THAVARAYAN AND TWO OTHERS
v.
BALAKRISHNAN

COURT OF APPEAL :
H. A. G. DE SILVA, J. AND ABEYWARDANA, J.
C.A. 1/81 – L.T. 13/7215/78
DECEMBER 12, 1983.

Code of Criminal Procedure Act, No. 15 of 1979, section 322(2) – Industrial Disputes Act (Cap. 131), Section 32 D (2) and (5) – Right to appeal from Order of Labour Tribunal on a question of law only – Petition of Appeal to contain statement of matter of law to be argued – Certificate by Attorney-at-Law that such matter of law is a fit question for adjudication – Domestic Inquiry.

The respondent was employed as a waiter in a restaurant owned by the appellants. One night when the restaurant was closed and re-decoration of the premises was being done, the Manager entrusted the keys of the restaurant to the respondent and instructed him to look after the premises. Later in the night when the 2nd appellant casually dropped in at the restaurant he found that the respondent was in the company of two thugs. On returning later after making inquiries he found the respondent missing and was told that he was upstairs but was prevented from going upstairs by the thugs who manhandled and threatened him. One of the thugs had the key of the premises. A complaint against the thugs was made to the Police the next day and the Manager on behalf of the appellants terminated the services of the respondent by letters R4 and R5. In the Labour Tribunal, the respondent totally denied misconduct on his part and the learned Labour Tribunal President held that the dismissal was unjustified and awarded compensation on the ground that the respondent had not, in violation of the principles of natural justice, been given a chance to show cause against the dismissal. The petitioner appealed from the judgment of the learned President of the Labour Tribunal

Held–

(1) In terms of the requirements of Section 322(2) of the Code of Criminal Procedure Act, No. 15 of 1979, read with Section 31D (2) and (5) of the Industrial Disputes Act an appeal from an order of the L.T. must be on a question of law only, certified by an Attorney-at Law as a question of law fit for adjudication by the Court of Appeal. The Petition of Appeal did not bear such a certificate by an Attorney-at-Law and on this ground alone must be rejected.

(2) Although a domestic inquiry is not statutorily required it is always desirable in order to establish the bona fides of the employer.

Cases referred to

(1) *Thomas v. Ceylon Wharfage Co. Ltd., (1948) 49 N.L.R. 397.*
(2) *Miskin v. Ponniah, (1903) 6 N.L.R. 132.*
(3) *The Police Officer, Dondra v. Baban, (1923) 25 N.L.R. 156.*

APPEAL from an Order of the Labour Tribunal.
N. W. Zanoon for respondent-appellants.
Applicant-respondent absent and unrepresented.

Cur. adv. vult.

February 10, 1984.

H. A. G. DE SILVA, J.

This is an appeal from the judgment of the President of the Labour Tribunal which has held that the dismissal of the applicant-respondent was unjustified and awarding the respondent compensation in a sum of Rs. 4,520 being two years' salary.

The respondent was employed as a waiter at the Criterion Restaurant owned by the respondent-appellants. He had commenced services under the appellants on 1.11.1971 and was at the time of his dismissal on 6th June, 1978, drawing a salary of Rs. 185 per month.

On the night of 27th May, 1978 (Vesak Poya Day), the restaurant which inter alia sells foreign liquor had been closed and this closure was made use of to redecorate the premises. At about 9.30 p.m. when the workmen engaged in the redecoration were still working, the Manager of the restaurant, N. Devarajah, entrusting the key of the front door of the premises to the respondent, had gone for his dinner. The respondent who stays in the premises at night, had been instructed to look after the restaurant, as the workmen were still on the premises and stores of liquor as well as equipment worth at least 2 lakhs of rupees were there.

At about 11.00 p.m. Ronald Thavarayan, a partner of the firm and the 2nd appellant in this appeal whilst on a sight seeing tour of the Vesak illuminations, had casually dropped in at the restaurant and had found the respondent in the company of two notorious thugs called Wimale and Vije, inside the restaurant. He had made inquiries about the whereabouts of the Manager from the respondent and left stating that he would return later and requesting the respondent to keep the door closed.

The 2nd appellant had then returned to the restaurant at about 11.30 p.m. and found the thugs still there and the respondent missing. He was informed that the respondent was upstairs and when the 2nd appellant attempted to go upstairs, he was prevented from doing so and was manhandled and threatened by the thugs. He had also seen the key of the premises in the hand of one of the thugs. The 2nd appellant had then left and made a complaint against the thugs to the Police the next day. (R6).

On 3rd June, 1978, the Manager on behalf of the appellants had by letters R4 and R5 terminated the respondent's services with effect from that date. R4 and R5 state that at 11.00 p.m. on 27th May, 1978, the front door of the premises was found open and the keys were in the hands of outsiders whilst the respondent was intoxicated and sleeping inside the bar. This conduct was considered a grave offence by the appellants.

The respondent gave evidence and it was a total denial of misconduct on his part. The learned President in his judgment giving reasons for the Order, has made certain findings as regards the evidence led at the inquiry, and has adverted to the fact that the respondent was not given an opportunity to show cause before dismissal and that this would be a violation of the principles of natural justice. He also states that on an analysis of the evidence given both by the respondent and the appellants and their witnesses, by a balance of probability he holds that the dismissal of the respondent was unjustified.

Section 31D(2) of the Industrial Disputes Act (Cap. 131) gives a party aggrieved by an order of a Labour Tribunal the right to appeal on a question of law *only*.

Section 31D(5) states that–

" The provisions of Chapter XXX of the Criminal Procedure Code (Cap : 16) (Chapter XXVIII of the Code of Criminal Procedure Act, No. 15 of 1979) shall apply mutatis mutandis in regard to all matters connected with the hearing and disposal of an appeal preferred under this section ".

This appeal was filed on the 1st January, 1981, and therefore Act No. 15 of 1979 will apply. Section 322(2) states that–

" where the appeal is on a matter of law the petition shall contain a statement of the matter of law to be argued and shall bear a certificate by an Attorney-at-Law that such matter of law is a fit question for adjudication by the Court of Appeal. "

Thomas v. Ceylon Wharfage Co. Ltd, (1) which dealt with an appeal under the Workmen's Compensation Ordinance held that the effect of Section 51 of that Ordinance was to make the provisions of Section 340 of the Criminal Procedure Code applicable to appeals under that Ordinance. Section 48 of the Ordinance gave the injured workman an appeal only on a point of law. Section 51 of the Ordinance which is similar to section 31D(5) of the Industrial Disputes Act makes Chapter XXX of the Criminal Procedure Code applicable to appeals under that Ordinance, i.e., including section 340(2) of the Criminal Procedure Code which is similar to section 322(2) of Act No. 15 of 1979. Basnayake, J. (as he then was) held in his judgment at page 398–

A petition of appeal under Section 48 of the Ordinance should in my opinion not only contain a statement of the matters of law to be argued but it also must bear a certificate by an advocate or proctor that such matter of law is a fit question for adjudication by the Supreme Court. An appeal under the Code on a matter of law which does not comply with the requirements of Section 340(2) cannot be entertained unless the case is one that falls under the proviso to the section. This appeal does not conform with the requirements of the Code and must therefore be rejected ".

In *Miskin v. Ponniah* (2) it was held that a petition of appeal (in regard to a sentence of a fine of Rs. 10) which appeared to be settled and signed by Counsel, without the certificate required by

section 340 (2) of the Criminal Procedure Code that the matter of law stated in the petition is a fit question for adjudication by the Supreme Court, is inadmissible in appeal.

The Police Officer, Dondra v. Baban (3) held that–

> " where an appeal lies on a matter of law only, the certificate that the matter of law is a fit question for adjudication should refer specifically to the point of law certified "

The principles enunciated in the cases referred to must necessarily apply to this appeal under the Industrial Disputes Act. The petition of appeal filed in this particular case does not bear a certificate signed by the appellants' Attorney-at-Law and hence does not conform to the requirements of section 322(2) of the Code of Criminal Procedure Act read with section 31D(2) and (5) of the Industrial Disputes Act and on this ground alone it has to be rejected.

Of the six grounds of appeal relied on by the appellants five grounds are pure questions of fact in respect of which the appellants have no right of appeal. Since learned Counsel appearing for them has made detailed written submissions, I have examined the evidence led at the inquiry, the conclusions on facts reached by the learned President and the reasons therefor and I cannot say that the learned President has misdirected himself on any material evidence or the inferences to be drawn from it. Therefore even on the facts I do not think there is any merit in this appeal.

One matter that requires comment by me is the submission of learned Counsel for the appellants that "the appellants are not obliged in law to hold any domestic inquiry relating to the dismissal." The law of Sri Lanka is materially different from that prevailing in India. In Sri Lanka there is no statutory obligation to hold such an inquiry. This submission has been drawn from a statement made at page 538 by S. R. de Silva in his treatise: "The Legal Framework of Industrial Relations in Ceylon", but this same author goes on to say–

> "notwithstanding that the holding of a domestic inquiry is generally not a legal requirement in Ceylon, such an inquiry is always desirable since the principles of natural justice require that

a person must be informed of the charge against him and an opportunity be given him to meet them. An inquiry helps to establish the bona fides of the employer, and dismissal without an inquiry may sometimes be indicative that the employer has acted arbitrarily".

It is this principle that the learned President has adverted to in his Order because it is common ground that no domestic inquiry was held by the appellants before the respondent was dismissed from their service. It must also be remembered as stated by S. R. de Silva in the treatise referred to above at page 570 that–

" subsequent cases, however, have consistently held that in a case of termination of employment the burden is on the employer to justify the termination on the principle that " he who alters the status quo and not he who demands its restoration, must explain the reasons for such alteration ". A cursus curiae has therefore developed over a long period of time before labour courts in regard to the burden of proof. In the unreported case of SC 11/61 the Supreme Court of Ceylon held that the burden was on the employer to justify a dismissal without notice where he relied on misconduct as a ground for such dismissal . . . ."

In my view on the facts of this case the appellants have failed, as the learned President has stated, to discharge that burden by a balance of probabilities.

Though the respondent had in his application to the Labour Tribunal prayed for reinstatement and back wages, the learned President has not ordered his reinstatement but awarded him compensation amounting to two years' salary at Rs. 185 per month, though he has held that the dismissal was unjustified. This, in the light of the appellants' submission that " the dismissal of the respondent was also based on a loss of confidence in the applicant employee " is in my view a just and equitable Order.

For the reasons I have given in this judgment I affirm the Order of the learned President and dismiss the appeal without costs.

ABEYWARDANE, J.–I agree.

Appeal dismissed