

SALEEM
v.
HATTON NATIONAL BANK LTD.

SUPREME COURT,
G. P. S. DE SILVA, C.J.
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 51/94
C.A. NO. 251/88 &
NO. 257/88
L.T. NO. 5/14776/86
JUNE 18 AND JULY 28, 1994.

Industrial Dispute - Termination - Compensation - Principles applicable - Can compensation be awarded where termination is justifiable? Difference between compensation and damages.

Held:

In making orders in cases of termination of services, the court in consonance with the spirit of labour law and practice and social justice is guided by three cardinal principles, namely, the jurisdiction of the Labour Tribunal is wide, relief under the Industrial Disputes Act is not limited to granting benefits which are legally due and the duty of the tribunal is to make an order which may appear to it to be just and equitable.

Damage always signifies recompense given to a party for the wrong that has been done to him. On the other hand, compensation includes recompense for pecuniary loss or damage which involves no breach of duty.

A Labour Tribunal may order compensation upon a termination of services even where such termination is justified and no distinction as to whether such termination was upon a closure of an industry or for misconduct as a disciplinary measure can be imposed in considering a claim for compensation.

Compensation will be ordered if there are special circumstances which would make it just and equitable to order such relief even where the termination of services is justified.

Cases referred to:

1. *Somawathie v. Backson's Textile Industries Ltd.* 79 (1) NLR 204.
2. *Shell Company of Ceylon Ltd. v. Pathirana* (1962) 64 NLR 71.
3. *United Engineering Workers Union v. Devenayagam* (1967) 69 NLR 289, 300.
4. *Highland Tea Co. of Ceylon Ltd. v. The National Union of Workers* (1967) 70 NLR 161.
5. *Ceylon Workers Congress v. Superintendent of Roeberry Estate* (1967) 70 NLR 211.
6. *The Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. Hillman* (1977) 79 (1) NLR 421, 427, 429, 430, 431, 433.
7. *Ceylon Cold Stores Ltd. v. Industrial and General Workers' Union* (1982) Srisantha's Law Reports Vol. 1 p. 7.
8. *Watareka Multi Purpose Co-operative Society Ltd. v. Wickremachandra* (1968) 70 NLR 239.
9. *The Group Superintendent Dalma Group v. The Ceylon Estate Staffs Union* (1971) 73 NLR 574.
10. *Rumblan v. The Ceylon Press Workers' Union* (1973) 75 NLR 575.
11. *Ceylon Transport Board v. Wijeratne* (1975) 77 NLR 481, 489.
12. *Piliyandala Polgasowita Multi Purpose Co-operative Society v. Liyanage* (1970) 74 NLR 138.
13. *Premadasa Rodrigo v. Ceylon Petroleum Corporation* (1991) 2 Sri LR 382, 406.
14. *Jayasuriya v. Sri Lanka State Plantations Corporation* S.C. Appeal 9/89 – S.C. Minutes of 3.05.1991.
15. *Ceylon Cold Stores v. Sri Nandalochana* (1989) 2 Sri LR 254.

APPEAL from judgment of Court of Appeal.

S. L. Gunasekera for appellant.

S. Sivarasa, P.C. with *Shamil Perera* and *Sampatha Welgampola* for respondent.

Cur adv vult.

August 29, 1994.

KULATUNGA, J.

The appellant who was the Manager of the Badulla Branch of the Respondent Bank successfully applied to the Labour Tribunal for relief against the termination of his services. The tribunal ordered the

respondent to reinstate the appellant without back wages, in the alternative to pay him compensation in a sum equivalent to 12 months salary i.e. Rs. 75,000/-. The appellant appealed to the Court of Appeal for enhancement of relief whilst the respondent appealed against the order of the tribunal and sought to have it set aside. The Court of Appeal held that the termination of the appellant's services is justified and allowed the respondent's appeal. The Court dismissed the appellant's appeal.

Special leave to appeal was granted only on the following question; "notwithstanding the finding of the Court of Appeal that the termination of the appellant's services is justified, is the appellant in any event entitled to the payment of compensation?" The case for each party has been set out in the written submissions tendered by learned counsel for the parties. I shall first advert to the salient facts.

The appellant joined the Respondent Bank in 1970 as a clerk on a salary of Rs. 118/- per month plus cost of living allowance. The evidence shows that he was hardworking and efficient. He had an unblemished record of service in the course of which he received regular promotions and salary increases culminating in his appointment as Manager, Badulla Branch with effect from 01.03.82. On the date of the termination of services (14.10.85) he was in receipt of a salary of Rs. 6,250/- inclusive of allowances.

The appellant was dismissed on account of the loss of a sum of Rs. 100,000/- of reserve money from the vault of the Bank, on or about 25.09.85. At the domestic inquiry held against the appellant, it was alleged that he had misappropriated the said sum; in the alternative, it was lost by reason of his negligence including the failure to keep the safe continuously locked. According to the respondent, the only misconduct established at the inquiry is negligence based on the following omissions:

- (a) failing to physically verify the cash in the safe according to the figures in the cash reserve register whenever cash is removed or lodged in the safe from time to time;

- (b) failure to physically verify the cash in the safe from time to time.

Excess cash which is not required for the daily requirements of the Bank is entered in the cash reserve register and deposited in a safe which is in the vault of the Bank. This money is lent to other institutions such as the Bank of Ceylon. Reserve cash is kept in Rs. 100/- notes made into bundles of rupees one lakh (each bundle being the size of a loaf of bread).

At the domestic inquiry, the appellant conceded that whenever cash was deposited in the safe or paid out it was his duty to count the bundles and satisfy himself that the money in the safe tallied with the cash register. It was the respondent's position that had such procedure been observed, the loss which occurred would have been averted. It was suggested to the appellant that by his failure to so check the balance cash in the safe he probably failed to detect the fact that an over-payment of Rupees one lakh had been made when a payment of Rupees one million was made to the Bank of Ceylon on 24.09.85. The appellant denied the suggestion. However, both at the domestic inquiry and before the Labour Tribunal he admitted having failed to check the balance cash in the safe after the said payment. The balance after that payment should have been 6 lakhs (six bundles) But on the 25th when he opened the safe to make a further payment to the Bank of Ceylon, he found a bundle of one lakh missing.

Before the Labour Tribunal, the appellant said that there was no circular which required him to count the money regularly and that it was impracticable to count so much money whenever it was deposited in the safe or paid out. He had physically checked the cash last on 12.09.85. Thereafter he functioned continuously as Manager until the detection of the loss on the 25th. He promptly reported the loss to the respondent and the Police. After his interdiction, he appealed to the respondent to reinstate him and to deduct from his salary in reasonable instalments the portion of the loss if any for which the respondent considered him to be liable.

In his appeal to the respondent, the appellant sought to explain the loss on the basis that it had resulted from the abuse of

confidence by one or more of his subordinates. This presumably is a reference to the second officer Rajapaksha, the accountant Bansajaya who were associated with the appellant in performing his duties whenever reserve cash was deposited or paid out and other officers who had some times acted for the appellant or the second officer.

To reach the safe, one must first open the door of the vault. That door has two locks one of which is a combination lock the numbers of which are known only to the appellant. The other lock is opened with an ordinary key which is with the second officer. Next, there is a grill door the key of which is with the second officer. The safe is reached by opening the grill door. The safe has a combination lock which is only known to the appellant. It has another lock for which the key is with the second officer. In the result, the safe cannot be opened except jointly by the appellant and the second officer. The appellant said in evidence that whenever cash is deposited or issued, it is counted by all the three officers involved namely, the accountant, the second officer and the appellant. Of them, the respondent held the appellant and the second officer responsible for the loss and dismissed both.

If as the appellant says there was six lakhs (6 bundles) in the safe after the issue of cash on the 24th, then the sum of one lakh (one bundle) which was lost had been stolen thereafter, some time before 8.30 a.m. on the 25th when the shortage was detected. The appellant said that the numbers of the combination locks were known to the officers who used to act for him or the second officer and suggested that they could have stolen the money having entered the vault using also duplicate keys turned out for that purpose. This is incredible, having regard to the security in the Bank and the need to turn out two sets of duplicate keys. What is more on the night of the 24th there was in the safe a total of about 20 lakhs when the monies other than reserve cash are also taken into account. If so it is unlikely that there was a theft of cash in the course of which only one lakh was removed.

It was in these circumstances, that the Court of Appeal took the view that on the basis of the available evidence the appellant was in breach of his fiduciary duty towards the bank and upheld his

dismissal. We took the view that the said decision is justified and hence gave leave on the limited question of compensation.

Some of the defences urged by the appellant appear to indicate a lack of candour and militate against his claim to relief notwithstanding the fact that the termination of his services is justified. But on reflection, I have decided not to penalise him for these defences, which he may have put forward on legal advice. Learned counsel for the appellant submits the following matters in favour of granting relief to the appellant.

- (1) The appellant had an unblemished record of service since his appointment in 1970.
- (2) His services were not terminated for any act of dishonesty.
- (3) He made a prompt report of the loss to his superiors and made a complaint to the Police.
- (4) His appeal for reinstatement coupled with a request to deduct a portion of the loss from his salary, in monthly instalments.

By way of emphasis, counsel states that the applicant's services were terminated for one single lapse in an otherwise exemplary career. He adds that no human being, whether employed in a fiduciary capacity or not, is perfect or could reasonably be expected to be perfect for all human beings at some stage or other make some mistake. Counsel submits that the Court of Appeal failed to consider the above matters and the question whether notwithstanding the justification of the termination of services the appellant is entitled to compensation. He relies on the decision in *Somawathie v. Backson's Textile Industries Ltd.*⁽¹⁾

Learned President's Counsel for the respondent submits that "compensation" connotes the payment of a sum of money to compensate for a wrong done. Hence, where there is no finding that a termination is unjustified, compensation should not be awarded. He also submits that the payment of compensation in this case would be totally incompatible with the facts. Counsel states that this proposition is supported by a long line of decided cases with the exception of *Somawathie's* case (*Supra*) which is distinguishable on the facts.

In view of the conflicting submissions of counsel this Court has to decide whether in the light of the decided cases and the relevant provisions of law, relief in the nature of compensation is available to the appellant. As the decisions show, this is not the first occasion where payment of compensation has been objected to on similar grounds. Whilst the question is not free from difficulty, it appears that in each case the Court has evolved a formula for making the order which it considered to be consonant with the spirit of labour law and practice and social justice. In doing so, the Court has been guided by three cardinal principles namely, the jurisdiction of the Labour Tribunal is wide; relief under the Industrial Disputes Act is not limited to granting benefits which are legally due; and the duty of the tribunal is to make the order which may appear to it to be just and equitable.

Thus in *Shell Company of Ceylon Ltd. v. Pathirana* ⁽²⁾ Abeyesundera J. held that in an application for relief under S. 31 B(1) of the Act, a Labour Tribunal has jurisdiction under S. 31 B(4) read with S. 31 C(1) to grant relief to a workman in spite of the fact that his services have been lawfully and justifiably terminated by his employer. In that case, the workman's services were terminated on payment 2 weeks' wages in lieu of notice, payable under the contract of service. The Labour Tribunal ordered the payment of 6 weeks' wages. The Court dismissed an appeal by the employer.

In *United Engineering Workers Union v. Devanayagam* ⁽³⁾ the Privy Council approved the decision in *Shell Company case (Supra)* and held that the power of the Labour Tribunal is not limited to granting benefits which are legally due. Their Lordships said:

"Section 31 B(1) does not say that a workman can apply for relief in respect of the wrongful termination of services. It merely says that he can apply in respect of the termination of services. The omission of the word "wrongful" is significant".

In *The Highland Tea Co. of Ceylon Ltd. v. The National Union of Workers* ⁽⁴⁾ the services of an estate labourer was lawfully terminated. At the same time his innocent wife's employment on the estate was also discontinued. Alles J. held that the termination of her employment was itself justified, in the interest of discipline. However, she was paid Rs. 300/- as compensation. This was followed by

Ceylon Workers Congress v. Superintendent of Roeberry Estate⁽⁵⁾ where Alles J. explained that the payment of "compensation" to the innocent wife is "more in the nature of some kind of compensation for past services in keeping with the spirit of labour practice prevailing today". The Labour Tribunal has jurisdiction to grant such relief under S. 31 B(4) read with S. 31 C(1) of the Act.

Somawathie v. Backson's Textile Industries Ltd.⁽¹⁾ Rajaratnam J. held that even where the termination of the services of a workman is justified he may be granted relief or redress which is just and equitable. The Court was of the view that the applicant could be paid some compensation within the contemplation of S.33(1)(d). In that case, the applicant who was admittedly a good worker was discontinued for engaging in female gossip which the Court opined "was not such a serious act of misconduct". The Court ordered the payment to her of a sum of Rs. 1,500/- (being a little over half a year's salary) as compensation.

We next have *The Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. Hillman*⁽⁶⁾. The former Supreme Court held that where the termination is justified in view of the closure of the employer's business (for which the employee is in no way responsible) compensation may be paid under S. 33(1)(d) read with Sections 31 B(1), (4) and 31 C(1) of the Act "in respect of the loss suffered by the employee." Sharvananda J. (as he then was pointed out that S. 31(1)(d) employs the term "compensation" and not "damages". He said -

"'Damage' always signifies recompense given to a party for the wrong that has been done to him. On the other hand 'compensation' includes recompense for pecuniary loss or damage which involves no breach of duty".

To illustrate the wider meaning of "compensation", Sharvananda, J. referred to the workmen's Compensation Ordinance and the Land Acquisition Act.

The decision in *Ceylon Cold Stores Ltd. v. Industrial and General Workers' Union*⁽⁷⁾ turned on different facts. In that case an employee of a bakery was detected by a security officer to be in possession of

a few sundry articles of small value allegedly stolen from the stores of the bakery. He was dismissed. Rodrigo J. (Abeywardene J. agreeing) held that the dismissal was justified. However, in view of the fact that the employee had an unblemished record of 20 years' service he was given relief in a sum of Rs. 7,800/- payable by the employer worked out at the rate of 1 1/2 months salary for each year of service for the first ten years and one month's salary for each year of service for the balance. The judgment made no reference to any section of the Industrial Disputes Act or any decided case.

I shall now examine the decisions relied upon by Counsel for the respondent for resisting the grant of compensation to the appellant. In the cases cited the decisions are to the effect that in the absence of an unlawful or unjustified termination of services compensation cannot be ordered. However, I find that each such decision has turned on the particular facts of the case. Hence, it does not appear that the dicta cited can be regarded as laying down any strict rule.

Thus in *Watareka Multi Purpose Co-operative Society Ltd. v. Wickremachandra* ⁽⁶⁾ the services of a probationary workman was terminated for inefficiency. There was no allegation of malice or unfair labour practice. Tennakoon J. (as he then was) held that in such a case, it was an error of law to award compensation.

In *The Group Superintendent Dalma Group v. The Ceylon Estate Staff Union* ⁽⁶⁾ termination was due to a closure of the estate. The employer offered the workman reasonable alternative employment which the workman refused. Alles, J. held that the Labour Tribunal had no power to order the employer to pay *ex gratia* a sum of money as compensation for loss of career.

In *Rumblan v. The Ceylon Press Workers' Union* ⁽¹⁰⁾ the workman was dismissed for causing damage to a machine that would cause continuous damage to the employer. The Labour Tribunal held that the dismissal was justified but awarded compensation. Kretser J. held that no compensation can be awarded.

In *Ceylon Transport Board v. Wijeratne* ⁽¹¹⁾ Vythilingam J. observed that where dismissal is justified, no compensation can be ordered. This is obiter for the reason that it was a case where the dismissal

was held to be unjust and the decision was concerned with the mode of assessing compensation in lieu of reinstatement.

The next case cited is *Piliyandala Polgasowita Multi Purpose Co-operative Society v. Liyanage*⁽¹²⁾. This is another case in which the employee's services were discontinued during his period of probation. It was discovered that he had been earlier charged in a Magistrate's Court for offences involving dishonesty and dealt with under S. 325 of the Criminal Procedure Code. Alles J. held that the termination of services was justified and that the employee was not entitled to an alternative order of compensation.

Counsel also refers to certain observations of Sharvananda J. in *Hillman's case (Supra)* in relation to a submission of Counsel for the employer that where the termination is justified, there is no justification to award compensation. Sharvananda J. said (79 (1) NLR 421 at 427).

"...The proposition will hold good if the termination is justified on the ground of misconduct of the employee and such termination is by way of disciplinary measure".

These observations are obiter; in any event they do not disclose an intention to lay down an invariable rule.

Finally, counsel cites a passage from the judgment in *Premadasa Rodrigo v. Ceylon Petroleum Corporation*⁽¹³⁾ where Amerasinghe, J. adopts with approval, the observations of Sharvananda, J. in *Hillman's case (Supra)* that if the employee's conduct has induced the termination he cannot have a just claim to compensation for loss of career. This is a case in which this Court upheld the concurrent findings of the Labour Tribunal and the Court of Appeal that the dismissal of the workman is justified on the ground of serious disobedience. The observations relied upon by counsel were made in that context; and no general principle can be formulated.

Learned counsel for the respondent also seeks to distinguish the instant case from the other cases where compensation was granted to workmen whose services had been justifiably terminated for misconduct, by way of disciplinary action. His argument is that in this

case the dismissal relates to the loss of a large sum of money from the care and custody of the appellant where as in the other cases such as *Somawathie's case (Supra)* and *Ceylon Cold Stores Ltd. (Supra)*, the dismissal was for misconduct which was not of a serious nature. Hence, no order for compensation should be made in favour of the appellant. This is a submission which merits consideration.

I am of the view that if the principle of giving relief established in the relevant decisions is sound, then the question whether compensation is legitimate in a particular case would depend on the facts and circumstances of such case; and a decision on the question whether having regard to the nature of the misconduct compensation may be ordered has to be judged in the context. Hence, in a case where the dismissal relates to loss of money, the amount involved would not, by itself, be conclusive.

The effect of the decided cases is that a Labour Tribunal may order compensation upon a termination of services even where such termination is justified is correct; and no distinction as to whether such termination was upon a closure of an industry or for misconduct as a disciplinary measure can be imposed in considering a claim for compensation.

On the question whether the appellant deserves compensation, I am of the view that there are special circumstances which would make it just and equitable to order such relief. Besides the considerations which have been urged by Counsel for the appellant, it is relevant to note that the employer has dismissed both the appellant and the second officer. This then is a case of shared responsibility even though as the Manager of the Bank, the appellant must accept primary responsibility for the loss. He was negligent but as rightly submitted by counsel, no dishonesty has been alleged against him and it is just one of those mistakes a human being is liable to make in a life time. I hold that the appellant is entitled to the payment of appropriate compensation in the circumstances of this case and having regard to his unblemished record of service.

On the question of compensation, counsel for the appellant has assessed it at Rs. 219,198/- in the light of decision in *Jayasuriya v. Sri Lanka State Plantations Corporation* ⁽¹⁴⁾. In that case,

compensation was ordered in favour of an employee whose dismissal was held to be unjustified. As such the quantum of compensation suggested by counsel cannot be supported.

I would consider it just and equitable to order compensation on the basis of the appellant's period of service. He joined the respondent Bank on 20.11.70. He participated in a strike on 01.09.72. Consequently, he was deemed in terms of emergency regulations to have vacated his employment as from that date. He was re-employed on 18.12.72 and continued in service until his dismissal on 14.10.85. On these facts, his period of service falls short of 15 years by about 4 1/2 months. I consider it fair for the purpose of determining compensation to disregard this deficiency and to make an order on the basis of 15 years. During his employment he was in receipt of benefits under the Employees' Provident Fund and the Employees' Trust Fund. His salary as at the time of his dismissal was Rs. 6,250/- inclusive of allowances. I consider it just and equitable to direct the respondent to pay compensation in a sum of Rs. 46,875/- computed at the rate of 1/2 months' salary for each year of service, on the analogy of computing gratuity in cases where the employee enjoys Provident Fund benefits – *Vide Ceylon Cold Stores v. Sri Nandalochana* ⁽¹⁵⁾.

Accordingly, I allow the appeal only on the question of compensation and direct the respondent to pay the appellant the sum of Rs. 46,875/- (Rupees forty six thousand eight hundred and seventy five). Subject to this variation, the judgment of the Court of Appeal is affirmed. The respondent is directed to deposit the said sum with the Assistant Commissioner of Labour, Badulla on or before 30.07.94; whereupon the appellant will be entitled to withdraw the same. The respondent is also directed to pay the appellant costs in a sum of Rs. 1,500/- (Rupees One Thousand Five Hundred). The relief granted by us will not prejudice the appellant's rights in respect of the EPF and ETF contributions in terms of the law.

G. P. S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.