ELPITIYA PLANTATIONS LTD.
v.
JAYASINGHE AND TWO OTHERS

SUPREME COURT.
DHEERARATNE, J.,
WIJETUNGA, J., AND
ANANDACOOMARASWAMY, J.
S.C. 84/96
H. C. KANDY (F) 73/94
M.C. NUWARA ELIYA 74223
SEPTEMBER 27, OCTOBER 10, 1996.

Industrial Disputes Act – Section 40(1) – Dismissed employee reinstated by Labour Tribunal with backwages – Appeal dismissed by the Court of Appeal – Backwages not paid – Employer prosecuted in the Magistrate's Court – Conviction – High Court Affirmed conviction and sentence – Is there a liability on the Employer to pay the Employee's salary when the matter is pending before the Court of appeal.

The Labour Tribunal on 17.4.84, ordered the reinstatement of the dismissed employee with six months backwages with effect from 21.5.84. The Employer appealed to the Court of Appeal and the Court of Appeal on 12.9.90 dismissed the appeal.

Thereafter the employee was reinstated but the backwages for the period 21.5.84 to 31.12.90 were not paid. Proceedings were instituted in the Magistrate's Court on 4.9.91 under section 40(1) of the Industrial Disputes Act which culminated in the Magistrate Court convicting the employer-appellant and ordering to recover the said sum as if it were a fine; with a default sentence. The High Court affirmed the conviction and the sentence. On appeal it was urged that the appellant could not have reinstated the employee as at that date because at that time in the exercise of a statutory right granted to him in terms of the Industrial Disputes Act he had preferred an appeal, and that if there was a liability to reinstate the Employee it arose only from 12.9.90.

Held:

(i) The nature and character of the Orders made by the Magistrate's Court are such that no law need say that a Magistrate must stay his hands in executing his Orders when they are in appeal.

In the case of the Orders of the Tribunal the same considerations do not apply, as regards the executing of a decree of a District Court, it would appear that the ordinary principle of law is that it is lawful to execute a decree in appeal.

(ii) The intention of the legislature appears to have been to make the act of non-compliance of a Tribunals order a penal offence, so that immediately upon a

conviction in the same proceedings the benefits denied to a workman resulting from such non-compliance could be obtained by the workman expeditiously and inexpensively.

(iii) Section 40(1) (q) should be interpreted so as to promote the general legislative purpose underlying those sections. The Industrial Disputes Act does not prohibit execution of the order made by a Tribunal pending appeal, the date of offence of failure to comply with the Tribunals order by not reinstating the employee would be 21st May 1984.

***Per* Dheeraratne J.,**

"If however an employer is charged at a time when an appeal is pending from the Tribunals order, a Magistrate being so informed should lay by the case, so as to avoid that anomaly.

This should be done by not because the employer has committed no offence but because finality has not been reached in the Labour Tribunal Order."

Case referred to:

1. *Federal Steam Navigation Co. Ltd., and Another* v. *Department of Trade and Industry* - 1974 2 All ER 97.

APPEAL from the High Court of Kandy.

Romesh de Silva P.C. with *Palitha Kumarasinghe* for appellant.

Uditha Egalahewa S.C. for 1,2 respondents.

G. Alagaratnam with *M. Adomally* and *Ms. Nazzil Buhary* for added respondents.

Cur. adv. vult.

November 11, 1996.
DHEERARATNE J.

This is an appeal from a judgment of the High Court affirming the conviction and sentence passed by the Magistrate's Court in a prosecution under subsection 40(1) of the Industrial Disputes Act.

Facts leading to the prosecution

The intervenient respondent (the employee) filed action in the Labour Tribunal on 5th May 1983 alleging that his services were wrongfully terminated by his employer; among other reliefs, he claimed reinstatement with backwages or compensation. After an inquiry, the Tribunal made order on 17th April 1984, directing the employer to reinstate the employee with effect from 21.5.84 and to

pay six months backwages fixed at Rs. 6054 to the office of the Assistant Commissioner of Labour on or before 31.5.84. The employer appealed from that order to the Court of Appeal. The Court of Appeal, on 12.9.90 pronounced judgment dismissing the appeal with costs. It is common ground among the parties that thereafter, the employee was reinstated in the sense that he was permitted to resume his employment under the employer. It is not disputed that the employee received no wages during the period 21.5.84 to 31.12.90 and that they add up to a sum of Rs. 428,385.14 cts. It was in these circumstances that the proceedings were instituted in the Magistrate's Court on 4.9.91 by the complainant labour officer, which culminated in the Magistrate's Court convicting the appellant and ordering to recover the said sum of money as if it were a fine and in default of payment, imposing a sentence of 18 months imprisonment.

The Charge and the relevant provisions of the Industrial Disputes Act

Translated to English, the charge sheet which is in Sinhala reads:-

"That you ... while being the employer, did fail to comply with the order given to you by the Labour Tribunal dated 17th April 1984 in case No. 9/1235783, in that;

1. on or about 31st May 1984, you did fail to forward to the Commissioner of Labour Hatton, the sum of Rs. 6054 mentioned in the said order payable to employee ...;

2. on or about 21st May 1984, you did fail to reinstate employee named ...;

and thereby, within the jurisdiction of this court, at Nuwara Eliya, you did commit an offence under section 40(1) (q) punishable under section 43(4) read with sections 43(1) and 43(2) of The Industrial Disputes Act No. 43 of 1950 as amended."

The relevant words of the subsections of the Industrial Disputes Act applicable to this case read;

40(1) "Any person who (q) being an employer, fails to comply with an order made in respect of him by a **labour tribunal**; shall be guilty of an offence under this Act".

43(1) "... every person who commits any offence under this Act shall be liable on conviction after summary trial before a magistrate to a fine not exceeding five hundred rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment".

43(2) "On the conviction of any employer for failure to comply with ... an order of any labour tribunal requiring such reinstatement, such employer shall be liable –

(i) to pay, in addition to any punishment that may be imposed under subsection (1), a fine of rupees fifty for each day on which the failure is continued after conviction thereof; and

(2) to pay such remuneration which would have been payable to him if he had been in such service on each such day of the period commencing on the date on which he should have been reinstated in service according to the terms of the ... order and ending on the date of the conviction of such employer, computed at the rate of salary or wages to which he would be entitled if his services had not been terminated.

Any sum which an employer is liable to pay in para (ii) of this subsection may be recovered on the order of the court by which he was convicted as if it were a fine imposed on him by that court and the amount so recovered shall be paid to the workman".

43(4). "Where an employer is convicted by a court for failure to comply ... with any order of any labour tribunal ... relating to the payment of any sum of money by such employer to the workman, or to grant any benefit to which that workman is entitled, the court may, in addition to any other sentence that it may impose on such employer, order that sum to be paid, or, if such benefit is capable of being computed in terms of money, that such amount as may be determined by the court (whose determination shall be final) as the value of such benefit be paid, within the period specified in that order of the court, it may be recovered on the order of the court as if it were a fine imposed by the court".

The effect of reinstatement.

The proposition that reinstatement implies restoration of the *status quo* and the employee is entitled to be restored to the same position with all the benefits as if he had never been discharged admits no doubt. Rideout's Principles of Labour Law 5th Edition at page 171 states – "Statutory efforts have been made to ensure that the first remedy an industrial tribunal considers if it finds a dismissal unfair, is reinstatement or re-engagement. The difference between the two is that reinstatement envisages return to the same job as if the dismissal had never occurred, and therefore with wages in the interval between dismissal and reinstatement. Re-engagement involves re-employment by the same employer, his successor or an associate employer, in comparable, or otherwise suitable, employment on terms specified by the tribunal and with compensation as the tribunal considers just and equitable." This is the settled law and it requires no labouring at my hands. Although arguments have been presented on behalf of the appellant in both Courts below that there was no liability on the part of the employer to pay the employee's salary due to him for the period 21.5.84 to 31.12.90 amounting to Rs. 428,385.14 cts., Mr. Romesh de Silva PC., quite rightly admitted that this amount is legally due from the employer. That is not the issue in this case. The charge against the appellant was that he committed an offence; and the provisions for the recovery of what is due to the employee could operate only if the appellant was rightly convicted of the offence he was charged with. [See subsection 43(2); "On the conviction of any employer ..."; subsection 43(4) "Where an employer is convicted ..."]. Therefore the real issue in this case is whether the appellant's conviction is correct. Learned President's Counsel complained that the appellant was convicted on the basis of equitable considerations by both Courts below and that on reading each of the judgments one cannot fail to get the impression that the main consideration in both judgments was to discover whether the benefit was legally due from the appellant or not. In fairness to both Courts below, I must say that such an approach was inevitable, because the principal submission for the defence in both Courts was that the amount of money was not legally due from the appellant.

Consideration of the charge

As could be seen, the charge specified two acts of omission which were alleged to have been committed on or about two particular dates, whereby the offence of failure to comply with the Labour Tribunal order dated 17.4.84, was committed. Let me take the first of these acts – that on or about 31.5.84 the appellant failed to forward a sum of Rs. 6054 to the Commissioner of Labour Hatton. It seems to me that the learned magistrate took no consideration of this act and no relief was granted to the employee on account of that act.The sum of money relating to that act, according to learned State Counsel, had already been paid to the Commissioner of Labour at the time the prosecution was instituted. This explains why the learned Magistrate chose to ignore that act of omission. Nevertheless, if the second act complained of was committed, it would have been sufficient to bring home the conviction.

Let me now come to the second act of omission specified in the charge, namely that the appellant, **on or about 21st May 1984** failed to reinstate the employee. Learned President's Counsel for the appellant contended that the appellant could not have reinstated the employee as at the date mentioned, because at that time, in the exercise of a statutory right granted to him in terms of the Industrial Disputes Act, he had preferred an appeal to the Court of Appeal; that if there is a liability on the part of the appellant to reinstate the employee, that liability across only from 12.9.1990 when the Court of Appeal dismissed the appeal; that when the appeal was preferred the order of the Tribunal was "held in abeyance". Both learned State Counsel and Mr. Alagaratnam, learned counsel for the employee, contended that regardless of whether an appeal was preferred or not, the appellant was bound to reinstate the employee from 21.5.84. Mr. Alagaratnam further submitted that what is "held in abeyance" is not the liability or obligation to comply with the order of the tribunal, but steps taken by the commissioner in instituting a prosecution. Unfortunately no authority was cited by either learned counsel in support of the twin facets of the theory of "holding in abeyance".

In my view, the answer to the questions as to when and whether the offence of failure to comply was committed, should be found within the confines of the Industrial Disputes Act itself. Although

subsection 31D (5) (and presently 31D (9)) after the amendment No. 32 of 1980 states that provisions of Chapter xxviii of the Code of Criminal Procedure shall *mutatis mutandis* apply to all matters connected with the hearing and disposal of appeals on orders made by the Tribunal, one has to bear in mind that the nature and character of the orders made by the Magistrate's Court differ markedly from those made by the Tribunal. In fact orders made by the Tribunal are akin in content to those made by a Court exercising civil jurisdiction. The nature and character of the orders made by the Magistrate's Court are such that no law need say that a Magistrate must stay his hands in executing his orders when they are in appeal. In the case of the orders of the Tribunal, the same considerations do not apply. As regards the execution of a decree of a District Court, it would appear that the ordinary principle of law is that it is lawful to execute a decree pending appeal. This principle, in my view, is mirrored in the opening words of section 761 of the Civil Procedure Code which are expressed in the negative. They read, "No application for execution of an appealable decree shall be instituted or entertained until after the expiry of the time allowed for appealing there from; ..."

The intention of the Legislature appears to have been to make the act of non-compliance of a Tribunal's order a penal offence, so that immediately upon a conviction, in the same proceedings the benefits denied to a workman resulting from such non-compliance could be obtained by the workman expeditiously and inexpensively, without resort to other modes of recovery. Subsection 40(1)(q) should be interpreted so as to promote the general legislative purpose underlying those sections. Such a purposive approach of statutory construction has been applied to penal provisions. (See the majority judgment in *Federal Steam Navigation Co. Ltd. and Another v. Department of Trade and Industry*[1]. In my view, if a literal construction is given to subsection 40(1) (q), that would advance the legislative purpose.

The Industrial Disputes Act does not prohibit execution of an order made by a tribunal pending appeal; on the other hand the very wording of subsection 40(1) (q) seems to point in the opposite direction. What reason was there for the legislature to mention only a Labour Tribunal in that subsection? Why was no reference made to failure to comply with orders of the Appellate Courts? The absence of

restrictive words "provided the order is not in appeal" or similar words to that effect, strengthens the view that the legislature intended to make the employer's failure to comply with the order made by the Tribunal an offence, even pending appeal. Therefore, the date of offence of failure to comply with the Tribunal's order by not reinstating the employee would be 21st May 1984 as correctly mentioned in the charge.

I will now deal with the submission of learned President's Counsel that if a construction other than what he contended is given, the appellant could have been **charged** on 1st June 1984 and **convicted**; thus if the appeal was allowed in 1990, he submitted, there would be an anomaly. This anomaly will not arise, like in the present case, if the prosecution is instituted after the appeal is decided. If however an employer is charged at a time when an appeal is pending from a Tribunal's order, a magistrate being so informed, should lay by the case, so as to avoid that anomaly. This should be done by the Magistrate not because the employer has committed no offence but because finality has not been reached in the Labour Tribunal order.

Conclusion

The Magistrate has imposed a sentence of 18 months imprisonment in default of payment of the fine of Rs. 428,385.14 cts. The default sentence does not appear to conform with the provisions of section 291 of the Code of Criminal Procedure as it exceeds one-fourth of the maximum term of imprisonment fixed for the offence. Therefore, it is reduced to one month's simple imprisonment Subject to the abovementioned variation, the conviction and sentence are affirmed and the appeal is dismissed. The Registrar of this Court is directed to send the record back to the Magistrate's Court as early as possible.

WIJETUNGA, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

Appeal dismissed.
Sentence varied.