

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an Application for Special Leave to Appeal and/or Leave to Appeal from an order of the Provincial High Court of the Eastern Province dated 6 June 2014, in terms of the Industrial Disputes Act and the High Court of the Provinces Act read with the Rules of the Supreme Court.

SC/Appeal/ 85/2016
SC (SPL) LA/118/2014
HC/Appeal HCB/LT/279/2012
LT Application
LT/BT/212/2011

Vadivel Vigneswaran
No. 60/08,
Sinna Uppodai,
Batticaloa.

APPLICANT~RESPONDENT~PETITIONER

Vs.

1. Bank of Ceylon,
Head Office,
Colombo.
2. Bank of Ceylon,
Batticaloa.

RESPONDENTS~APPELLANTS~

RESPONDENTS

SC/Appeal/ 86/2016
SC (SPL) LA/117/2014
HC/Appeal HCB/LT/278/2012
LT Application
LT/BT/211/2011

Vadivel Maheswaran
No. 60/08,
Sinna Uppodai,
Batticaloa.

APPLICANT~RESPONDENT~PETITIONER

Vs.

3. Bank of Ceylon,
Head Office,
Colombo.

4. Bank of Ceylon,
Batticaloa.

RESPONDENTS-APPELLANTS-RESPONDENTS

Before: Buwaneka Aluwihare PC J
S. Thurairaja PC J
Mahinda Samayawardhena J

Counsel: Jude Dinesh for the Applicant- Respondent- Appellant.
N. Vigneshvaran, DSG for the Respondents-Appellants-Respondents
instructed by D. Munasinghe.

Written Submissions: Written submissions of the Applicant-Appellant 20.04.2023
Written submissions of the Respondent 25.04.2023

Argued on: 31.01.2023

Decided on: 11.10.2023

JUDGEMENT

Aluwhare PC. J,

The Present appeals are concerned with the termination of employment of two brothers who were employed by the Batticaloa Branch of the Bank of Ceylon. The brothers were recruited by an oral agreement during the time of the armed conflict, partly in consideration of their father being a minor employee of the bank. After the end of the hostilities, on or about 02nd June 2011, the Appellants were informed that their services were no longer necessary as the Bank had recruited other persons to fill their positions. At the time both the Appellants were in their mid-twenties.

Each of them had filed separate applications before the Labour Tribunal, however, their appeals to the High were consolidated and a common judgment was delivered by the learned High Court judge as the facts and circumstances relating to the cases were identical. As such, this court too considered both appeals together and are dealt with in a single judgement.

Being aggrieved by the loss of their employment, the Appellants filed applications in the Labour Tribunal of Batticaloa seeking reinstatement and other benefits on the basis that the Appellants' services were wrongfully and unlawfully terminated. The Labour Tribunal by order dated 15th October 2012 ordered reinstatement with back wages amounting to Rs. 170,100/- and that the Appellants be made permanent in their posts. The Respondents appealed to the High Court of the Eastern Province, which by order dated 6th June 2014, set aside the order for reinstatement, and converted the back wages of Rs, 170,100/- to compensation. The present appeals arise from the said judgement of the High Court.

The Appellants claim that they were permanent employees and therefore entitled to reinstatement. The Respondent bank maintains that the Appellants were casual employees who were employed "on an ad-hoc casual basis without any contract to carry out 'odd-jobs'" during the period of the hostilities that prevailed in that part of

the country because they were children of a minor employee at the bank. The Respondent bank claims that it was unable to regularize the Appellants' recruitment after the end of the war as they had been recruited outside the normal channels. The Respondents argue that compensation of 18 months' salary i.e., one and a half years' salary is reasonable and in view of the present economic situation, has agreed to increase the amount to Rs. 800,000/- which amounts to more than 76 months' salary.

Special leave was granted on the following questions of law;

Paragraph 9

- a) Did the Learned High Court Judge err in considering the law related to casual employment?
- b) Did the Learned High Court Judge err in failing to consider that the usual reliefs for wrongful termination are reinstatement with back wages?
- c) Did the Learned High Court Judge err in failing to consider that the absence of a written contract in Industrial Law does not warrant a definite conclusion that employment was casual in nature?

The Question of Type of Employment

The central question in this matter is whether the Appellants were casual employees, thereby not being entitled to the right to reinstatement. In determining the type of employment, rather than relying on the label given to the type of employment, the Court must evaluate the nature of the actual work carried out. A person labelled as a casual employee may very well be carrying out more responsibilities than that characteristic of a casual employee and be expected to function in a regular capacity.

In *Superintendent of Pussella State Plantation, Parakaduwa v. Sri Lanka Nidahas Sevaka Sangamaya* (1997) 1 SLR 108 the Supreme Court highlighted that a "mere label is not sufficient to classify a workman as a 'casual employee'; if the real character of the employment is that of a permanent employee." In *National Water Supply and Drainage Board, Regional Office, Peradeniya v. DP David and Others* CA 1787/93

decided on 02.02.1993 it was specified that it is the duty of the court to decide the type of the employment based on the facts rather than the label given.

The Appellants had worked at the Batticaloa Head Office, the Branch Office at Mamangam and the Branch Office at the Railway Station. Their main duties were those required for the orderly maintenance of the respective branches. The learned Deputy Solicitor General appearing for the Respondent Bank, submitted a table containing the applicable facts; the enumeration of the tasks carried out by the Appellants as well as the chronology of the events tabulated therein, which was useful in evaluating the employment of the Appellants to determine the type of employment.

The Appellant in SC Appeal 85/2016 was usually tasked with cleaning the branch office, cleaning the toilets at the Station Road Branch, preparing tea and watering the garden etc. The Appellant was further tasked with delivering cheques from one bank to another, depositing cash in the locker in the presence of the cashier and the Manager, arranging the cash once it arrives every month from Colombo, and pasting damaged currency notes. His brother [SC Appeal 86/2016] similarly, was required to clean the branch offices including the toilets and the office furniture, prepare tea, cleaning the Manager's quarters, do shopping and buying provisions needed by the Manager and the bank staff , attending to matters connected with posting of letters by attending to the post office. It is noteworthy that the Appellant in SC Appeal 86/2016 too, like his brother, carried out the tasks of searching for voucher bundles, checking forms and scanning receipts of pawned jewellery which were related to the integral activities of the bank.

The Appellants were not employed under a contract of employment nor were they recruited through a formal process. They had been recruited during the turbulent times due to their father being a minor employee of the bank. The Appellants position was that they were made to understand that they would be made permanent employees at some point in the future. The Appellants were not required sign a register or mark attendance and were paid by voucher signed by the Manager and the Chief Clerk as opposed to the salary being deposited in a bank account which is

the practice for permanent employees of the bank. The Appellants were not considered for EPF or ETF benefits. At one point the Appellants had submitted letters to the Respondent bank requesting that they be made permanent employees.

While the abovementioned factors indicate that the Appellants were not originally employed on a permanent basis there are several factors that support the Appellants' proposition that they were in fact not merely casual employees. The Appellants were paid once a week, for each day they had worked, through a voucher signed by both the Manager and the Chief Clerk which was forwarded to the Cashier who would pay their salaries. One of the Appellants would collect the cheques signed by the Manager. The Appellants had reported to work regularly for a period in excess of 5 years, had been in the practice of formally requesting for leave from the Manager by letter, had been issued bank ID cards, had been assigned chairs to sit, were under the supervision of the Manager and Chief Clerk when going to other banks for official purposes and had received certificates for participating at sports events organized by the bank for its employees. Furthermore, the former Manager had in his evidence stated that he considered the Appellants to be essential for the smooth functioning of the bank.

When considering the nature of the responsibilities fulfilled by the Appellants and certain practices related to the management of their employment relationship with the bank, a considerable degree of regularity and permanence can be observed. The Appellants reported to work daily and were paid their salary on a weekly basis. As demonstrated by judicial precedent, uninterrupted service and a payment method other than a daily wage payment are characteristic of the non-casual nature of the work. This was illustrated in *All Ceylon Commercial and Industrial Workers Union v. Pieris* ID 44 and 58 CGG 11, 471 of 05.08.1958 where the work of the employees in question was held to be of a non-casual nature as they were paid at the end of each week and their names kept in the check-roll unless they did not come to work for a long period. That the workmen had come to work regularly for several years was also considered to be a factor supporting the non-casual nature of the work.

Furthermore, in terms of obtaining leave the petitioner has been in the practice of obtaining prior permission for leave through a letter addressed to the Bank Manager. The Petitioner had also been required to report to work at a set time every day in order to open the doors of the building. These practices negate the primary attribute of casual employment that the employee is not mandatorily expected to report to work every day and can take leave without prior approval as the wage is paid on a daily basis or according to the tasks completed.

The Appellants' salaries were increased from Rs. 300 per day to Rs. 350 per day. On March 2010 a further application was made by the Manager to increase their salaries to Rs. 450 per day. An increase in salary was considered to be an indication of non-casual employment. In *Ceylon Ceramics Corporation v. Weerasinghe* SC 24-25/76 SCM 2507.78 (unrep) the Supreme Court held that the increase of the employee's salary was a factor that her employment was of a permanent nature, regardless of the fact that in evidence she had admitted that she was employed on a casual basis as informed by the employer.

Although the Appellants themselves had at the earlier stages considered that they were not permanent employees, it cannot be held to militate against a finding that over time the employment has assumed a permanent character. Here I quote with approval, Justice R. K. S. Suresh Chandra in '**The Employment Relationship (scope) in Sri Lanka**';

"The description or designation on a document where the workman may have agreed to be designated as a casual employee is not conclusive. The actual relationship between the parties must be examined and if it is revealed that the employer had treated the employee as a person with a permanent character, then he will not be treated as a casual employee."

The impression to be had from the sum of the evidence is that the Appellants carried out their work diligently and conscientiously and were able to handle increasing responsibilities, which was appreciated by the bank Manager as well. Although not tasks integral and indispensable to the principal activities of the bank, the Appellants were held in a level of regard as to be trusted with several tasks related to the

transactional activities of the bank such as delivering cheques from one bank to another. The work carried out by the Appellants enabled the smooth functioning of the activities of the bank without any discomfort or inconvenience to the officers and the customers.

The foregoing evaluation leads to the conclusion that although the Petitioners may have been employed as casual employees, over time the nature of the employment underwent such changes as to make it take a permanent form. The absence of a written contract in itself does not warrant a definite conclusion that employment was casual in nature.

Reinstatement or Compensation

In *Meril Fernando & Co v. Deiman Singho* (1988) 2 SLR 242 the rationale for reinstatement not being available to a casual employee was explained thus;

“The word ‘casual’ denotes such employment as is subject to, resulting from or occurring by chance and without regularity. By its very nature, such employment cannot confer upon a workman a right to reinstatement as there is no former position in which he can be placed again or a previous state to which he can be restored, as in the case of a permanent employee.”

Although the Appellants cannot be classified as casual employees, after considering the circumstances particular to this case the court should be cautious in ordering reinstatement. The Respondent being a financial institution, the recruitment to various positions in all probability must be tied to requisite qualifications that commensurate with the position. There is no material before us to say that the Appellants possessed the requisite qualifications to join the Respondent Bank as permanent employees. The court is mindful that the trajectory of their employment at the bank was such as to reasonably create an expectation of being formally employed as permanent employees in the minds of the Appellants. Furthermore, the nature of their work was such as to transform their employment into a regular and permanent character. However, I am of the view that the passage of more than 10

years since the dismissal from work, and the age of the Appellants being not so advanced as to make it impossible to find other employment, as well as the work carried out by the Appellants not being of a highly specialized nature which militates against finding employment elsewhere, are practical considerations that warrant attention in this particular case.

While the usual relief for wrongful termination is reinstatement with back wages, compensation in lieu of reinstatement can be granted as equitable relief. Labour Tribunals are endowed with discretion to make just and equitable orders. Justice Kulatunga in *Saleem v. Hatton National Bank* [1994] 3 Sri LR 409 at page 415 identified three cardinal principles the Court has used to decide whether the order of payment of compensation by the Labour Tribunal is possible. Those grounds which map the parameters of the just and equitable jurisdiction of the Labour Tribunal are;

“...the jurisdiction of the Labour Tribunal is wide; relief under the Industrial Disputes Act is not limited to granting benefits which are legally due; and the duty of the tribunal is to make the order which may appear to it to be just and equitable.”

It is in the exercise of this discretion that the Labour Tribunal of Batticaloa has found in favour of the Appellants and ordered reinstatement and back wages. Therefore, the Learned High Court Judge did not err in failing to consider that the usual reliefs for wrongful termination are reinstatement with back wages.

In fairness to the Appellants, I am of the view that the compensation in the sum of 170,000/- ordered by the High Court does not sufficiently compensate for the diligence and loyalty of the Appellants especially during the turbulent period of the war, they had consistently and conscientiously worked and made a noteworthy contribution enabling the Respondent to provide banking services to the public without an interruption during that period.

Albeit on a justification other than that of the Learned Judge of the High Court of the Eastern Province, I am inclined to uphold the grant of redress in the nature of

compensation. The compensation that was ordered in a sum of Rs.170,000/- by the High Court is hereby varied and the Respondent is directed to pay a sum of Rs. 800,000/-[Rupees eight hundred thousand] to each of the Appellants. Subject to the above variation the Appeal is dismissed.

Appeal partially allowed

JUDGE OF THE SUPREME COURT

S. THURAIRAJA PC. J

I agree

JUDGE OF THE SUPREME COURT

MAHINDA SMAYAWARDHENA J.

I agree

JUDGE OF THE SUPREME COURT