ASSOCIATED CABLES LTD.
v.
KALUTARAGE

SUPREME COURT
AMERASINGHE, J.,
GUNASEKERA, J. AND
WEERASEKERA, J.
S.C. APPEAL NO. 102/98
H.C./A/L.T. NO. 1460/97
L.T. NO. 2/114/87
JUNE 3, 1999

Industrial Dispute – Termination of services – Ground for interfering with the decision of a Labour Tribunal – Breach of natural justice – Grant of compensation in appeal – Duty of the appellate court to give the basis of computing compensation.

The respondent-workman applied to the Labour Tribunal for relief on the ground that his services had been constructively terminated by the appellant-employer on 18. 3. 87 by being refused entry to his work place namely, the factory owned by the appellant-employer. The workman said in evidence that he was also humiliated on that occasion and that he promptly made a complaint to the Piliyandala Police. The employer's position was that the workman had vacated post by failing to report for work after the incident on 18. 3. 87, notwithstanding written instructions to resume work. The workman explained that he did not report for work as he feared being harassed if he resumes work and that the employer's letters calling upon him to report for work were *mala fide*.

After the inquiry into the workman's application at which both parties were represented by counsel, the Labour Tribunal reserved its order for 25. 04. 97. On that day the parties were not represented by counsel, but the workman attended the Tribunal when the Labour Tribunal President called him up from the well of the Tribunal and questioned him regarding the statement he had made to the Police. The purpose of that questioning was to test the credibility of his evidence. After such questioning the President of the Tribunal decided that there was no unjust termination of services but that the workman had vacated his post.

On an appeal by the workman the High Court reversed the decision of the Labour Tribunal and held that the termination of services was not justified; and as the workman did not claim reinstatement, the High Court awarded him compensation in a sum of Rs. 150,000 on the basis that 10 years had elapsed since the termination of services.

Held:

1. The procedure adopted by the Labour Tribunal President in questioning the workman who was unrepresented, on the day fixed for the delivery of the order, was not lawful as it was in breach of the requirements of natural justice. Consequently, the decision of the Tribunal was not supported by legal evidence and the finding was perverse.

2. The award of compensation to the workman in a sum of Rs.150,000 was bad for the want of an adequate basis for computing that amount. Instead, the payment of 3 years' salary would be a just and equitable award of compensation.

Cases referred to:

1. *De Silva and others v. Seneviratne and others* – (1981) 2 Sri L.R. 7.
2. *Hatton National Bank v. Perera* – (1996) 2 Sri L.R. 231.
3. *Jayasuriya v. Sri Lanka State Plantation Corporation* – (1995) 2 Sri L.R. 379.

APPEAL from the Judgment of the High Court.

Gomin Dayasiri with *Miss Manouri Jinadasa* for the appellant.

A. Sri Nammuni for the respondent.

Cur. adv. vult.

July 8, 1999.

L. H. G. WEERASEKERA, J.

The President of the Labour Tribunal had concluded that the services of the applicant-respondent had not been unjustly terminated but that he had vacated his post upon the basis of certain findings of fact

which the applicant-appellant before the High Court contended was so wholly untenable inasmuch as the President who held judicial office was required to give both parties a full and clear notice of the case against him, an opportunity of being represented and stating their cases, sufficient time and notice, without being taken by surprise when an order had to be made and that having failed to do so the order was not legally tenable and was unreasonable and perverse.

The learned High Court Judge by his order dated 26. 03. 98 though at the beginning of his reasoning directed his mind to this most important aspect appears to have thereafter examined various questions not relevant to the matters in issue and regrettably expressed various conflicting views but concluded finally that the dismissal of the applicant was unreasonable and wrongful and that the order of the Labour Tribunal was not just and equitable. Since the applicant-appellant-respondent did not claim reinstatement the High Court Judge very justifiably proceeded to make order for compensation in favour of the applicant though regrettably without giving a basis nor reasons or method of computation.

From this order of the learned High Court Judge the respondent-respondent-petitioner invites intervention of Court, submitting that the reasoning of the High Court Judge is conflicting and cannot be sustained –

(*a*) in respect of the question of termination of service.

(*b*) that no rational basis of computation of compensation has been used to determine the amount of compensation at Rs. 150,000.

Special leave to appeal was allowed on one question namely,

"Whether the High Court was justified in interfering with the finding of fact reached by the Labour Tribunal."

The High Court acting as an Appellate Court is invited to review the findings of the Labour Tribunal President acting as trial Judge on question of facts.

In my opinion where the findings on questions of facts are based on the credibility of a witness or witnesses on the perception of the trial Judge though such findings are entitled to great weight and not be lightly dismissed and deserving the utmost consideration, where the trial Judge has failed by legal evidence and conduct to satisfy the basic requirements of natural justice or that the finding is rationally not possible and therefore perverse then in such a situation the Appellate Court is justified in reviewing such findings.

In this view I am supported by the decision of Ranasinghe, J. in *De Silva & others v. Seneviratne and others*[1] and the decision of G. P. S. de Silva, Chief Justice in the case of *Hatton National Bank v. Perera*[2].

G. P. S. DE SILVA, CJ. held:

> "*In order to set aside the determination of facts by the tribunal that this termination was unjustified the appellant must satisfy that there was no legal evidence to support the conclusion of fact or the finding is irrational or perverse.*"

The applicant-appellant-respondent was a machine operator at respondent-respondent-appellant Company situated at Nagoda, Kalutara. The respondent-appellant decided to shift the factory to Piliyandala. Though numerous other employees were granted compensation on termination of services by reason of the shift as being redundant the applicant-respondent though he sought, was not one of them. The respondent-appellant's position was that the applicant-respondent was not pleased with the transfer to Piliyandala as a result of the factory being shifted to Piliyandala. In fact this is not disputed as the applicant had made a complaint to Commissioner of Labour regarding his transfer to Piliyandala factory and of his being harassed and that the inquiry in regard to which was fixed for 16. 03. 87. The applicant-appellant went for the inquiry before the Commissioner but that the respondent-respondent-petitioner did not attend. In consequence appellant-respondent could not report for work on 16. 03. 87. On

17. 03. 87 the appellant-respondent did not report for work and informed the respondent-appellant by telegram of being indisposed which is now admitted.

When the applicant reported for work on 18. 03. 87 he was refused entry at the gate. This was when all the other workers were being granted entry into the factory. He was humiliated. He proceeded to the Police station and made a statement to the Piliyandala police at about 8.30 am on 18. 03. 87. On 19. 03. 87 the application for relief for constructive unjust termination of services was made by the applicant-respondent.

By R1 of 24. 03. 87 the respondent-appellant informed the applicant-respondent that though the records disclose that the appellant was absent as he was indisposed, no medical certificate has been sent in support and requesting him the applicant-respondent to report for work, failure to do so would be considered as his having vacated post. This was followed by R2 dated 28. 03. 87 giving him 3 days to report for work in default of which his services would be considered to have been vacated.

To this the applicant-respondent replied by R3 dated 03. 03. 87 setting out his position and repudiating the respondent-petitioner's allegations in R1 and R2 and stating that the invitation to report for work could not be complied with as he apprehended that he would be put into trouble.

The respondent-petitioner by R4 persisted in inviting the applicant-appellant-respondent to report for work on 09. 04. 87 on pain of his having to be considered to have vacated his post if he did not report for work.

The entire trial before the learned Labour Tribunal President proceeded on the basis as to whether the applicant-respondent's alleged refusal of entry into the factory on 18. 03. 87 amounted to constructive termination or whether by reason of the applicant-

respondent not reporting for duty as requested in R1, R2 and R4, such conduct amounted to his having vacated post.

It must be noted that during the entire trial before the learned President of the Labour Tribunal the applicant-respondent and respondent-petitioner were both represented by counsel and the cases for and against them were transparent to them.

On 17. 01. 99 the case of both the applicant and respondent-petitioner was concluded. The case was to be called on 17. 03. 97 for written submissions which was extended up to 25. 04. 97 on which date the order was to be delivered.

On 25. 04. 97 the order was scheduled to be delivered. The learned Labour Tribunal President before the order was delivered proceeded to question the applicant-respondent on the statement made to the Piliyandala Police on 18. 03. 87 in order to test the credibility of the applicant-respondent's evidence. The questions asked were in respect of A3 the statement to the Piliyandala Police and the respondent's apprehension of bodily harm if he returned to work.

What disturbs me in the procedure adopted by the learned President of the Labour Tribunal is that –

(*a*) the 25th of April, 1997, was the day on which after the closure of the cases of both parties and the filing of written submission was the designated day on which the order was due to be delivered;

(*b*) on all other dates of hearing the applicant-respondent was represented by counsel. So also the respondent-petitioner;

(*c*) it could not reasonably be expected for the applicant-appellant to have retained counsel on 25. 04. 97 as it was the day on which the order was due to be delivered and there was no need for counsel to represent him;

(d) the applicant-appellant-respondent was called from the well of the Court and examined on A3.

In my view unrepresented and unprepared for a trial on the day order was due he must surely have been taken by surprise. The applicant-appellant would not have had the benefit of the advice of counsel or even the benefit of having time to consider what he was being questioned on.

Although the Labour Tribunal was required to make a just and equitable order in my opinion it must not only be just and equitable but the procedure adopted to that end must be legal and every judicial body exercising judicial powers must so arrive at a order only on legal evidence. It is my perception that the procedure adopted as 25. 04. 97 was far from what is legal evidence and that any consequential finding is perverse.

The question of fact sought to be clarified by the learned President on 24. 04. 97 was the time when the statement A4 was made to the Police and on this question conclusions were drawn by the learned President of the Labour Tribunal as well as to the applicant's credibility.

On the question of time and as to the applicant's credibility lies a mere difference of 20 minutes. It may well have been that the chronometer at the Police station did not record correct time or the person who wrote recorded wrong time or even if the correct time was recorded to draw adverse conclusions on a difference in time of so small a magnitude is in my view irrational.

Though letters R1, R2 and R4 invited the applicant-respondent to resume work the invitation was not accepted. The applicant-respondent's position was that he feared he could be put into further trouble if he resumed work and that the invitation was made *mala fide*. Rather than an adverse inference being drawn the cross-examination of that applicant-appellant-respondent had been on the basis

that on previous occasions he had been assaulted, ie from or about 1985. Can one not therefore reasonably assume that the applicant feared the invitation to resume work was for the same purpose and can he be faulted for not resuming work. To draw an adverse inference against the applicant-appellant-respondent is in my view no less irrational and perverse.

There was strong ground for interference by the High Court Judge.

I am, therefore, for the reasons set out of the view that there was no legal evidence to support the conclusion of the learned Labour Tribunal President and that the conclusions so drawn were irrational and perverse and that the order of the Labour Tribunal President cannot be sustained. Though the High Court was justified in interfering with the findings of the Labour Tribunal, I do not subscribe to some aspects of the reasoning in the judgment of the learned High Court Judge in arriving at this conclusion that the termination of the service was unjustified and for a composite sum of Rs. 150,000 be paid as compensation.

I agree with the finding that the applicant-appellant-respondent's services had been constructively terminated. The applicant-appellant-respondent asked for no reinstatement but sought only compensation. To my mind the consequence of the finding that the dismissal is unlawful would warrant what in the circumstances would be just and equitable compensation.

I prefer to follow the basis that was considered by Dr. Amerasinghe, J. in the case of *Jayasuriya v. Sri Lanka State Plantation Corporation*[3]

> *"For an order to be just and equitable it is not sufficient for such order merely to contain a just and equitable verdict. The reasons for such verdict should be set out to enable the parties to appreciate how just and equitable the order is"*

in order to illustrate what ought to be a just and equitable award of compensation.

and at page 409 supra where Dr. Amerasinghe, J. concluded :

> *"There ought to be at least an approximate computation of the immediate loss, ie loss of wages and benefits from the date of dismissal up to the date of the final Order or Judgment, and another with regard to prospective, future loss, and a third with regard to the loss of retirement benefits, based as far as possible on a foundation of solid facts given to the Tribunal by the parties."*

Thus, what should be considered is actual financial loss not sentimental loss. To which list I would add the last salary or wage earned by the worker as being a relevant consideration in the computation of compensation.

Leave to appeal has not been granted in respect of the question of compensation. Though strictly this question would not fall within the scope of this appeal it would not be just and equitable in the peculiar circumstances of this case, in the interests of justice that as invited by counsel, the question of the award of compensation is not reviewed by me.

The essential question sans procedural restriction is the actual financial loss caused by the unfair dismissal. The learned High Court Judge gives no basis for awarding Rs. 150,000 except to state that the applicant-appellant-respondent's services were terminated in 1987 and 10 years had elapsed by the time of his order. Though in my view the basis of the computation was totally inadequate to my mind he appears to have directed his mind to just and equitable relief where the dismissal was not justified when he did award compensation.

In those circumstances it would be justified to review the award of compensation in the following manner.

The salary of the applicant at the time of termination of his service was Rs. 1,900 per month. Being a machine operator prospects of future employment would not have been difficult. He has asked for no reinstatement and sought to be voluntarily retired on the payment of a sum of Rs. 20,000 which had been offered to other workers by the employer. The termination of his services according to the applicant-respondent was on the 18th March, 1987. His application to the Labour Tribunal in terms of section 31 (*a*) of the Industrial Disputes Act was on the 19th of March, 87 and the order of the President of the Labour Tribunal was on 19th of May, 1997. The applicant-respondent would be entitled to Employees Provident Fund benefits and other contributions made by him during his period of service. Taking these factors into consideration I would consider 3 years' salary as a just and equitable award of compensation.

The finding of the learned High Court Judge that the termination of the services of the applicant-appellant-respondent was not justified is affirmed, but I vary the order for the award of compensation to Rs. 68,200.

The applicant-appellant-respondent is entitled to Rs. 5,000 as costs of appeal.

DR. A. R. B. AMERASINGHE, J. – I agree.

D. P. S. GUNASEKERA, J. – I agree.

Appeal dismissed.
Order for comprehension varied.