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[2010] 2 SRI L.R. - PART 11

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DIGEST

I pause to state here if a public body does not fulfill the requirements of law when taking decisions affecting the rights of the individual, the Court, exercising writ jurisdiction, when it is brought to its notice, must see that such Public Body does fulfill them.

Both Counsel at the hearing of this case agreed that the subject matter of this case is the play ground (one acre land) and the adjoining block of land amounting to 20 perches in extent. With regard to 20 perches block, adjoining the play ground, there is no decision by the board of management of the UDA to alienate this land to the Department of WLC. Therefore the decision of the 1st to 3rd respondents and or 7th to 13th respondents alienating this land (20 perches land) too should be quashed.

Legitimate expectation

I would now like to deal with the question whether the petitioners had a legitimate expectation to keep the said land as a playground. In this context it is relevant to consider P9 and P11. P9 is a letter written by Director General UDA to the Coordinating Secretary to the Ministry of Housing and Construction with copy to the Secretary Jayanthipura Housing Scheme. The Director General, by P9, on 14th November 1995, admitted that the said land had been reserved for Jayanthipura Housing Scheme for the last 40 years. According to P9, this land had been recommended to continue as a playground for Jayanthipura Housing Scheme. The Director General UDA, by P11, on 29.11.1999, again reiterated the above stand of the UDA namely that the land had been recommended to continue as a playground for Jayanthipura Housing Scheme. The Director General, by the said letter, categorically informed the President of the said housing scheme that the UDA had not given any approval to allocate

the said playground to any outsider for development. These two letters (P9 and P11) were issued in response to two letters written by the petitioners.

Learned SSC contended that P9 and P11 were not within the vires of the UDA since they were issued without any legal authority. She, therefore, contended that these two letters cannot generate legitimate expectation in the petitioners. She relied on the judgment of the Supreme Court delivered on 16.11.2005 in *Tokyo Cement Co. Ltd. Vs. Gunarathne and others*[10]. In Tokyo Cement Co. case, the petitioner claimed that the vessel was purchased by the petitioner in view of certain representations made by the Department of Customs in a gazette notification made under Section 47 of the Customs Ordinance specifying the form of the bill of entry and the guide issued, with regard to the clearance of good. The petitioner wrote a letter to the Director General of Customs notifying of the purchase of the vessel and seeking confirmation that 23.5% of the FOB value be taken as the component of freight. The Deputy Director made an endorsement on the letter stating "freight charge of 23.5% approved." This matter was confirmed by the same officer by letter dated 24.5.2001. However when the goods were imported the valuation department of the customs refused to accept the said freight charge of 23.5% and sought to impose the duties on the basis of CIF value that had been declared by the petitioner previously. The decision of the customs was challenged on the following grounds. They are:

(1) that the impugned decision was contrary to the contents of the 'cusdec' form and access guide and as such is ultra vires;

(2) that the impugned decision cannot be made in law in view of the previous representation made by the Department

of Customs giving rise to the principle of estoppel and denial of legitimate expectation of the petitioner.

In terms of Section 51 of the Customs Ordinance when ad valorem duties are imposed, the importer is required to state the value of such articles in the entry together with the description and quantity of the same. It is further provided that "the value shall be determined in accordance with the provisions of the schedule E and duties shall be paid on a value so determined." His Lordship Chief Justice S. N. Silva held as follows: "In the case at hand the Deputy Director has in the communication P6 and P17 purported to fix the freight charge at 23.5% of the FOB price. Such a course of action is clearly not permitted by the provisions of the Ordinance referred to above in relation to the imposition of ad valorem duties. The whole purpose of making a valuation in terms of Section 57 and schedule 'E' of the Customs Ordinance would be brought to nought if such a course of action is permitted to stand. The representation is ultra vires and would not be binding."

It is then seen in the above case that the representation made by the Deputy Director is ultra vires. In the present case, what is the material to suggest that P9 and P11 are contrary to the provisions of the UDA Law? Learned SSC, whilst inviting the attention of court to Section 8 of the UDA Law, tried to argue that P9 and P11 are contrary to the said section. I have carefully examined Section 8 of the UDA Law and I am of the opinion that P8 and P11 are not contrary to the said section. Even the respondents, in their objections, do not state that P9 and P11 are contrary to the UDA Law. There is no such material even in the letter (P26) sent subsequent to P9 and P11, although the writer of P26 has mentioned about P9 and P11. P26 is a letter written on

25.10.2004 by Director Lands on behalf of the Chairman of the UDA. Even in this letter, the said Director Lands does not say that P9 and P11 were issued without authority. A copy of P11 had even been sent to the Secretary to the President. Thus is it the position of the respondents that decision taken without authority has been communicated to Her Excellency the President? It there any material to suggest that the Board of Management of the UDA subsequently resolved that P9 and P11 had been issued without authority? Has the UDA up to date withdrawn P9 and P11? The above two questions will have to be answered in the negative. In view of these observations court is unable to hold that P9 and P11 are not within the authority of UDA. Therefore the principles laid down in the above judicial decision (Tokyo Cement Company case) have no application here. Hence the contention of the learned Senior State Counsel which is not based on the facts of this case will have to be rejected. To my mind there is a clear promise given by the UDA in P9 and P11 that the land would be kept as a playground for the residents of Jayathipura Housing Scheme. The petitioners claim that they have been using this land as a playground since 1964 when the housing scheme was originated. The petitioners have taken up the position that even the school children of Battaramulla have been using this land as a playground. This position of the petitioners is strengthened by letter P9 wherein Director General of the UDA has stated thus: "The above land is an informal playground used by the occupants by the Jayanthiputa Housing Scheme (about 300 houses) and the school children of the surrounding." In view of these facts, the question whether the petitioner had a legitimate expectation to keep or use this land as a play ground must be considered. I now turn my attention to this question. With regard to P9 and P11 learned SSC, referring to 1R4, submitted that 1st respondent became the owner of

the land only in 19.3.1989 and as such the Director General of the UDA could not have said that this land (playground) has been reserved for Jayanthipura Housing Scheme for the last 40 years. She contended that by 14th November 1995 which is the date of P9, the UDA was holding the ownership of the land only for six years and as such 40 years period mentioned in P9 was factually incorrect. She contended that the Board of Management of the UDA had not granted approval to write P9 and P11. On the strength of these facts she contended that both P9 and P11 are factually incorrect and that court should not consider these documents. I now advert to these contentions. It is true that when P9 was issued the UDA was not holding the ownership of the land for 40 years. But it must be noted that according to P9 it is not the UDA which had reserved the land for the last 40 years. What P9 says is that the land has been reserved for Jayanthipura Housing Scheme for the last 40 years. The UDA, by P9, too admits the above reservation. The fact that this land had been recommended **to continue** as a playground by the UDA remains unchallenged. Although P9 speaks about 40 year period, P11 dose not state so. P9 and P11 have also been produced by the 1st, 2nd and 3rd respondents along with their statement of objections as 1R2b and 1R2c. But strangely, 1st to 3rd respondents in their statement of objections do not state that P9 and P11 were issued without the approval of the Board of Management of the UDA. Even in the letter dated 25.10.2004 (P26) written by the Director Land Development and Management of the UDA, he had failed to mention the alleged failure on the part of the Board of Management of the UDA to grant the said approval although he had admitted having sent P9 and P11. The UDA has, so far, not withdrawn P9 and P11. The 1st respondent (UDA), by P9 (dated 4.11.1995) and P11 (dated 29.11.1999), admitted that it had recommended to continue this land as a playground for

Jayanthipura Housing Scheme. Then it would appear that this admission has been made by the 1st respondent after it became the owner of the land. Thus, it can be argued that this is one of the grounds on which the petitioners are entitled to form a legitimate expectation to keep this land as a playground. Learned SSC sought to sterngthen her contention, that is to say that P9 and P11 are not within the vires of the UDA by raising the following question. Can the petitioners expect to enjoy privilege of open space from others land? According to regulation 22 (1) of the UDA regulation (P5), 10% of the land must be kept for recreational purpose. Regulation 22(1) provides:

"Where the parcel of land or site to be subdivided exceeds 1.0 hectare, an area of not less than ten per centum or the land or site, excluding streets shall be reserved for community and recreation used in appropriate locations."

Learned SSC contended that according to the said regulation, 10% of the land must be reserved at the time of the subdivision of the land. She further contended that the said percentage must be reserved from the land to be subdivided and not from the nearby land or adjoining land. With regard to this contention I have to make the following observation. Regulation No. 22, in Gazette P5, was promulgated on 10.3.1986 whereas the subdivision of the petitioner' land, according to plan P2A, took place in 1962. Thus regulation 22 has no application here. Despite the existence of such a situation, the Director General of UDA issued P9 and P11. This shows that the UDA wholeheartedly recommended the continuation of this land as a playground. The UDA, by P9, admits and has recognized the necessity to keep open space within the residential areas. Why did the UDA, by P9, recommend that this land be continued as a play ground?

The word 'continue' must be emphasized. To continue with something, it must already be in existence. Therefore it is clear that this land had been used as a playground even prior to the issue of P9. According to P11 it was the decision of the UDA to continue this land as a playground and not a decision of the Director General. Minutes of the board meetings of the UDA are kept with the UDA. The petitioners have no access to these minutes. If there is no such decision by the UDA, then, the minutes of the board meeting prior to the issue of P11 would indicate the there was no such decision. As I pointed out earlier, the 1st and 3rd respondents, in their statement of objections, had not taken up the position that P9 and P11 were issued without the approval of the UDA. Even in letter dated 25.10.2004 (P 26) the respondents have not taken up this position. For the above reasons, I am unable to agree with the contention of the learned SSC.

On the question of legitimate expectation, I would like to consider following judicial decisions. "Where a student from Nigeria was given oral assurances that she would have no difficulty in returning after going home for Christmas, yet was refused leave to enter on returning, the refusal was quashed by the Court of Appeal on the ground of legitimate expectation and unfairness." Vide Administrative Law by Wade and Forsyth 8th edition page 371.

The Privy Council, in holding that the Government of Hong Kong must honour its published undertaking to treat each deportation case on its merits, has applied the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty. Vide *Attorney General of Hong Kong vs. Ng Yuen Shiu (Privy Council)*(11)

In *Regina Vs. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*[12], Liverpool Corporation had the duty of licensing the number of taxies which they thought fit, and for some years the number had been fixed at 300. In 1971 a sub committee of the council recommended increases in the number of licensed taxies for 1972 and again in 1973, and no limitation on the numbers thereafter. The chairman of the relevant committee gave a public undertaking on August 4, 1971, that the number would not be increased beyond 300 until a private bill had been passed by Parliament and had come into effect, and his undertaking was confirmed by him orally and by the town clerk in a letter to two associations representing the holders of existing taxi licences. In November 1971 the sub committee resolved that the number of licences should be increased in 1972, before the private bill had been passed, and the resolution was approved by the full committee and by the council in December. The association of licence holders applied to court for an order of prohibition and certiorari. The Divisional Court refused the application, but the Court of Appeal granted an order of prohibition against the corporation from granting any increased number of licences without first hearing any representations which might be made by or on behalf of persons interested therein, including the appellant association. Lord Denning MR said at page 308: "the corporation was not at liberty to disregard their undertaking. They were bound by it so long as it was not in conflict with their statutory duty. . . . . The public interest may be better served by honouring their undertaking than by breaking it."

"Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue" Vide Lord Fraser in

Council of Civil Service Unions and Others. Vs. Minister for the Civil Service (13) (House of Lords) at 944. It is pertinent to consider the case of *R v. North and East Devon Health Authority, ex parte Coughlen*(14). The facts of this case in brief are as follows: Miss Coughlen met with an accident in 1971. From the date of her tragic accident in 1971 until 1993 Miss Coughlen lived in and received nursing care in Newcourt Hospital for the chronically sick and disabled. It was a large old house with communal wards. It was considered unacceptable for modern care. A decision was taken to discharge the resident 'to a setting which would be more clinically and socially appropriate.' On 15th March 1993 Miss Coughlen moved to Mardon House along with other patients and the Majority of the staff from Newcourt. Marden House was designed to house young, long-term severely disabled, residential patients. The residents of Newcourt had been involved in discussions about the nature and design of the buildings and its services. Newcourt patients were persuaded to move to Mardon House by representations on behalf of the health authority that it was more appropriate to their needs. The patients relied on an express assurance or promise that they could live there 'for as long as they chose.' Nursing care was to be provided for them in Mardon House. It was the new Newcourt.

Mardon House was let by the Exeter and District Community Health Service NHS Trust to a charity, the John Grooms Association, and it was registered as nursing home. John Grooms withdrew in June 1994, as they felt that the evolving service was so heavily weighted in favour of acute clinical work that the unit would be unregistrable under the terms of Registered Homes Act 1984. It ceased to be a registered nursing home and became the responsibility of the NHS trust. It reverted to being solely a NHS facility. No

new long-term patients were admitted from mid-1994. On 7th October 1998 the decision was taken by the health authority to withdraw services from Mardon House and to close the facility. Miss Caughlen challenged the decision of the health authority by way of judicial review. Issues, inter alia, before the court were whether the assurance given on behalf of the health authority to Miss Coughlen and other patients that they can live in Mardon House for as long as they choose constituted a legitimate expectation, and whether the frustration of the legitimate expectation amounts to an abuse of power. Lord Woolf MR at page 883 held: "We have no hesitation in concluding that the decision to move Miss Coughlen against her will and in breach of the health authority's own promise was in the circumstances unfair. It was unfair because it frustrated her legitimate expectation of having a home for life in Marden House. There was no overriding public interest which justified it." Lord Woolf MR at page 889 further remarked thus: "The decision to close Marden House was, however, unlawful on the ground that . . . . the decision was an unjustified breach of a clear promise given by the health authority's predecessor to Miss Coughlen that she should have a home for life at Marden House. This constituted an unfairness amounting to an abuse of power by the health authority.

In the case of *Wickremratne vs. Jayaratne and Others*(15), "lease of corpus was originally granted to the Petitioner's father. After his death the Provincial Land Commissioner recommended that a portion of the corpus be leased to the Petitioner. The Petitioner agreed to this. The District Secretary requested the Petitioner to handover possession of the entire land whilst retaining the area agreed to be retained by him. However, thereafter the District Secretary decided to take possession of the entire land on behalf of the State, without

affording an opportunity to the Petitioner to make representations. It was contended inter alia that the Petitioner had a legitimate expectation that he would be given a lease of the land (portion)." Gunawardana J held thus: "It is the fact that the legitimate expectation had arisen against the State itself (on the basis the State must be held to have acted through its officers, who are agents of the State) that makes it (expectation) enforceable against the State. If it had been otherwise, that is if the legitimate expectation had not arisen directly as against State itself - then the State could still have proceeded to acquire the land - undeterred by the fact that the legitimate expectation had arisen as against the officers only - because it is the State that is seeking to acquire the lands, but the State is bound, because the officials had in giving assurances, acted as agents of the State and not in their private capacity. The State itself has to honour and cannot renege on the promise held out by its servants to the petitioner."

In the case of *Sirimal and Other vs. Board of Directors of the Co-operative Wholesale Establishment and Others*[16], "the petitioners complained that the 1st respondent ("The CWE") did in violation of their rights under Article 12(1) of the Constitution stopped extension of their services beyond 55 years and purported to retire them from 31.7.2002, by circular dated 21.6.2002(P6). The previous circular dated 14.11.1995 (P5) provided for granting of annual extension from 55 until 60 as in the case of the public sector under Chapter V section 5 of the Establishments Code. The reasons given for the new policy decision were:

(a) Redundant labour force

(b) Heavy losses; and

(c) Reorganization of the CWE to make it a profit making organization

The applications of all petitioners except Nos. 19 and 20 were recommended by the Service Extension Committee; and no application was sent to the Ministry for decision. The previous practice was to grant annual extension up to 60 years except where medical or disciplinary grounds existed."

Weerasuriya J (S. N. Silva CJ and Ismail J agreeing) held as follows:

1. The optional age of retirement in the CWE had been 55 years of age with a right to seek extension up to 60 years of age as in the public sector. The impugned circular seeks to make retirement compulsory at 55 years. The petitioner had a legitimate expectation of receiving extension up to 60 years except where medical or disciplinary grounds were present.

2. Where it is sought to change conditions of service denying the right of extension, the employees should be given a reasonable time and an opportunity of showing cause against change. The court may decide whether the change of conditions of service on policy was lawful. Where the decision is perverse or irrational, the court will intervene.

Applying the principles laid down in above judicial decisions, I hold the view that P9 and P11 had generated a legitimate expectation in the minds of the petitioners to keep this land as a playground.

Change of earlier promises given by Public Bodies when there is an overriding public interest

Having created legitimate expectation amongst the residents/occupiers/ owners of Jayanthipura Housing Scheme is it fair for the UDA to alienate the said land to

the Department of WLC? Learned SSC contended that it became necessary for the UDA to take this decision in order to house the Department of WLC. Can the UDA change its earlier promises or undertaking on the basis that the public interest requires to do so? On this question I would like to consider the following passage from Administrative Law by Wade and Forsyth 8th Edition page 372 "Although there are now decisions of high authority to show that voluntary statements of policy may sometimes be treated almost as binding restrictions in Law, it is obvious, on the other hand, that public authorities must be at liberty to change their policies as the public interest may require from time to time." It is therefore seen from the above passage that public bodies can change their policies depending on whether there is a public interest to do so. When government, especially in a developing country, undertakes development activities, public bodies should be at liberty to change their earlier decisions. But what in necessary to consider, in this case, is whether there was such an overriding public interest when the UDA decided to alienate the said land to the Department of WLC. In this connection, Cabinet memorandum (P16) dated 8.2.2001, signed by the Minister of Urban Development, Construction and Public Utilities, is important. The Minister in P16 stated that the Government had decided to construct a new secretariat with all facilities in Battaramulla in order to bring all government departments and agencies functioning outside the Sri Jayawardenepura administrative area into one building and the Department of WLC could be provided with necessary office space within the said premises. The Minister has made the following statement in the said Cabinet memorandum (P16). "Under these circumstances, allocation of a land to the Wild Life Department as suggested does not arise." In view of the said statement by the Minister

can the UDA say that there was on overriding public interest to give this land to the department of WLC? The respondents have not produced any document to contradict the said position of the Minister. Her Excellency the President. in a cabinet memorandum, dated 30.1.2001 (P16) stated that a land at Robert Gunawardene Mawatha, Battaramulla had been assigned by the UDA for the purpose of constructing a Head Office Complex for the Department of WLC. Then, how can there be an overriding public interest to give this land which is at Jayanthipura Battaramulla to the Department of WLC? For these reasons I am of the view that there is no overriding public interest to give this land to the Department of WLC. In these circumstances it is not possible for the UDA to say that they changed their policy as there was an overriding public interest to give this land to the Department of WLC. For the above reasons, I am unable to agree with the contention of the learned SSC.

Protection of legitimate expectation

I have earlier pointed out that the petitioners had a legitimate expectation to use this land as a playground. Can the decision of the UDA to alienate the said land to the Department of WLC be quashed on the basis that the petitioners had a legitimate expectation? I now turn to this question. "Inconsistency of policy may amount to an abuse of discretion, particularly when undertakings or statements of intent are disregarded unfairly or contrary to citizen's legitimate expectation." Vide Administrative law by Wade and Forsyth 8th edition page 370.

In the case of *Attorney General of Hong Kong vs. Ng Yuen Shiu (supra)* the Government of Hong Kong announced that certain illegal immigrants, who were liable to deportation, would be interviewed individually and treated on their

merits in each case. The Privy Council quashed a deportation order where the immigrants had only been allowed to answer questions without being able to put his own case, holding that 'when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. Lord Denning MR in Liverpool Taxi Fleet Operators' Association's case (supra) expressed the view that Liverpool Corporation was not at liberty to disregard their undertaking and the corporation was bound by it so long as it was not in conflict with its statutory duty.

In *Regina vs. Secretary of State for Education and Employment, Ex-parte, Begbie*[18] Court of Appeal of England held that Court would not give effect to a legitimate expectation if it would require a public authority to act contrary to the terms of a statute.

In *R vs. Home Secretary exp Asif Mahmood Khan*[19], Court of Appeal of England quashed the refusal of Home Office to allow a Pakistani, settled in England, to bring in his young nephew with a view to his adoption, since the Home Officer had issued a circular specifying the conditions which need to be satisfied but had, by 'grossly unfair administration', refused admission on altogether different ground. If the published policy was to be changed, the applicant should be given full and serious consideration whether there is some overriding public interest justifying the new departure.

In the case of *Dayarathne and others v. Minister of Health and indigenous Medicine*[20] at 412 His Lordship Justice Amerasinghe held: "When a change of policy is likely to frustrate the legitimate expectations of individuals, they must

be given an opportunity of stating why the change of policy should not affect them unfavourably. Such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution against unequal treatment arbitrarily, invidiously, irrationally or otherwise unreasonably dealt out by the executive. They focus on formal justice and the rule of law, in the sense that rule of natural justice help to ensure objectivity and impartiality, and facilitate the treating of like cases alike. Procedural rights are also seen as protecting human dignity by ensuring that the individual is told why he is being treated unfavourably, and by enabling him to take part in that decision."

Considering the above judicial decisions, I hold that the public authorities are bound by its undertakings/promises provided (1) that they do not conflict with its statutory duty (2) that there is an overriding public interest justifying the departure from the earlier undertakings or promises. However after the promise or undertaking, if parties enter into an agreement on the strength of the said promise or undertaking and if such agreement is violated, then no writ will lie to remedy the grievances arising from such violation since in such a situation relationship between parties is contractual. When the relationship between parties is a contractual one, no writ will lie to remedy the grievances arising from an alleged breach of contract. See *Chandradasa vs. Wijeratne*[21] *Weligama Multipurpose Co-operative Society vs. Chandradasa Daluwatta*[22] *Jayaweera vs. Wijeratne*[23] *De Alwis vs. Sri Lanka Telecom*[24] *K. S. De Silva vs. National Water Supply & Drainage Board and Another*[25], *Jayawaredene vs. Peoples Bank*[26]. I further hold that if a public authority decides to act contrary to its published policy or decides to frustrate legitimate expectation created among the individuals by way of promise or undertaking such decisions, unless there is an

overriding public interest, are liable to be quashed by way of writ of certiorari.

In the present case, the UDA, by P9 and P11, gave a promise/ undertaking that this land could be used as a playground by the residents/occupiers/owners of Jayanthipura Housing Scheme and thereby published its intention. The petitioners and the school children of Battaramulla have been using this land as their playground for several years. This is the position of the petitioners. These facts have even been admitted by the UDA in the letter P9. I have earlier referred to the undertakings given in P9 and P11. Before the 1st to 3rd respondents departed from their undertaking, were the petitioners given a fair hearing as to why they depart from their undertaking? The answer is no. Thus, the 1st to 3rd respondents have not followed the principles laid down in Khan's case (supra). I have earlier held that P9 and P11 had generated a legitimate expectation amongst the residents/occupiers/owners of Jayanthipura Housing Scheme to keep/use the land as a playground. When I apply the principles laid down in the above judicial decisions to the facts of this case, the decisions of the UDA to alienate/handing over the physical possession of the land to the department of WLC will have to be quashed.

At the hearing of this application both counsel agreed that the subject matter of this application is one acre (playground) and the adjoining block of land amounting to 20 perches. Thus, the judgment of this case applies to both blocks of land.

For the reasons set out in my judgment, I issue a writ of certiorari quashing the decisions of 1st to 3rd and the 7th to 13th respondents to alienate and/or grant and/ transfer the said land to the Department of WLC. With regard to writ

of prohibition prayed for by the petitioners, I must mention here in future if there is an overriding public interest to depart from the undertaking given by the UDA it must be possible for the UDA to do so after following the correct legal procedure. I have earlier, referring to Cabinet memoranda of H.E the President and the Minister of Urban Development, Construction and Public Utilities (P16), held that there was no overriding public interest to give this land to the department of WLC. Therefore I am justified in issuing a writ of prohibition in respect of two blocks of land referred to above. A writ of prohibition is, therefore, issued restraining the 1st, 2nd, 3rd and 5th respondents from using and/or utilizing the said land namely one acre land used as playground and the adjoining block of land amounting to 20 perches for any purpose other than as an open space and playground.

The 1st respondents is directed to pay Rs. 50,000/- to the petitioners as costs.

SRIPAVAN J. - I agree.

application allowed.

KOTAGALA PLANTATIONS LTD., AND ANOTHER V. CEYLON PLANTERS SOCIETY

SUPREME COURT
J.A.N. DE SILVA, CJ.
SRIPAVAN, J., AND
EKANAYAKE, J.
S.C. APPEAL NO. 144/2009
W.P./HCCA/KAL/18/2008
LT/35/MG/102/2005
JULY 5TH, 2010

Industrial Dispute - a dispute between an employer and workman/ workmen - Termination of Services of a workman - an appeal lies from an order of the Labour Tribunal to the High Court on a question of law.

After trial the Labour Tribunal held that the termination of the services of the workman was justified and dismissed the application. The Applicant- Appellant - Respondent appealed against the order of the Labour Tribunal to the High Court. The High Court allowed the appeal and granted compensation to the workman. The Respondent - Respondent - Appellants made an application for special leave to appeal to the Supreme Court and leave was granted on the following questions of law.

(a) Was the judgment of the High Court just and equitable?

(b) Was the judgment of the High Court contrary to law?

(c) Did the High Court err in law by not evaluating the evidence and the award of the Labour Tribunal?

(d) Whether the High Court erred in law computing the compensation payable to the said employee?

Held

(1) The learned Judge of the High Court has failed to consider the fact that the question of arriving at a decision on the primary facts of a case rests with the original Tribunal.

It is not for an Appellate Court to view the evidence and come to a different conclusion regarding the facts of the case, unless the finding on the facts by the Tribunal was against the weight of the evidence.

(2) An allegation involving misconduct or moral turpitude is a determining factor in proceeding before a Labour Tribunal in order to decide whether the workman is a fit and proper person to be continued in employment in an establishment.

(3) If the conduct of the workman had induced the termination, he cannot in justice and equity claim compensation for loss of career.

Per J. A. N. De Silva, C.J., -

"The jurisdiction of the Labour Tribunal is intended to produce in a reasonable measure a sense of security in a workman so long as he performs his duties efficiently, faithfully, and for the betterment of his establishment and not otherwise".

Per J. A. N. De Silva, CJ., -

"Judicial discretion plays an indispensable part in out legal system. However, such discretion must be exercised fairly and reasonable within the four corners of the Industrial Disputes Act. Though a just and equitable order must be fair by the parties to an application, it never means the interests of the workman alone be safeguarded."

APPEAL against the Judgment of the High Court to the Supreme Court with leave been granted.

Cases referred to :-

(1) *Caledonian Estates Ltd. v. Hilllman* - 79 NLR 421

Uditha Egalahewa with Gihan Galabodage for the Respondent - Respondent - Appellants.
Gamini Perera for the Applicant - Appellant - Respondent.

Cur.adv.vult

December 15th 2010

J. A. N. DE SILVA, CJ.

The Applicant-Appellant-Respondent made an application on behalf of L.P.D. Seneviratne being a Planter, to the Labour Tribunal of Matugame alleging that the services of the said Seneviratne had been terminated wrongfully and unjustifiably and prayed that he be reinstated with back wages or in the alternative be granted compensation in lieu of reinstatement.

The 1st Respondent-Respondent-Appellant filed answer stating that the services of the said Seneviratne were terminated after he was found guilty at a domestic inquiry held against him for misconduct and prayed that the application be dismissed.

The 2nd Respondent-Respondent-Appellant filed answer stating that it was the Managing Agent of the 1st Respondent -Respondent-Appellant and that there was no contract of employment between the said Seneviratne and the 2nd Respondent-Respondent-Appellant.

After trial the Labour Tribunal held that the termination of the services of the said Seneviratne was justified and dismissed the application. The Applicant-Appellant-Respondent appealed against the said order of dismissal to the provincial High court of Kalutara and the said High Court allowed the appeal and granted compensation to the said Seneviratne in a sum of Rs. 840,000/-.

The Respondent-Respondent-Appellants made an application for special Leave to Appeal to the Supreme Court and leave was granted on the following question of law:

(a) Was the Judgment of the Honorable Judge of the High Court just and equitable?

(b) Was the judgment of the Honorable Judge of the High Court contrary to law?

(c) Did the Honorable Judge of the High Court err in law by not evaluating the evidence and the award of the Labour Tribunal?

(d) Whether the Honorable, Judge of the High Court erred in law in computing the compensation payable to the said employee?

At the inquiry before the Labour Tribunal, since the termination of the services of the workman was admitted by the Employer evidence was led by the Employer regarding the act of misconduct of the workman and also his service record. The President of the Labour Tribunal having considered the evidence led regarding the act of misconduct through witnesses Chaminda Priya Nandasiri and Nuwan Thusahra Jayatunge, who were Assistant Field Officers accepted their evidence as regards the act of misconduct which was one of the charges against the workman for assaulting the Field Officer, Jayakody in the presence of the two witnesses who testified before the Labour Tribunal. The President of the Labour Tribunal had given careful consideration to the evidence of the said two witnesses and held that the Employer had proved the fact of assault on Jayakody by the workman. The President had also considered the evidence of the workman regarding the said incident where the workman had admitted his presence and the exchange of words between him and Jayakody. In those circumstances the President of the Labour Tribunal was in the best position to assess the credibility of the said witnesses in relation to the said incident especially in the light of the fact that the workman had not expressly denied the act of assaulting Jayakody.

On behalf of the workman it had been submitted that the victim of the assault, Jayakody was not brought in as a

witness to establish the assault. It transpired in the course of the evidence before the Tribunal that Jayakody and three others had also been dismissed for having assaulted the workman in this case soon after the assault by the workman on Jayakody had taken place. The President of the Labour Tribunal considered this position too in arriving at his conclusion.

The President of the Labour Tribunal had considered the documents and evidence relating to the past record of service of the workman in arriving at the conclusion that the workman was not entitled to any relief. Further the president also adverted to the fact that the workman while being employed under the Employer had engaged himself in doing some work outside his realm of duties by managing another property for his relations which was established by the production of the documents relating to the lease of land which was signed by him, which fact was not seriously challenged on behalf of the workman.

The President of the Labour Tribunal thus arrived at a finding that the acts of misconduct of the workman were established by the Employer before the Tribunal and held that the workman was not entitled to any relief on a consideration of the totality of the evidence placed before the Tribunal which included the facts relating to his past conduct and the doing of work outside the scope of his duties for others.

An appeal lies from an order of a Labour Tribunal only on question of law. A finding on facts by the Labour Tribunal is not disturbed in appeal by an Appellate Court unless the decision reached by the tribunal can be considered to be perverse. It has been well established that for an order to be perverse the finding must be inconsistent with the evidence led or that the finding could not be supported by the evidence led. (*Vide* *Caledonian Estates Ltd. v. Hillman* [1].

Thus, the question before the High Court was to see whether the order of the President of the Labour Tribunal was perverse. A perusal of the judgment shows that the High Court had acted on a misconception that the Labour Tribunal had based its decision on the past record of the workman which the high court considers to be irrelevant and extraneous.

The learned Judge of the High Court has failed to consider the fact that the question of arriving at a decision on the primary facts of a case rests with the original Tribunal. It is not for an Appellate Court to view the evidence and come to a different conclusion regarding the facts of the case unless the finding on the facts by the Tribunal was against the weight of the evidence. In fact on a reading of the entirety of the judgment of the High Court, it would appear that the High Court Judge has misdirected himself.

The learned Judge of the High Court formed the misconception that the Tribunal had based the justifiability of terminating the services of the workman on his past record which the learned judge considered as matters relating to inefficiency. However he failed to consider the manner in which the Tribunal had evaluated the evidence that was placed before the Tribunal. The High Court having stepped out of the path went onto hold that the Tribunal was wrong in holding that the termination was justifiable and held that the termination of the services of the workman was unjustified.

It is noted that the High Court did not consider the fact that the workman was an Assistant Manager and should set an example to his subordinates. The workman having had an altercation with the Field Officer Jayakody on the field had gone to the extent of assaulting him in the presence of other workers of the Estate. This is a high handed action on

the part of an Executive Officer which cannot be condoned by the fact of the said workman being himself subjected to an attack by the said Field officer Jayakody and three others subsequently. The Employer had also taken steps to terminate the services of the said employees who had attacked the workman.

The Employer could not turn a blind eye on the act of misconduct of the workman when he had complained of an attack on him by other employees of the Estate. All those who had acted in that manner which was subversive and detrimental to the maintaining of discipline on the estate had been dealt with by the employer in the same way.

In dealing with the evidence of the two Assistant Field Officers who gave evidence regarding the assault on Jayakody by the workman Seneviratne, the learned High Court Judge has considered their evidence but has stated as to whether such evidence was acceptable or not. In effect he has stated that both witnesses speak to the same facts which would thus be a corroboration of the fact that the workman Seneviratne had assaulted Jayakody and therefore the conclusion reached by the President of the Labour Tribunal that the act of misconduct committed by the workman Seneviratne had been established cannot be faulted.

The learned High Court Judge in his judgment states that the Employer has acted in breach of the conditions of its 'sales agreement' apparently meaning the terms and conditions of the 'contract of employment' by stating that there is a duty cast on the employer to provide a safe place of work for the employee and that in the instant case the employer had not done so. He in fact goes to the extent of stating that the employer by failing to safeguard the employees had discriminated by allowing subordinates to proceed to the superior's

(the workman in the present case) office and attack him while on duty and that the management had not taken any steps against the violations committed by Jayakody and other workers. There was material before the Tribunal to show that the employer had terminated the services of Jayakody and three others regarding the assaulting of the workman Seneviratne. Thus this court does not see any substance in the observations made by the learned judge of the High Court.

Further, the Learned High Court Judge in his judgment stated that inefficiency is not relevant as the termination of the workman had been based on assault and nothing else and that the Labour Tribunal relied on inefficiency which is not the issue that resulted in the termination of the services of the workman. He has stated that the employer had not taken any steps regarding the inefficiency of the workman and therefore the documents R8 to R38 which contain matters regarding the efficiency and shortcomming of the workman are not acceptable documents as they were not challenged by way of an inquiry. This would be another clear misdirection on the part of the learned Judge when considering matters relating to the relationship between the employer and the workman. Evidence regarding past conduct of a workman is relevant to show how a workman has performed during his period of employment, his attitude towards, work, efficiency, conduct, discipline etc, as these contributing factors influence an employer when dealing with promotions, increments, granting of benefits to a workman. Matters relating to misconduct and inefficiency are not condoned just because no immediate action is taken against an employee when such matters occurred.

An allegation involving misconduct or moral turpitude is a determining factor in proceedings before a Labour Tribunal

in order to decide whether the workman is a fit and proper person to be continued in employment in an establishment. If the conduct of the workman had induced the termination, he cannot in justice and equity claim compensation for loss of career. On the other hand, if the termination was not within the control of a workman but solely by the act and will of an employer, a Tribunal exercising just and equitable jurisdiction is well entitled to grant relief in the nature of compensation to a discharged workman. The jurisdiction of the Labour Tribunal is intended to produce in a reasonable measure a sense of security in a workman so long as he performs his duties efficiently, faithfully and for the betterment of his establishment and not otherwise. No workman should be permitted to suffer for no fault of his, but on unwanted, dishonest, troublesome workman maybe discharged without compensation for loss of his employment. The workman in those circumstance has to blame himself for the unpleasant and embarrassing situation in which he finds himself.

In the instant case, it is noted that acts of misconduct previously committed by the workman include, unsatisfactory attendants, purchase of diesel in an unauthorized manner for personal use, leaving the estate without obtaining leave, failure to report for duty once the period of leave expires, acting in breach of the terms and conditions of employment and managing a tea plantation that does not belong to the Applicant-Appellant-Respondent etc.

This Court is at a lost to understand the legal basis upon which the High Court granted compensation to the workman. Judicial discretion plays an indispensable part in our legal system. However, such discretion must be exercised fairly and reasonably within the four corners of the Industrial Disputes Act. Though a just and equitable order must be

fair by the parties to an application, it never means the interests of the workman alone be safeguarded. The desirability of giving reasons for decisions so widely recognized by appellate Courts, that a failure to do so amounts to a failure to do justice especially where the concepts of social security and social justice form an integral part of Industrial Law. It is fundamental importance that reasons should be given for decisions and decisions should be based on evidence of probative value.

Accordingly, I set aside the Order of the learned High Court Judge dated 6th August 2009 and affirm the Order made by the President of the Labour Tribunal dated 4th December, 2008. The appeal is thus allowed, without costs.

SRIPAVAN J. - I agree

EKANAYAKE J. - I agree

appeal allowed.