SIRIGAMPOLA
v.
THE BOARD OF INVESTMENT OF SRI LANKA AND OTHERS

COURT OF APPEAL
GUNAWARDANA, J. (P/CA)
CA NO. 363/99
JUNE 28, 2001

Leave of absence from Sri Lanka – Medical leave – Medical certificate not conforming to the requirements of the 'E' code – S. 23.9, s. 23. 9.1 – No obligation to do what is impossible – Is the employee on a contract?

The petitioner had been granted leave of absence from the Island from 01. 01. 98 to 30. 06. 98. The petitioner by his letter of 01. 07. 98 asked for medical leave for a period of 3 months from 01. 07. 98 to 30. 09. 98. The respondent refused to accept the medical certificate as it did not conform to the requirements of the 'E' code.

In terms of s. 23. 09. 01, any medical certificate in support of his illness should be obtained from a Medical prectitioner nominated for that purpose by the Sri Lanka Mission or the approved agent. A vacation of post notice was served on the petitioner.

The petitioner contended that, there was no Doctor nominated by the Sri Lanka High Commission in the State in Australia where he was staying.

Held:

(1) The relevant section requires the officer to produce a medical certificate from the Doctor nominated by the Sri Lankan Mission. When there is no such nominated Doctor it is hardly necessary for it to be stated in the section itself that the officer need not produce a medical certificate from such a Doctor for one does not labour the obvious. It is in a way irrational to do so.

(2) The wrong construction of a law or regulation constitutes an error of law, as does the erroneous interpretation of s. 23. 9 of the 'E' code which prompted or caused the respondents to reject the relevant medical certificate.

Per Gunawardana, J. (P/CA)

"Laws and regulations have to be interpreted with wisdom born of knowledge, experience and sagacity, one must adopt a benevolent and rational approach, not an exceedingly wooden-headed one devoid of humanism."

(3) The service or employment of the petitioner under the 1st respondent was prudent to an appointment on the terms of a letter of appointment and not a contract because there is nothing consensual about the letter of appointment.

APPLICATION for writ in the nature of *Certiorari/Mandamus.*

Cases referred to :

1. *Neidra Fernando* v. *Ceylon Tourist Board* – CA 1343/98 – CAM.
2. *R.* v. *Civil Service Appeal Board Ex parte Bruce* – 1988 3 ALL ER 686 (QB).

Elmo Perera with Ms. P. Wanigaratna for petitioner.

Y. *Wijethilake* DSG, for 1st and 4th respondents.

Cur. adv. vult.

August 07, 2001

U. de Z. GUNAWARDANA, J. (P/CA)

The petitioner, who was an employee of the 1st respondent (Board of Investment of Sri Lanka) had filed this application seeking an order of *certiorari* to quash the vacation of post notice (P16) dated 10. 11. 1998 served on him which notice had been signed by the 2nd respondent (Chairman of the BOI). The background facts are as follows: the petitioner had been granted leave of absence from the Island from 01. 01. 1998 to 30. 06. 1998 which leave was sought by the petitioner to enable him to accompany his wife to Australia. Accordingly, leave was granted and the petitioner proceeded to Australia.

Thereafter, the petitioner had by his letter dated 01. 07. 1998 asked for medical leave for a period of three months from 01. 07. 1998 to

30. 09. 1998. The medical certificate (2R1) which was annexed to the said letter 01. 07. 1998 was recalled by the petitioner as the respondents refused to accept the same on the basis that it did not conform to the requirements of the Establishments Code. The petitioner submitted another medical certificate dated 23. 09. 1998 issued by the same doctor which medical certificate recommended six weeks' leave from the date of the certificate. This medical certificate was also not entertained by the respondents who stated that it also did not comply with the requirements of section 23 : 9 of the Establishments Code which is as follows: 23 : 9 "If an officer falls ill while on leave abroad for a week or more he should report the fact to Sri Lanka Mission in that country, if any or the approved Agent of the Sri Lanka Government, if any. In case of prolonged illness, he should keep his Head of the Department also informed. Then, 23 : 9 :1 states thus: "Any medical certificate required to be furnished by the officer to his Head of Department in support of his illness which should be obtained at the officer's own expense, should be from a medical practitioner nominated for that purpose by the Sri Lanka mission or the approved agent as the case may be".

The petitioner's position is that there was no doctor nominated by the Sri Lankan High Commission in the state in Australia where he was staying which position had not been contradicted. It is worth pointing out that the petitioner has got the 2nd medical certificate dated 23. 09. 1998 certified by the Department of Foreign Affairs and Trade in Australia. Law does not require anyone to do impossible things or there is no obligation to do what is impossible. It is now recognised that a thing is impossible in the legal sense or legal contemplation when it is not practicable and can be done at excessive and unreasonable cost. (vide *Black's Law Dictionary*). As the maxim goes. *Impossibilium nulla, obligatio est.* Laws or regulations, even those in the musty and mouldy Establishments Code, are made with a view to those cases which happen most frequently and not to those which are of rare or accidental occurrence. One cannot forget the general truth ingrained in the oft-quoted proverbial remark: "*Jus constitui*

oportet in his quae ut plurimum accidunt non quae ex imopinato". Laws and regulations have to be interpreted with wisdom born of knowledge, experience and sagacity. One must adopt a benevolent and rational approach, not an exceedingly wooden-headed one, devoid of humanism.

The solution must emphasize and recognize common human needs, if it is reasonably possible to do so, within the framework of the law, and avoid seeking solely legalistic ways, of solving human problems. It is said that the law does not define exactly but trusts in the judgment of the good Judge. In fact, the relevant section of the Establishments Code require the officer to report his illness to the Sri Lanka mission in that foreign country only if there was one (such mission). Of course, there was a mission representing Sri Lanka, but the mission had omitted to nominate a medical practitioner in that state for purpose of issuing medical certificates.

It cannot realistically be thought section 23 : 9 : 1 required an officer who falls ill in a foreign country in which the mission had not nominated a doctor to furnish a medical certificate in the manner specified or required in that section. The relevant section requires the officer to produce a medical certificate from the doctor nominated by the Sri Lanka mission. When there is no such nominated doctor it is hardly necessary, for it to be stated in the section itself that the officer need not produce a medical certificate from such a doctor for one does not labour the obvious. It is, in a way, irrational to do so. The wrong construction of a law or regulation constitutes an error of law, as does the erroneous interpretation of 23 : 9 of the Establishments Code which prompted or caused the authorities (respondents) to reject the relevant medical certificate.

One must also take into consideration the fact that no attempt had been made to call in question the genuineness of the medical certificate and it was not even suggested that the petitioner's illness was simulated. The petitioner had substantially complied with

section 23:9 of the Establishments Code. In the circumstances, he couldn't possibly have done more.

It is in situations such as this that the Court has to act on Bassanio's plea to Portia when Shylock made his demand for his pound of flesh: "And I beseech you, wrest once the law to your authority: to do a great right, do a little wrong, and curb this cruel devil of his will".

Furthermore, the employment of the petitioner by the 1st respondent cannot strictly be said to be one under a contract. The position that arises in this case is the same as that which arose in *Neidra Fernando v. Ceylon Tourist Board.*[1] To cite the relevant excerpt from my own judgment in that case: "It can, at least, be arguably said that, in fact, the petitioner had no contract of employment, as such with the Ceylon Tourist Board (1st respondent). In *R. v. Civil Service Appeal Board ex parte Bruce*[2] a distinction, (however tenuous it may appear to be to the uninitiated or to those not admitted to or conversant with the finer points of Administrative Law) had been drawn between service pursuant to a contract of employment on the one hand, and service merely by virtue of an appointment on the terms of a letter of appointment on the other. In that case May, LJ. held: that there was a sufficient public law component or element connected or associated with the dismissal of the executive officer concerned – since the service of the applicant (officer) arose out of an appointment and not in consequence of a contract, as such. Notwithstanding that feature, the Court, in that case, refused to grant judicial review of the decision of the Civil Service Board dismissing the applicant, because it was felt that the most appropriate forum for resolving disputes arising out of that particular dismissal was an industrial tribunal.

Examination of the letter of appointment dated 03. 03. 1968 (by virtue of which, admittedly, the service of the petitioner under the Ceylon Tourist Board (1st respondent orginated) shows that there is no consensus, mutuality or common agreement about the terms on

which the petitioner had been appointed – consensus being the signal quality of a contract. The letter of appointment is all one-sided or unilateral, if I may say so – the Ceylon Tourist Board (1st respondent) prescribing all terms of the appointment, which terms were imposed from above and had to accepted by the petitioner, willy-nilly. In this state of things, it cannot be said that the petitioner's service with or under Ceylon Tourist Board arose out of any contract of employment, as such, and the legal relationship that arose out of that form of service could not be equated to a contract".

(The above is an excerpt from my judgment in Neidra Fernando case (*supra*)).

The examination of P1 dated 03. 01. 1991 clearly places one matter beyond controversy, that is, that the service or employment of the petitioner under the Board of Investment of Sri Lanka (1st respondent) was pursuant to an appointment on the terms of a letter of appointment and not to a contract because there is nothing consensual about the aforesaid letter of appointment (P1).

For the foregoing reasons I do hereby grant an order of *certiorari* quashing the vacation of post notice (P16) dated 11. 11. 1998. In consequence, the respondents are directed by an order of *mandamus* to reinstate the petitioner in service. The 1st respondent is directed to pay the petitioner Rs. 10,500 (Ten thousand five hundred) as costs.

Application allowed.