance of the Superintendent. The Respondent denied any confrontation with Bodinayake in the office of the estate and his position was that he had met Bodinayake on his way to the residence of Bodinayake and had spoken to him about his impending transfer.

The Appellants did not issue a charge sheet to the Respondent nor did they hold any inquiry regarding the alleged incident. The Collective Agreement which was produced by the Respondent showed that the Estate should have held a disciplinary inquiry. Even Bodinayake had not gone to the Police immediately after the incident. It is to be noted that he had made his complaint to the Police regarding the alleged threat on the same day that he issued the termination letter on the Respondent. Taking into account this background, and the contradictory

nature of the evidence of Bodinayake as well as the other witnesses before the Magistrate's Court, and the unconvincing evidence of the witnesses before the Tribunal, it would have been unsafe to consider the allegation against the Respondent as being established even on a balance of probabilities.

The charge sheet filed in the Magistrate's Court referred to the incident as having occurred on 12/9/93 whereas the alleged incident is said to have occurred on the 11th of September 1993. The statement made by Bodinayake to the Police on the 13th of September was not produced by the prosecution in the Magistrate's Court. The statements made by Krishnabawan and Doliet were produced in the Magistrate's court. If this was done, the failure to produce the complainant's Bodinayake's statement does not stand to reason. There is no indication even as to whether the Police investigated into the complaint of Bodinayake as there was no evidence to show even whether the Respondent's statement was recorded by the Police. Bodinayake's evidence as revealed from the record in the Magistrate's Court is contradictory on the date as well.

The recording of statements of a complainant, witnesses and the person against whom an allegation is made by the Employer, the issue of a show cause letter, the issue of a charge sheet and the holding of a disciplinary inquiry are practices are often followed by an Employer to show bona fides on the part of the employer regarding actions taken by employers regarding misconduct on the part of an employee. In the present case the complainant's statement is not made available even if there was one, the statement of the witnesses are recorded two days after the alleged incident, one witnesses' statement is recorded in Sinhala by another witness to the alleged incident when he could not write in Sinhala, no show cause letter had been issued, no charge sheet had been issued, the termination had been effected summarily by issuing a letter of termination two days after the alleged incident and that too by the Superintendent, Bodinayake, delivery of the letter of termination at the Respondent's residence.

The Appellant had led evidence regarding threats made out by the Respondent subsequent to his dismissal on Krishnabawan and Neeta Rajakaruna. These are matters that can be considered by a Tribunal in considering the relief that is to be granted to an employee and cannot be made use of for determining the justification of termination of services. Such evidence can be considered in deciding whether reinstatement is an appropriate remedy. Vide Superintendant, We-Oya Group v Ceylon Estate Staffs' Union 74 NLR 189.

The learned President has not analysed the evidence in depth especially in view of the fact that the main complainant of the threat did not give evidence before the Tribunal and that there were infirmities in the evidence presented before the Tribunal, the nature of the case presented before the Tribunal in arriving at the finding that the charges against the Respondent had been established. The tests to evaluate the evidence available such as the test of inconsistency per se and inter se do not seem to have been considered by the learned President in evaluating the evidence. It would appear from the record of the Tribunal that the learned President who gave the order had not heard the case especially when witness Krishnabawan had given evidence and that it was given before her predecessor. Considering the nature of the evidence that has been given by Krishnabawan from the recorded evidence, his demeanour would have been very relevant as on the day he was subjected to examination-in-chief, he had said that no incident had occurred on the day in question, and thereafter he had absented himself from attending the Tribunal and after several dates of absence when he was examined with permission he mentions about the incident when probed with the statements that he is said to have made to the Office and to the Police. The learned President appears to have been prejudiced by the evidence relating to the threats made out by the Respondent on the Appellant's witnesses after the Respondent's services

had been terminated and by the evidence of the Respondent as she had given more emphasis in her order to his evidence as he had appeared to be a busy body and against whom several allegations were made when he was under cross examination and as he had given evasive answers when confronted with certain matters regarding his activities. It is necessary to consider the merits of the employer's case first before comparing same with the defence presented by the employee. The infirmities in the case of the Employer cannot be filled by the evidence of the employee. The learned President therefore has erred in arriving at the conclusion that the charges against the Respondent had been established and dismissing the application of the Respondent.

On the appeal to the High Court, the learned High Court Judge in setting aside the order of the Labour Tribunal held that the learned President was bound to follow the decision of the Magistrate's Court which finding is erroneous. The learned President was not bound to follow the decision of the Magistrate's Court but had only to take the decision into consideration in arriving at a finding. Vide Associated Battery Manufacturers v United Engineering Workers Union 77 NLR 541.

The learned High Court Judge's setting aside of the order of the Labour Tribunal can be justified only on the basis that the learned President of the Labour Tribunal had erred in law in arriving at the decision that the charges against the Respondent had been established whereas as shown above the evidence was not satisfactory to arrive at such a finding. In the result it has to be decided that the dismissal of the Respondent is wrongful as the charges against him have not been established.

The High Court has granted him the relief of reinstatement with back wages. The termination of services had taken place in 1993 and the order of the Labour Tribunal had been given in 2006. Eighteen years have passed by since the termination of the Respondent's services. The delay appears to have been due to the proceedings in the Labour Tribunal being laid by pending the proceedings in the Magistrate's Court. It is therefore necessary to consider the nature of the relief that could be granted to the Respondent. The High court has ordered reinstatement with back wages. The Respondent would be around 55 years of age by now and it is necessary to consider whether reinstatement is the appropriate relief that could be granted to him.

Considering the evidence before the Tribunal regarding the Respondent's conduct and the nature of the allegation against him it would not be in the best interests of justice to grant him reinstatement. It has been revealed in the Respondent's evidence that he has been engaged as a Superintendent in another plantation which he tried to show was not so but in a sworn affidavit filed by him in another case he has declared himself to be a Superintendent. Further there were allegations that he had threatened the witnesses who gave evidence against him. In the submissions filed by the Appellant and in the grounds set out in the appeal the Appellant has stated that the High court has failed to appreciate that compensation in lieu of reinstatement would be a more appropriate alternative in all the circumstances and it has also been put down in that manner in the questions of law on which leave to appeal had been granted by this court. Therefore, it would not be in the best interests of justice to grant him the relief of reinstatement in such circumstances, which would bring in the question of determining the compensation that could be granted.

In granting compensation it is necessary to consider whether the Respondent has proved to the Tribunal the monetary loss caused to him by the termination of his services. Vide Jayasuriya v Sri Lanka State Plantations Corporation 1995 2 SLR 379. He has not made an attempt to prove his loss although the burden was on him to do so. His salary had been Rs.3418/- at the time his services had been terminated. On being probed about his income he had stated that he earned

about Rs.3000/- per month when he gave evidence before the Tribunal in 2004. Taking into account all the circumstances of the case and the inflation that has taken place since the time of his dismissal, it would be just and equitable to grant him compensation in a sum of Rs.615,240/- on the basis of his last drawn salary of Rs.3418/- for 15 years as this case has taken 18 years to reach a conclusion.

The questions of law on which leave was granted are answered as follows:

(a) The High Court had not considered the position regarding the standard of proof in relation to an application under S.31B (1) of the Industrial Disputes Act;

(b) The High Court had erred in holding that the judgment of the Magistrates Court was binding on the Labour Tribunal;

(e) The High Court had not erred in arriving at the finding that the termination of the services of the Respondent was unjustifiable as the evidence led before the tribunal by the Appellant was insufficient to establish the alleged misconduct on the part of the Respondent;

(f) The High Court had failed to consider the alternative of awarding compensation in granting the relief of reinstatement of the Respondent;

(g) The High Court failed to appreciate that compensation in lieu of reinstatement was a more appropriate alternative considering the circumstances of the case.

The judgment of the High Court is varied to the extent that the order for reinstatement would be replaced by an order for compensation in a sum of Rs.615,240/- to be paid to the Respondent by the Petitioners. Subject to the said variation the appeal is dismissed with costs fixed at Rs.31,500/-.

JUDGE OF THE SUPREME COURT

AMARATUNGA J.

I agree.

JUDGE OF THE SUPREME COURT

MARSOOF J.

I agree.

JUDGE OF THE SUPREME COURT