

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

In the matter of an application for special leave in terms of Article 128 of the Constitution.

Gardihewa Kodikara Mallika
Ratnapremi Fonseka
No. 380B, Preeethipura, Kalalgoda,
Pannipitya

Applicant

SC Appeal No. 45/2014
SC (Spl) LA 08/2014
HC Appeal No: HCLT 100/11
LT Application No. 01/242/2002

Vs.

Sri Lanka Insurance Corporation
Limited,
No. 21, Vauxhall Street, Colombo 02.
Respondent

AND BETWEEN

Sri Lanka Insurance Corporation
Limited,
No. 21, Vauxhall Street, Colombo 02.
Respondent-Appellant

Vs.

Gardihewa Kodikara Mallika
Ratnapremi Fonseka
No. 380B, Preeethipura, Kalalgoda,
Pannipitya

Applicant-Respondent

AND NOW BETWEEN

Sri Lanka Insurance Corporation
Limited,
No. 21, Vauxhall Street, Colombo 02.
Respondent-Appellant-Appellant

Vs.

Gardihewa Kodikara Mallika
Ratnapremi Fonseka
No. 380B, Preeethipura, Kalalgoda,
Pannipitya

Applicant-Respondent-Respondent

Before: Buwaneka Aluwihare PC, J.
P. Padman Surasena J.
E. A. G. R. Amarasekera J.

Counsel: Sagara Kariyawasam instructed by Ms. Manjula Jayatilaka for
the Respondent-Appellant-Appellant.
J. C. Weliamuna PC with Pulasthi Hewamanna for the
Applicant-Respondent-Respondent.

Argued on: 17. 07. 2019

Delivered on: 03. 11. 2021

Judgement

Aluwihare PC J.

The Applicant-Respondent-Respondent (hereinafter referred to as the ‘Applicant’) sought an order for reinstatement or compensation in lieu, from the Labour Tribunal, on the basis that her employment was unjustly terminated by the Respondent-Appellant-Appellant (hereinafter the ‘Appellant Corporation’).

At the conclusion of the inquiry before the Labour Tribunal, the Learned President of the Labour Tribunal had come to a finding that the termination of the Applicant’s services by the Appellant-Corporation was in fact unjust. The Learned President,

however, instead of ordering reinstatement, ordered the Appellant Corporation to pay the Applicant a sum of Rs. 854,460 /- as compensation. The question of reinstatement did not arise as the Applicant had passed her retirement age when the award of the Labour Tribunal was pronounced.

The Learned Judge of the High Court, sitting in appeal, affirmed the order made by the Labour Tribunal and dismissed the appeal of the Appellant Corporation.

This court granted Special Leave to appeal on the questions of law referred to in sub-paragraphs (i), (ii) and (iii) of paragraph 12 of the petition of the Appellant which are as follows;

(i) Has the Honourable Judge of the High Court of the Western Province erred in law in not considering the entirety of the evidence against the Respondent [the Applicant]

(ii) Has the Honourable Judge of the Provincial High Court of the Western Province erred in law in holding that the Respondent [Applicant] cannot be found guilty of charge 04 since the Respondent has been exonerated from the charge number 03 at the domestic inquiry.

*(iii) Has the Honourable Judge of the Provincial High Court of the Western Province erred in law in failing to consider the applicability of the judgement of *Ceylon Oil Workers' Union v. Ceylon Petroleum Corporation* (1978-79) 2 SLR 72 to the present case.*

It is to be noted that the questions of law referred to in (i) and (ii) above, relate to the court misdirecting itself on the factual findings. As such, it would be incumbent on this court to consider the facts of this case in considering the said questions of law.

The Factual Matrix

The Applicant was holding the position of Manager, Education and Social Security Department of the Appellant Corporation at the time her services were terminated.

Under the said department, in collaboration with National Gem and Jewellery Authority [hereinafter the NG & JA] an insurance scheme had been launched for gem miners. In the course of the inquiry conducted by the Appellant Corporation, it had come to light that several insurance premiums paid by the NG & JA in favour of the Appellant Corporation, had not got credited. The inquiries revealed that whilst certain insurance premiums that ought to have got credited to the Appellant Corporation and some other payments made upon insurance claims by the Appellant Corporation, to several insured, had got credited to the bank account of one Jayasena Udagedara, another employee of the Appellant Corporation. It had also transpired in the course of the investigation into the alleged fraud that cheques of the Appellant Corporation had been drawn without the 'account payee' crossing. In certain other instances, the 'account payee' crossing on certain cheques had been cancelled. It is alleged that this cancellation of the 'crossings' was done, in order to facilitate the crediting of those cheques to the account of said Jayasena Udagedara.

The position taken up by the Appellant Corporation was, that the removal of the crossings on certain cheques had been done at the request of the Applicant. The Appellant Corporation relied heavily on the evidence of witness Nimal Wijesooriya to substantiate these allegations. Thus, to determine the issues raised in this appeal, it is imperative that this court considers the testimony of the said witness.

It must be stated at the outset, that the Learned President of the Labour Tribunal had not been satisfied with the evidence led on behalf of the Appellant; and the Learned President had come to a finding that the charges 1, 4, 6, 7 and 8 on which the Applicant was found guilty at the domestic inquiry, had not been established by the Appellant on a balance of probability. Furthermore, from the tenor of the award, it appears that the Learned President of the Labour Tribunal had accepted the explanation offered by the Applicant with regard to the said charges.

It is well-settled law that findings of fact by a Labour Tribunal should not be disturbed lightly, unless the court is convinced that the Labour Tribunal had misdirected itself

on material matters which had resulted in substantial prejudice, in this case, to the employer.

The termination of the Applicant's employment was based on the fact that several of the charges preferred against her at the domestic inquiry had been proved and consequently she had been found guilty. The Learned Labour Tribunal President, however, opined that her guilt had not been satisfactorily established.

As the first two questions of law [(i) and (ii) referred to above] are based on the alleged misdirection on the part of the President of the Labour Tribunal, it would be necessary to consider the evidence led at the inquiry before the Labour Tribunal to resolve the issues.

The case of the Appellant Corporation, pivots on the evidence of the accountant-Internal Audit Division, Nimal Wijesooriya.

I shall now consider the evidence of Nimal Wijesooriya, with a view to ascertaining as to whether the assertion of the Appellant-Corporation can be justified. Witness Wijesooriya at the commencement of his cross-examination had summed up the alleged fraud committed by the Applicant as follows;

“Facilitating a sum of Rs. 175,000/- to be credited to the personal account of Jayasena Udagedara and facilitating the cheques collected as premium to the value of Rs. 279,056.25/- to be credited to the account of Jayasena Udagedara, and attempting to commit a fraud thereafter; however, the fraud could not be accomplished.” [page 264 of the Labour Tribunal brief]

The statement of the witness in verbatim is reproduced below.

“රු. 1 75,600/- ක මුදලක් ජයසේන උඩගෙදර තමැති අයගේ පුද්ගලික හිණුමට බැර කිරීමට ඉඩකඩ සැලැස්වීම. ඒ අතරට වාරික මුදල වගයෙන් ලැබුණු රු. 2 79,056.25 ක මුදලක් අදාළ වෙක් පත ජයසේන උඩගෙදර යන අයට යන්න සලස්වා ඔහුගෙන් පසුව වංච කිරීමට උත්සාහ කිරීම තමුන් වංච කිරීමට ලැබුණේ නැහැ.”

At the conclusion of his investigation, what the witness appears to be saying, is, that the Applicant could not commit a fraud, but made an attempt to do so by facilitating the depositing of several cheques to Jayasena Udagedara's account.

The witness insinuates that, there had been some degree of complicity on the part of the Applicant in the fraud committed by Udagedara.

Both to ascertain as to whether there was any nexus between Udagedara and the Applicant and, whether there had had any complicity on the part of the applicant, in the fraudulent acts alleged to have been committed by Udagedara as well, it is necessary to consider the material elicited, in the course of the investigation conducted by witness Wijesooriya.

According to the evidence, the alleged fraud had come to light after the Applicant was transferred out from the Social Insurance department on 1st December 1998. No sooner the management had come to know of the incident, Jayasena Udagedara had stopped reporting for work, and he had vanished without trace. According to the evidence, even the police investigation could not trace him and he had been treated as having vacated his post.

The sum total of Wijesooriya's evidence is that; insurance premiums collected by NG & JA from gem miners who had opted to obtain insurance cover, which in turn had been handed over to Udagedara, along with some insurance payments made to purported claimants, had been credited to Udagedara's personal account.

The complicity on the part of the Applicant, as alleged by the Appellant Corporation, was that, it was she who caused the crossings on the cheques to be cancelled and thereby enabled Udagedara to have the cheques credited to his account, which, would not have been possible otherwise.

The central issue is whether it had been established through evidence, that both the Applicant and Udagedara connived to commit the alleged fraudulent transactions.

As far as Udagedara is concerned, there is no doubt of his involvement as the evidence amply demonstrates that it was he who handled the cheques and which had been credited to his bank account.

Udagedara's involvement can also be inferred by his conduct, in that he suddenly vacated his post without any notice with the Appellant Corporation and thereafter could not be traced. As opposed to that, there is no evidence whatsoever to say that the Applicant benefitted in any way from the fraudulent transactions. This may have been the reason why witness Wijesooriya stated that she "*attempted to commit a fraud, but it could not be accomplished.*" Thereby the investigating officer himself had admitted under oath that the Applicant had not committed any fraud. What remains to be decided is whether there was an attempt on her part to commit the alleged acts or whether there had been some complicity on her part in those transactions.

This issue cannot be resolved by considering the evidence, that the Applicant had the crossing on the cheques cancelled, in isolation. It must necessarily be considered with other relevant factors as well, in order to appreciate the larger picture relating to the impugned transaction.

In this regard, the Applicant's testimony is significant. According to her, she was entrusted with a fair share of responsibilities as Manager of the, Education and Social Security Department. The insurance scheme for gem miners had been newly introduced and she had been directed by the then Chairman Jagath Wickramasinghe to proceed to the NG & JA with Udagedara to finalize matters relating to this newly launched insurance scheme. According to her Udagedara was a *confidant* of the chairman and was tasked to run errands for him. The Applicant, explaining the procedure with regard to payments, had stated that the preparation of payment vouchers was handled by several subject clerks and checked by an executive officer [Sandamali Navaratne] who in turn had to forward the vouchers to Padma Perera [for approval [Witness Wijesooriya has confirmed this procedure under cross examination at page 326 of the LT brief]. It was the position of the Applicant that;

these approved claims are sent to her only in instances where the claimants request for cancellation of the crossings on the cheques, because they did not have bank accounts to credit the payments[cheques]. She had also stated that her interactions, as far as her work was concerned, was with the subordinate staff under her and not with Udagedara. She had added that Udagedara was the choice of the Chairman Jagath Wickramasinghe to coordinate matters with the NG & JA and that he was not entrusted with any work in her unit. The Applicant had claimed that Udagedara was allowed to work in the unit, even after she was transferred out to another section.

The cancellations of the crossings on the cheques in question had been done, not by the Applicant but by the accountant, based, however, on the requests made by the Applicant. In this regard the learned counsel for the Appellant Corporation drew the attention of this court to the evidence of witness Wijesooriya reflected on pages 167 to 175, 216 and 227. The fact that the Accounts Division acceded to the request of the Applicant [to cancel the crossings] demonstrates that the cancellation of the crossings was not something unusual but had been routinely done to oblige the clients of the Corporation. On the other hand, if the Applicant had believed that the representations made to her, to have the crossings on the cheques cancelled were genuine, she cannot be blamed for acting on those representations. Although members of the staff under the Applicant were designated to attend to specific tasks as explained earlier, steps relating to the processing of insurance claims appear to have been interlinked. Each member of the staff was required to work, placing reliance and trust on each other in processing insurance claims or carrying out their tasks. The conduct of the Applicant, hence, has to be viewed in that light. It needs to be emphasized that apart from the requests made by the Applicant to have the crossings on the cheques cancelled, there is no evidence whatsoever to say that she had done anything irregular in relation to the impugned transaction nor has it been established that she had any link with Udagedara as far as the fraudulent transactions were concerned.

In the circumstances, one cannot fault both the learned President of the Labour Tribunal or the learned High Court Judge in reaching the conclusion that the

Appellant Company had failed to prove the charges against the Applicant. As such I hold that neither the learned President of the Labour Tribunal nor the learned High Court Judge had erred either in law or in fact. Accordingly, I answer the questions of law (i) and (ii) referred to above, on which leave was granted, in the negative.

The learned counsel for the Appellant also argued that learned Judge of the High Court erred in law by his failure to apply the principles laid down in the case of **Ceylon Oil Workers' Union v. Ceylon Petroleum Corporation** (1978-79) 2 SLR 72 [The 3rd question of law on which leave was granted].

In the case referred to, it was held that; *"Where the misconduct of the workman lay in the commission of a fraud on the employer, the misconduct is of so serious a nature, that it strikes at the very foundation of the contract of service and warrants summary dismissal. The workman had been placed in a position of trust and confidence by the employer in the expectation that he would discharge his duties honestly and conscientiously, but had shown by his conduct that, he can no longer command the confidence of his employer. The continuation in service of such an employee would prejudice the good name, reputation and interests of the employer."*

No doubt the facts of this case clearly demonstrate that a fraud had been perpetrated on the Appellant Corporation. The above pronouncement of their Lordships would be applicable, as far as employee Udagedara was concerned. I am, however, of the view that it would not be applicable to the Applicant for the reason that the Appellant Corporation had failed to establish any *misconduct* on her part.

Wijayatilake J. in **The Ceylon University Clerical and Technical Association v. The University of Ceylon, Peradeniya** (1970) 72 NLR 84 held that where a Labour Tribunal was tasked with deciding whether the employee was guilty of a criminal act involving moral turpitude such as the misappropriation of funds the standard of proof adopted should be beyond reasonable doubt as in a criminal case. As there is no evidence as to the complicity of the Applicant in the fraud committed by Udagedara, it is only fair that the Applicant be given the benefit of that finding, for as observed by Wijayatilake J. "*A dismissal of this nature would amount to a condemnation for life*

and to do so when there is a reasonable doubt would be, in my opinion, neither just nor equitable.” (at page 90).

As such, I answer the third question of law on which leave was granted also in the negative.

Accordingly, the appeal is dismissed subject to costs.

Appeal dismissed

JUDGE OF THE SUPREME COURT

PREETHI PADMAN SURASENA J.

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKERA J.

I agree.

JUDGE OF THE SUPREME COURT