THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2009] 1 SRI L.R. - PART 9

PAGES 225-252

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company (Printers) Ltd.

Price: Rs. 25.00

DIGEST

Page

The B report clearly stated that the petitioner was brought to the Kandy Police Station and a complaint was made by the 1st respondent. The petitioner was brought to the Police Station around 11.00 p.m. on 28.02.2007 and he had been produced before the learned Magistrate at his residence around 4.00 p.m. on 01.03.2007, where he was released on surety bail of Rs. 100,000/- (P_5). It is interesting to note that the learned Magistrate after a perusal of the material placed before him had recorded that 'no offence appears to have been committed'.

An arrest take place when a person is either taken into custody or placed under restraint. In *Holgate-Mohammed v Duke*(6) Lord Diplock was of the view that when a person is detained or restrained by a police officer and that he is aware that he is being detained or restrained, that would amount to an arrest of the person although no formal words of arrest were spoken by the officer.

Considering the circumstances of this application, a question arises as to whether there was a need for the 1st respondent to have brought the petitioner to the Kandy Police Station. In his statement recorded at the Kandy Police Station he had stated that the petitioner was arrested for protection of the petitioner and if that had been the reason for his arrest there would not have been any need to have detained the petitioner until 4.00 p.m. on 01.03.2007.

It is not disputed that the petitioner was arrested around 10.00 p.m. on 28.02.2007 and produced before the learned Magistrate around 4.00 p.m. on 01.03.2007. In effect he had been in police custody for over 18 hours.

Section 327 of the Code of Criminal Procedure Act refers to the procedure that should be adopted when a person is arrested by a peace officer without a warrant. According to Section 37,

"Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period then under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate,"

Section 35 of the Code of Criminal Procedure Act states that when a person, who had been arrested by a private person is produced before a peace officer and there is no reason to believe that he had committed any offence that he shall be at once discharged. The peace officer could arrest such a person only if there is reason to believe that he is a person, who has acted in the circumstances set out in Section 32 of the Code of Criminal Procedure Act.

Considering the circumstances of the present application it is apparent that there were no reasons for the petitioner to have been arrested and also there was no necessity for him to have been kept in custody without, being produced before the Magistrate for over 18 hours. Although Section 37 of the Criminal Procedure Code refers to a period of 24 hours as the period a person taken without a warrant could be kept in custody without producing him before the Magistrate, this does not mean that a person could be kept for the maximum period of time under arrest without taking necessary steps to produce him before the learned Magistrate. What Section 37 of the Code of Criminal Procedure Act had contemplated is that, a person who has been taken into custody without a warrant should be produced before the learned Magistrate as early as possible and without any unnecessary delay. The time taken for such production should be considered on the circumstances of each case.

On a consideration of the totality of the circumstances it is clear that the petitioner was taken into custody for his own

protection and for the protection of his property and therefore there was no necessity for any unnecessary delay. I accordingly hold that the petitioner's fundamental rights guaranteed in terms of Article 13(2) of the Constitution had been violated.

The petitioner had complained that his fundamental rights guaranteed in terms of Article 11 had been violated by the 1st respondent as he was brutally assaulted by him. The petitioner had complained that as a result of the said brutal assault by the 1st respondent, he was bleeding from his nose, his face and his right eye was swollen and reddened and the left ear drum too had got injured. Article 11 of the Constitution, which deals with the right pertaining to freedom from torture, reads as follows:

> *"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

Torture or cruel, inhuman or degrading treatment or punishment could take many forms and even the nature of the physical harm may differ from case to case. When there is a complaint against a police officer alleging that the complainant had been assaulted, a mere allegation would not be sufficient to prove that there had been a violation of Article 11 of the Constitution. As stated in *Ansalin Fernando v Sarath Perera and others*,(7) an allegation against the police cannot be rejected merely because the police deny such allegation or due to the fact that the aggrieved party cannot produce any medical evidence of the injuries. Whether any allegation is in violation of Article 11 of the Constitution would depend on the facts of each case.

However, in order to establish the alleged allegation of torture it would be necessary for an aggrieved party to corroborate his averments against the respondents and for

such corroboration it would be necessary to produce evidence including medical evidence.

In *Namasivayam v Gunawardena*[8] referring to the need for corroborating the averments of alleged torture, Sharvananda, C. J., had stated that,

> "On the question whether the petitioner was subject to cruel treatment or torture, petitioner's averments stands uncorroborated by any medical evidence and has been denied by the respondents. The evidence is not sufficient for us to hold that there had been any violation of Article 11 of the Constitution."

On many instances, this Court therefore had directed aggrieved persons to be examined by a Judicial Medical Officer, in order to obtain a Medico-Legal Report. In this instance, however, after the petitioner was arrested and taken to the Police Station, a police officer had taken the petitioner to the Judicial Medical Officer, Dr. A. B. Seneviratne of the General Hospital, Kandy around 12.00 noon on 01.03.2007.

The consultant Judicial Medical Officer, Dr. A.B.Senevirathne, who was attached to the General Hospital, Kandy had tendered the Medico-Legal Report pertaining to the petitioner to this Court. The relevant parts of the Judicial Medical Report are re-produced below to indicate the kind of injuries the petitioner had sustained on the night of 28.02.2007.

" Injuries

1. Sub conjunctival haemorrhage in left eye,
2. Traumatic performation of the ear drum in the left ear No evidence of nerve damage.
3. Pain and swelling in the nose with fracture of the nasal bone,

4. Multiple small abrasions over the malar prominence of the left cheek

5. Abrasion 4.0 x 2.0 cm. over upper third front right side of the chest.

Non –grievous injuries – (1),(3),(4)

Grievous Injuries	Limb under Section 311 of Penal Code	Explanatory remarks if any
(2)	C	Permanent privation or impairment of the hearing of either ear
(3)	G	Cut or fracture of bone cartilage or tooth dislocation or subluxation of bone, joint or tooth

Injuries caused by – blunt weapon."

An examination of the Medico - Legal Report clearly indicated that the petitioner had suffered several grievous and non – grievous injuries. The question that arises at this juncture is as to who had been responsible for such injuries. As stated earlier the petitioner's contention was that the 1st respondent, in his anger that the petitioner's vehicle had obstructed his vehicle from moving , had assaulted him and the 1st respondent had taken up the position that since the petitioner and his friends were treasure hunters, the villagers had assaulted him.

Although the 1st respondent had stated that since the petitioner was a treasure hunter the villagers had assaulted him, he had not tendered any evidence in support of this contention. Moreover as pointed out earlier, the place where

the incident took place or the surrounding area had not been either declared or known as an area, where there is any archaeological value. In such circumstances the contention of the 1st respondent fails and on a careful examination of the two versions and the findings of the consultant Judicial Medical Officer referred to in the Medico-Legal Report, it is apparent that the contention of the petitioner is more probable and has to be accepted.

I accordingly hold that the 1st respondent had violated the petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution.

The petitioner had clearly stated that the 1st respondent had become annoyed with the petitioner since the 1st respondent could not move his vehicle as the petitioner's vehicle had come from the opposite direction, at a place where the road was too narrow for two vehicles to pass.

Although the 1st respondent had contended that the petitioner had been on that road on an expedition in search of treasure, it is apparent that the petitioner's contention is more probable and that the 1st respondent had been simply displaying his authority as the Officer - in – Charge of the Police Station Ginigathhena.

It is the duty of a police officer to use his best endeavour and ability to prevent all crimes, offences and public nuisances and more importantly to preserve the peace. In order to carry out his duties efficiently and effectively, it would be necessary to have the trust and respect of the public. It is not easy to command that from the public and in order to earn such trust and respect, the police officers must possess a higher standard of moral and ethical values than that is expected from an average person.

The facts and circumstances of this application clearly demonstrate the lack of such higher standards of ethical and

moral value that is expected from a police officer. As stated by Atukorale, J. In *Amal Sudath Silva v Kodituwakku.*[9]

"Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects helpless suspect in his charge to depraved and barbarous methods of treatment..... Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order " (emphasis added)"

For the reasons aforesaid I hold that the petitioner's fundamental rights guaranteed in terms of Articles 11, 13(1) and 13(2) of the Constitution had been violated and the 1st respondent is responsible for the said violation of Article 11 and 13(1) of the Constitution. I accordingly direct the 1st respondent to pay personally to the petitioner a sum of Rs. 50,000/- as compensation and costs. Since the violation of Article 13(2) had occurred whilst the petitioner was in the custody of the police station,Kandy and no particular officer was responsible for such violation I hold that the said violation would be the responsibility of the State and therefore I direct that a sum of Rs. 15,000/- be paid to the petitioner by the State as compensation and costs. Altogether the petitioner would be entitled to a sum of Rs. 65,000/-. These amount to be paid within three(3) months from today.

The Registrar of the Supreme Court is directed to send a copy of this judgment to the Inspector – General of Police.

EKANAYAKE, J.- I agree.

IMAM, J. - I agree.

Application allowed

MUKTAR AND OTHERS
V.
RATHNASIRI, DIVISIONAL SECRETARY, ACQUIRING OFFICER

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
BALAPATABANDI, J.
RATNAYAKE, J.
S.C. (APPEAL) NO. 12/2006
C.A. NO. 4/2001
LAND ACQUISITION BOARD
OF REVIEW NO. CL 1214
NOVEMBER 4TH, 2008

Colombo District (Low Lying Areas) Reclamation and Development Board Act, No. 15 of 1968 - Section 4(2) – Land Acquisition Act, no. 15 of 1968 – Section 7 – Determination of the quantum of compensation for the property to be acquired – Evidence Ordinance – Section 57(9) , 101 and 102

The appellants had filed an appeal before the Land Acquisition Board of Review against an award made by the respondent regarding an undivided ½ share of late Ummu Shifa Musthar, one of the respondents of the application before the Court of Appeal and who had died during the pendency of that appeal and ½ share each of the 2nd to 7th appellants respectively. The Land Acquisition Board of Review was inter alia entrusted with the task of deciding the relevant date on which the market value of the acquired property should be determined. The main dispute involved was to be determined in terms of section 4(2) of the Colombo District (Low Lying Areas) Reclamation and Development Board, Act No. 15 of 1967 or in terms of section 7 of the Land Acquisition Act.

The Board of Review held that the relevant date for the purpose of computing the quantum of compensation for the property in question was 24.04.1981 that date being the date of publication of the section 7 notice under the Land Acquisition Act, and not 22.09.1968, viz. the date of commencement of Act No. 15 of 1968. The Board of Review, which subsequently heard the appeal quashed the award made by the

respondent. The respondent being dissatisfied with the decision of the Board of Review preferred an appeal to the Court of Appeal. The Court of Appeal set aside the decision of the Board of Review and affirmed the Award of Compensation made by the respondent based on the market value of the property as at the commencement of Act No. 15 of 1968.

The appellants-respondents-appellants appealed against the aforesaid judgement of the Court of Appeal . The Supreme Court granted special leave to appeal.

Held :

(1) In determining the condition of the land in 1968 and the condition of the land at the time of acquisition for the purpose of computing compensation to be payable, the Board of Review had arrived at a decision, not purely on facts, but on an inference on the applicability of the Act No. 15 of 1968 and section 7 of the Land Acquisition Act.

(2) When an acquisition of land falls within the purview of section 4(2) of the Colombo District (Low Lying Areas) Reclamation and Development Board Act No. 15 of 1968, the valuation of the property has to be computed on the basis of the valuation as at the date of the commencement of the Act No. 15 of 1968.

(3) When it is claimed that the condition of the land in question had changed from its original position at the time of its acquisition, the person who makes that statement should lead evidence to prove that position in terms of section 102 of the Evidence Ordinance It would be presumed that in the ordinary course of nature there was no change in the condition of the land.

Cases referred to :

1. *Collettes Limited V. Bank of Ceylon* – [1982] 2 S.L.R. 514
2. *Mahavitharana V. Commissioner of Inland Revenue* – (1962) 64 NLR 217
3. *Naidu & Co. V. The Commissioner of Income Tax* – (1959) AIR S.C. 359

APPEAL from a judgment of the Court of Appeal

Faiz Musthapha, P.C., with *Faizer Marker and Hussain Ahamed* for Appellants Respondents- Appellants.

M.N.B. Fernando, D.S.G., with *Rajiv Gunathilake S.C.,* for Respondent-Appellant-Respondent.

Cur.adv.vult.

June 18, 2009

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 11.03.2005. By that judgment the Court of Appeal allowed the appeal of the respondent-appellant-respondent (hereafter referred to as the respondent), set aside the decision of the Board of Review and affirmed the award of compensation made by the acquiring officer based on the market value of the property as at the commencement of Act, No. 15 of 1968. The appellants-respondents-appellants hereinafter referred to as the appellants appealed to the Supreme Court against the said judgment of the Court of Appeal for which this Court granted Special Leave to Appeal on the following questions:

1. Was the Court of Appeal wrong in rejecting the preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981?
2. Having erroneously held that a question of law had arisen, did the Court of Appeal thereafter further err by making a pronouncement, which interferes entirely with a finding of pure fact?
3. In any case was the Court of Appeal wrong in concluding that the land had not undergone any change without contrary to evidence being led either before the Board of Review or the Court of Appeal itself?

4. Did the Court of Appeal misdirect itself on the burden of proof?

The facts of this appeal, as stated by the appellants, albeit brief, are as follows:

The appellants had filed an appeal before the Land Acquisition Board of Review against an award made by the respondent regarding an undivided ½ share of late Umma Shifa Musthar, one of the respondents of the application before the Court of Appeal and who had died during the pendency of that appeal and 1/12th share each of the 2nd to 7th appellants respectively. The property acquired bears assessment No.13, Horadehipitiya Road, Kolonnawa, containing in extent 11A-OR-31.00P.

The Board of Review was, *inter alia,* entrusted with the task of deciding the relevant date on which the market value of the acquired property should be determined. The main dispute therefore involved the question as to whether compensation of the property to be acquired was to be arrived at in terms of Section 4(2) of the Colombo District (Low Lying Areas) Reclamation and Development Board, Act No. 15 of 1968 (hereinafter referred to as Act, No. 15 of 1968) or in terms of Section 7 of the Land Acquisition Act.

The appellants maintained that the relevant date for valuation should be the date on which notice under Section 7 of the Land Acquisition Act was published in the Gazette, viz., 24.04.1981, whereas the respondent took up the position that compensation should be awarded on the basis that acquisition falls within the purview of Section 4(2) of Act, No.15 of 1968 and therefore the date of commencement of that Act. viz. 22.09.1968, should be adopted as the relevant date for the purpose of computing compensation.

The appellants had admitted that Act, No. 15 of 1968 came into effect on 22.09.1968 and the Gazette Notification of the intention to acquire the property in question in terms of the Land Acquisition Act was published on 12.08.1970. The appellants have also admitted that the said property was acquired on 02.03.1979, when Section 38(a) notice was published in the Gazette.

The Board of Review, which initially heard this matter, by their order dated 20.02.1995 had held that the market value would be determined as at 22.06.1968, only if the land acquired at the time of acquisition was in the same condition it was on 22.09.1968.

According to the appellants, the land acquired was not in a marshy, waste or swampy state, but in an improved condition at the time of acquisition on 02.03.1979 and in those circumstances determination of the question of compensation to be made in terms of Section 7 of the Land Acquisition Act, the material date being 24.04.1981, the date on which Section 7 notice of the Land Acquisition Act was published in the Gazette.

Accordingly, it was held that the relevant date for the purpose of computing the quantum of compensation for the property in question was 24.04.1981 that date being the date of publication of Section 7 Notice under the Land Acquisition Act, and not 22.09.1968, viz., the date of commencement of Act, No. 15 of 1968.

The total award of compensation by the respondent was Rs. 350,000/- and the appellants were awarded same in proportion to their respective shares. The appellants original claim after certain restriction had amounted to Rs. 8,860,150/- stating that the appellants will be entitled to compensation in proportion to their respective shares.

The Board of Review, which subsequently heard the appeal by the appellants had by their order dated 20.12.2000 quashed the award made by the respondent in respect of the amount of compensation and substituted the total amounting to Rs. 6,621,500/- stating that the appellants will be entitled to compensation in proportion to their respective shares.

The respondent being dissatisfied with the decision of the Board of Review preferred an appeal to the Court of Appeal. Learned Counsel for the appellants took up preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the date of the land in 1968 and 1981. The Court of Appeal, by their judgment dated 11.03.2005 held against the appellants and allowed the appeal of the respondent. The Court of Appeal thereby had set aside the decision by the Board of Review dated 20.12.2000 and had affirmed the award of compensation made by the respondent based on the market value of the property at the commencement of Act, No.15 of 1968.

Having stated the facts of this appeal let me now turn to consider the questions raised in this appeal on the basis of the submissions made by both learned Counsel for the appellants and the respondent.

1. **Was the Court of Appeal wrong in rejecting the preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981?**

Learned President's Counsel for the appellants contended that although the appellant's original restricted claim was Rs. 8,860,150/- as compensation, the respondent had awarded only Rs. 350,000/-. The Board of Review had quashed the

Award made by the respondent in respect of the amount of compensation and had substituted the total amount to be Rs. 6,621,500/-. The respondent being dissatisfied with the said decision of the Board of Review had preferred an appeal to the Court of Appeal and had sought to appeal from the decision of the Board of Review on the following questions of law:

1. Should the relevant date on which the market value of the acquired property be determined according to the date on which Notice under Section 7 of the Land Acquisition Act was published in the Gazette or should the relevant date be determined according to the date of commencement of the Colombo District (Low Lying Areas) Reclamation and Development Board Act, No.15 of 1968?

2. Whether the part of Section 4(2) of which reads as "the market value of that land for purposes of determining the amount of compensation to be paid in respect of that land shall, notwithstanding anything to the contrary in that Act, be deemed to be the market value which that land would have had at the date of commencement of that Act if it then was in the same condition as it is at the time of acquisition" should be interpreted as if the condition of the land had changed from the time of acquisition, the provisions of the said Section 4(2) will not be applicable and the relevant date for the valuation should be taken as Section 7 date?

The appellants had taken up a preliminary objection before the Court of Appeal that the said questions are only pure questions of fact and that no questions of law had been disclosed. Their position was that the comparison of the condition of the land as at the date of acquisition and as at the date that Act, No. 15 of 1968, came into being (which was on 19.09.1968) was a pure question of fact.

It is not disputed that the question to be considered before the Land Acquisition Board of Review was whether the land in question was in the same condition at the time of acquisition, as it was at the date of commencement of the Act, No. 15 of 1968. The said Board of Review had accordingly examined the applicability of Section 4(2) of Act, No. 15 of 1968 and Section 7 of the Land Acquisition Act. Considering the issue in question, the said Board of Review had stated that,

> "Learned Counsel for appellants submitted that, according to the description given in the tenement list R1(a) dated 30.07.80, this land has been described as a garden containing eight temporary buildings and 25 coconut trees 10 to 25 years old, and therefore if one keeps in mind the fact that at the commencement of the Reclamation and Development Board Act it applied to "low lying, marshy, waste or swampy areas" the land acquired was not in that state, but in an improved condition at the time of acquisition, namely on 02.03.79. Learned Counsel for appellants contention is that in view of the aforesaid circumstances, determination of the questions of compensation had to be made under Section 7 of the Land Acquisition Act, the material date being the date on which the Section 7 notice was published in the Gazette, namely 24.4.81 ".

It is therefore quite clear that the question of condition of the land had to be considered by the Board of Review. On a careful examination of the proceedings and the order made by the Board of Review, it is apparent that the condition of the land as of the date of acquisition compared with the condition of the land as at the date of Act, No. 15 of 1968 was not arrived at by the Board of Review on an assessment of facts. Further the Board of Review had led no evidence on the condition of the land in 1968 at the time the said

Act, No. 19 of 1968 came into operation and had come to the conclusion of the condition of the land, not on an assessment of the facts, **but purely by inference.**

In fact the Court of Appeal had given its mind to this question and had correctly found that no evidence had been led before the Board of Review with regard to the condition of the land in 1968, viz., at the time Act, No. 15 of 1968 came into operation. Since no evidence had been led before the Board of Review, it was erroneous for the Board to have concluded that the land in question earlier had been marshy and swampy and that the land acquired was not in that state, but an improved condition at the time of acquisition. On that basis the Board of Review had decided that the relevant date for the purpose of computing the quantum of compensation for the land is 24.04.81 and not 22.09.68, which was the date Act, No. 15 of 1968, came into operation.

What constitute a question of law was considered and determined by this Court in *Collettes Ltd. v. Bank of Ceylon*[1] where it had been stated *inter alia,* that,

i. **inferences from the primary facts found are matters of law;**

ii. whether there is or not evidence to support a finding, is a question of law; and

iii. whether the provisions of a statement applying to the facts; what is the proper interpretation of a statutory provision; what is the scope and effect of such provision are all questions of law.

As stated earlier the Board of Review had drawn inferences from the primary facts, which were before them and no evidence was led to support their findings. Further the

Board of Review interpreted the statutory provisions in arriving at the date for the purpose of computing the quantum of compensation for the land in question. The Court of Appeal, after considering the matter before it, quite correctly came to the conclusion that the questions referred to the Court of Appeal for determination were questions of law that had to be decided by that Court.

It is not disputed that before the Board of Review the appellants and the respondent were relying respectively on the applicability of Section 7 of the Land Acquisition Act and Section 4(2) of the Act, No. 15 of 1968 for the purpose of arriving at the relevant date to compute the quantum of compensation. Considering the submissions made before the Board of Review and for the reasons stated above it is quite apparent that the Board had arrived at a decision, not on the basis of the facts before the Board, but on an interpretation of the aforementioned statutory provisions.

Accordingly it is apparent that the Court of Appeal was not wrong in rejecting the preliminary objection that 'no question of law had been disclosed and what was referred to was a pure question of fact,' which was in relation to the state of the land in 1968 and 1981.

2. Having erroneously held that a question of law had arisen, did the Court of Appeal thereafter further err by making a pronouncement, which interferes entirely with a finding of pure fact?

Learned President's Counsel for the appellants contended that he relied on the decision in *Mahawitharana v Commissioner of Inland Revenue*[2] where H. N. G. Fernando, J. (as he then was) had adopted a statement by Gajendragadkar, J. in *Naidu and Co. v The Commissioner of Income Tax.*[3]

The contention of the learned President's Counsel for the appellants was that what was held in the decision in *Naidu and Co. (supra)* by Gajendragadkar, J., was that finding of facts could be challenged only within narrow limits and limited to improper admission of evidence or exclusion of proper evidence or not supported by legal evidence or is not rationally possible. Learned President's Counsel submitted that the Court of Appeal had distinguished this decision on the basis that what was considered in that case relates to a pure question of fact, which is not the issue in question in this case.

In *Mahawitharana v Commissioner of Inland Revenue (supra)*, the Supreme Court had to consider the question as to whether 'on the facts and circumstances proved in the case, the inference that the transaction in question was an adventure or concern in the nature of trade is in law justified? While answering the said question of law in the affirmative, the Supreme Court had held that in a case stated under Section 78 of the Income Tax Ordinance, the Supreme Court could consider the correctness of the inference drawn by the Board of Review as to the Assessor's intention, only a) **if that inference had been drawn on a consideration of inadmissible evidence or after excluding admissible and relevant evidence, b) if the inference was a conclusion of fact drawn by the Board, but unsupported by legal evidence, or c) if the conclusion drawn from relevant facts was not rationally possible and was perverse and should therefore be set aside.** This was laid down on the basis of the decision in *Naidu and Co. (supra)* and in both *Naidu and Co. (supra)* and in *Mahawitharana (supra)* the questions in issue were based on pure questions of fact.

The issue in question in this matter, as was stated earlier, was on the basis of the condition of the land in 1968 and the condition of the land at the time of acquisition. Whilst,

the respondent contended that the applicable date should be the date when Act, No. 15 of 1968 came into operation, the appellants submitted that what should be taken into consideration was the date of acquisition. Admittedly it is necessary to arrive at the correct date for the purpose of computing compensation to be payable and for that purpose it is necessary to know whether there had been a change in the condition of the land between 1968 and the date of acquisition, as, if there had been such a change in the condition of the land, Section 4(2) of Act, No. 15 of 1968 would not be applicable for the payment of compensation.

It is not disputed that the condition of the land at the date of acquisition was arrived at by the Board of Review based on evidence, there had been no evidence with regard to the condition of the land in 1968.

Accordingly as stated earlier, under question No. 1, the Court of Appeal had accepted that the Board of Review, in determining the condition of the land in 1968, had arrived at a decision, not purely on fact, but on an inference on the applicability of the Act, No. 15 of 1968 and an interpretation given to Section (2) of Act, No. 15 of 1968 and Section 7 of the Land Acquisition Act.

It is not disputed that the appellants Valuers and the State Valuer had given evidence with regard to the valuation of the land, but no evidence was led as stated earlier, in relation to the condition of the property in question in 1968. The Land Acquisition Board of Review, in question of computation of compensation had considered the question on the basis that the land had been considered in an improved condition at the time of its acquisition and it is important to note that the Board of Review had arrived at this conclusion on the premise that Act, No.15 of 1968 was applicable to low lying,

marshy, waste or swampy areas and therefore this land was marshy in the year 1968. It is therefore apparent that the Board of Review in order to arrive at its finding had interpreted the provisions of Act, No 15 of 1968 and such a course of action could not be accepted as considering a pure question of fact.

Accordingly the Court of Appeal was correct in concluding that the decision in *Mahawitharana(supra)* could be distinguished on that basis.

It is therefore evident that the Court of Appeal did not interfere with a finding of pure fact.

In any case was the Court of Appeal wrong in concluding that the land had not undergone any change without contrary to evidence being led either before the Board of Review or the Court of Appeal itself?

Learned Counsel for the appellants contended that the Court of Appeal misdirected itself in interfering with questions of fact and determining that the land had not undergone any changes.

As stated earlier, the Board of Review, after interpreting the provisions of Act, No. 15 of 1978 and the Land Acquisition Act, had determined erroneously that the land in question had undergone changes after 1968.

The Court of Appeal after determining that there was a question of law that whether there was a proper interpretation and application of section 4(2) of Act No. 15 of 1968, had proceeded to examine the documents relating to the land in question, which included the Deed of Transfer at the time the said land was purchased by the appellants predecessors and the condition of the land as referred to in the said Deed of Transfer.

It is not disputed that the said land was purchased by the appellants on 04.10.1968. Accordingly, the Court of Appeal considered a question of law based on the determination made by the Board of Review and had correctly examined the relevant documents, which were tendered to the Court of Appeal. Since the land in question had been purchased by the appellants predecessors in 1968, and that being the year in which the condition of the land was relevant, after examining the said Deed, the Court of Appeal had correctly held that there had been no change in the condition of the land.

Did the Court of Appeal misdirect itself on the burden of proof?

Learned Presidents Counsel for the appellants submitted that the respondent had taken up the position that the computation of compensation should be calculated on the basis of Section 4(2) of Act, No. 15 of 1968 and therefore the burden of establishing the fact that the condition of the land had not changed after 1968 until the date of acquisition on 24.04.1981 was on the respondent.

As stated earlier, the following facts were common ground in this appeal: the land in question was purchased by the appellants predecessors on 04.10.1968 and the Act, No. 15 of 1968 came into being on 22.09.1968. In terms of the acquisition process, the Section 4 notice under the Land Acquisition Act was dated 12.08.1970, order had been made in terms of Section 38(a)7 of the Land Acquisition Act on 02.03.1979 and the Section 7 notice in terms of the said Act was issued on 24.04.1981.

It is also common ground that the land was vested in terms of Section 38(a) of the Land Acquisition Act on 02.03.1979

and that at that time there was no Condition Report prepared for the land in question. In such circumstances when the Acquiring Officer took over the land it was presumed that there had been no change in the condition of the land, Accordingly the respondent had decided to compute the amount of compensation in terms of Section 4(2) of Act, No. 15 of 1968, where it is stated that,

> " ..... Notwithstanding anything to the contrary to that Act, be deemed to be the market value which that land would have had at the date of commencement of this Act **if it then was in the same condition as it is at the time of acquisition"** (emphasis added).

The appellants had been of a contrary view to the effect the land in question had changed from its original position at the time of its acquisition , then in terms of Section 101 of the Evidence Ordinance the burden of proving that assertion lies on the appellants; Section 101 of the Evidence Ordinance states that,

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

Accordingly if the appellants had asserted that the condition of the land in question had changed from its original position at the time of its acquisition, in terms of Section 101of the Evidence Ordinance, the appellants should lead evidence to prove that position. Further in terms of Section 102 of the Evidence Ordinance, the burden of proof

lies on the appellants, who required the Court to determine the amount of compensation they would be entitled to which was different from what the respondent had computed as compensation. When the appellants claimed that the compensation should be computed in terms of the Land Acquisition Act as the condition of the land had changed from the time it was purchased by the appellants predecessors and when the respondent had stated that there had been no change in the condition of that land, the burden of proof lies on the appellants to lead evidence that the land had undergone a change in its condition. Further as correctly pointed out by either party, in terms of Section 57(9) of the Evidence Ordinance it would be presumed that in the ordinary course of nature there would be no change in the condition of the land; section 57(9) clearly states that there is no need to prove the ordinary course of nature and if there is no evidence of the condition of the land in 1968 to the contrary by the appellants, it is presumed that in terms of the ordinary course of nature that there was no change in the condition of the land. Therefore the burden of proving that there had been a change in the condition of the land solely rests on the appellants.

For the reasons aforesaid the questions of law for which special leave to appeal was granted are answered in the negative.

This appeal is accordingly dismissed and the judgment of the Court of Appeal dated 11.03.2005 is affirmed.

I make no order as to costs.

BALAPATABENDI, J. – I agree

RATNAYAKE, J. – I agree

Appeal dismissed.

INDRAJITH RODRIGO V. CENTRAL ENGINEERING CONSULTANCY BUREAU

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
AMARATUNGA, J. AND
MARSOOF, P.C., J.
S.C. APPEAL NO. 57/2004
S. C. (SPL.). L.A. NO. 126/2004
H.C. APPEAL NO. 105/2001
L. T. APPLICATION NO. 13/1793/97
SEPTEMBER 25TH , 2008

Industrial Disputes Act No. 43 of 1950 – Section 31B – Application to a Labour Tribunal – Section 31C – Duties and powers of Labour Tribunal in regard to applications under Section 31B – Tribunal may make such order as may appear to be just and equitable – Maxim – ei incimbit probatio, qui dicit, non qui negat *– Burden of proof lies upon him who affirms, not upon him who denies.*

The High Court of the Western Province made the decision dated 25.03.2004 pursuant to an Appeal filed by the appellant – respondent – appellant (appellant) against the decision of the Labour Tribunal President, whereby the President made the order in favour of the appellant that he be reinstated in service in the respondent-appellant-respondent Bureau (respondent) and awarded Rs. 190,080.00 as compensation for the period he had been out of employment consequent to his interdiction and subsequent dismissal. In his appeal to the High Court, the appellant only sought to have the compensation ordered by the Labour Tribunal enhanced. There was also a cross-appeal filed by the respondent against the order of the Labour Tribunal. These appeals were taken up together in the High Court which decided in favour of the respondent and set aside the decision of the Labour Tribunal and dismissed the appeal of the appellant.

The appellant sought leave to appeal against the decision of the High Court and leave to appeal was granted by the Supreme Court.

Held :

(1) A Labour Tribunal, in the process of redressing grievances of workmen in a just and equitable manner, cannot lose sight of procedural propriety and evidentiary legitimacy.

(2) An unduly technical approach should not be adopted towards the equitable remedy provided by Section 31B of the Industrial Disputes Act.

(3) In Labour Tribunal proceedings where the termination of services of a workman is admitted by the respondent, the onus is on the latter to justify termination by showing that there were just grounds for doing so and that the punishment imposed was not disproportionate to the misconduct of the workman. The burden of proof lies on him who affirms, and not upon him who denies as expressed in the maxim *ei incimbit probatio, qui dicit, non qui negat*.

(4) It is a well established principle that the primary (albeit discretionary) remedy for harsh, unjust or unreasonable termination of employment is reinstatement to the same position or re-engagement to a comparable position held prior to the termination.

Held further:

Reinstatement has always been awarded at the discretion of the Labour Tribunal or Court and such discretion has to be exercised judicially taking into consideration all the circumstances of the case.

(5) The back wages payable to the appellant have to be computed on the basis of the terminal salary drawn by him on the last day he actually worked for the respondent.

Cases referred to :

1. *A. G. v. Windsor* – 24 Beav 679
2. *Manager, Ury Group, Passara v. The Democratic Workers' Congress* – 71 NLR 4
3. *Up Country Distributors (Pvt.) Ltd. v. Subasinghe* – 1996 Sri L. R. 330
4. *Associated Cables Ltd. v. Kulatunga* – 1999 2 Sri L.R. 314

5. *Millers Ltd. v. Ceylon Mercantile Industrial and General Workers Union* – 1993 1 Sri L. R. 179
6. *Vasudeva Nanayakkara v. K. N. Choksy and Others* – S. C. Application No. 209/07, S. C. Minutes of 13. 10. 2009
7. *Amarajeewa v. University of Colombo* 1993 2 Sri L. R; 327
8. *Saleem v. Hatton National Bank* – 1994 3 Sri L. R. 409
9. *The Caledonian (Ceylon) Tea and Rubber Estates Ltd. V. J. S. Hillman* 1977 79 (1) NLR 421
10. *Sithamparanathan v. Peoples Bank* – 1989 1 Sri L.R. 124
11. *Jayasuriya v. Sri Lanka State Plantationas Corporation* – (1995) 2 Sri L. R. 379
12. *Hatton National Bank v. Perera* – 1996 2 Sri L. R. 231

APPEAL from the High Court of the Western Province.

Manohara de Silva, P. C., with *Pubudini Wickremaratne Rupasinghe* for Appellant.

A. Srinath Perera, P. C., with *Shammil J. Perera* and *P. Sarathchandra* for Respondent.

Cur. adv. vult.

December 17, 2009

MARSOOF, J.

This is an appeal from the decision of the High Court of the Western Province dated 25th March 2004. The said decision of the Provincial High Court was made pursuant to the appeal filed by the Appellant-Respondent – Appellant (hereinafter referred to as "the Appellant") against the decision of the President of the Labour Tribunal dated 8th November 2001, whereby he was reinstated in service as an Engineer (Grade III) in the Respondent – Appellant- Respondent Bureau (hereinafter referred to as "the Respondent") and awarded Rs.190,080/- as compensation (as equivalent to two years salary as back wages) for the period he had been out of employment consequent to his interdiction and

subsequent dismissal from service. In his appeal to the Provincial High Court, the Appellant had sought only to have the said compensation enhanced. There was also a cross-appeal filed in the Provincial High Court by the Respondent inter alia on the basis that the learned President of the Labour Tribunal had failed to take into consideration the fact that the termination of service on the basis of which the Appellant had come before the Labour Tribunal had subsequently been set aside by a decision of the Supreme Court by virtue of which he was paid back wages and consequential dues on the assumption that he had continued in service for nearly two more years, and that the subsequent termination of his service was not the subject to the application filed in the Labour Tribunal. The Provincial High Court held with the Respondent on both appeals and made order that the application made by the Appellant to the Labour Tribunal should stand dismissed.

Before adverting to the several questions of law on which leave to appeal was granted by this Court, it is necessary to refer briefly to the facts of this case which will make it easier to comprehend the said questions of law.

The Appellant had initially joined the service of the Respondent on 31st January 1986 on "Contract basis" and from 3rd November 1986 he had been absorbed into the permanent cadre as a Grade III Engineer. It transpires that while so serving, the Appellant was served with a charge sheet dated 14th June 1995 (R1) alleging that he "had failed to comply with the directions that had been given". Following a disciplinary inquiry, the proceedings or report of which were not produced by either party at the Labour Tribunal, the Appellant was served with a letter dated 19th December 1995(R2) informing him of the decision of the inquiry, which was against him, and asking the Appellant to resign from his post as a "merciful"alternative to dismissal by the

Respondent. The Appellant refused to resign and was subsequently dismissed from service by the letter dated 14th November 1996(R3) issued by the Chairman of the Respondent Bureau.

Invoking the jurisdiction of the Labour Tribunal against his dismissal in terms of Section 31B of the Industrial Disputes Act No. 43 of 1950, as subsequently amended, the Appellant filed his application dated 9th May 1997 praying for reinstatement with back wages, or alternatively, for compensation in a sum of Rs.1 million for loss of livelihood, and Rs.4 million for promotions and scholarships which he had allegedly been deprived of, and for gratuity. The Respondent filed its answer on 30th June 1997, expressly admitting in paragraph 7 thereof, the termination of the Appellant's services by its letter dated 14th November 1996 (R3), and seeking to justify the same on the basis that the said termination of services was just and reasonable in view of the Appellant's alleged grave misconduct.

Since the Appellant had also filed SC Application No 220/96 (FR) in this Court challenging the aforesaid termination of his service under Article 126 of the Constitution, by his order dated 7th November 1997 the President of the Labour Tribunal directed that the application filed by the Appellant be laid by pending the final determination of the said fundamental rights application. Based on the admission made by the learned Counsel for the Respondent that it was the Board of Directors, and not the Chairman of the Respondent, that had the power to dismiss the Appellant under the provisions of the State Industrial Corporations Act No. 49 of 1957, as subsequently amended, on 11th June 1998 this Court by its order marked 'R5' set aside the purported dismissal of the Appellant and directed