R. F. DE MEL AND ANOTHER

v.

IMADUWA, LABOUR OFFICER AND ANOTHER

SUPREME COURT
S.N. SILVA, C.J.
BANDARANAYAKE, J., AND
YAPA , J.
S.C. APPEAL CASE NO. 65/2001
H.C. (M.C.) APPEAL NO. 705/97
M.C. COLOMBO (FORT) CASE NO. 29798
28 NOVEMBER 2002 AND 14 JANUARY AND 3 FEBRUARY, 2003

Industrial Dispute – Non compliance with an order of the Labour Tribunal – Prosecution of the employer – Industrial Dispute Act, sections 40 and 43 – False representation by prosecutor to Magistrate that the Labour Tribunal order had been complied with – Workman's right to representation in such proceedings – Employer's duty to comply with order of Labour Tribunal.

The 2nd respondent ("the workman") had been employed by the appellant ("the employer") for 22 years. He had been litigating for 14 years for enforcement of an order by the Labour Tribunal for reinstatement and back wages. On 8.6.1988 he complained to the Labour Tribunal that the employer had wrongfully terminated his services. On 26.6.1991, parties settled the dispute before the Tribunal, the employer agreeing to reinstate the workman, without a break in service, with effect from 1.7.1991, and to pay six months back wages at the rate of Rs. 1200/- per month. Although the workman reported for work on 1.7.1991 and after the receipt of the formal order of the Tribunal dated 4.7.1991 the employer failed to reinstate him or to pay back wages. Consequently, the 1st respondent ("the Labour Officer") prosecuted the employer before the Magistrate under section 40(1)(e) read with section 43(1), (2) and (4) of the Industrial Disputes Act.

On 8.6.1994, the Magistrate discharged the employer on a report by the Labour Officer that the settlement order had been complied with. The workman appearing by counsel denied any compliance but the Magistrate ruled that the workman had no right of representation. On an appeal by the workman the High Court set aside the order of the Magistrate and directed an adjudication before another Magistrate. At the fresh inquiry the Magistrate held that the employer had failed to comply with the Order of the Labour Tribunal and ordered reinstatement of the workman with effect from 15.1.1997 and to pay him back wages at the rate of Rs. 1250/- per month from 1.7.1991.

The evidence showed that the employer had attempted to "settle" the dispute by depositing Rs. 55,000/- with the Assistant Commissioner of Labour. The workman who was represented by a lawyer demanded an additional sum of Rs. 30,000/-.

Held:

1. Although the formal order of the Labour Tribunal incorporating the settlement was dated 4.7.1991, the employer had undertaken to reinstate the workman with effect from 1.7.1991 and to pay back wages for six months. The employer had failed to comply with that settlement.
2. A reference in the charge to the failure to comply with the order dated 4.7.1991 was not raised as an objection at the prosecution and it did not cause prejudice to the employer. Hence that defect was curable under section 166 of the Code of Criminal Procedure Act. It was not an objection that could be raised at the stage of the appeal.
3. In the absence of an order made by the Court, the employer was not entitled to settle the dispute by unilaterally depositing money with the Assistant Commissioner of Labour.
4. There is no basis to vary the decision of the High Court and the Magistrate made in the fresh case.

5. (*Obiter*) In any event, a sum of Rs. 55,000/- was highly inadequate as compensation to a workman who had put in 22 year of service and dismissed from work for no apparent reason.

APPEAL from the judgment of the High Court

Harsha Soza for appellants

Sanath Weerasinghe for 2nd respondent (workman)

Viveka Siriwardene, De Silva, State Counsel for 1st respondent (the Labour Officer)

Cur.adv.vult

April 01, 2003

HECTOR YAPA, J.

The aggrieved party-respondent (hereinafter after referred to as the workman) was employed as a pump attendant at the petrol filling station run by the accused appellants (hereinafter referred to as the appellants) under the name C.F. de Mel & Sons, No. 161, Parsons Road, Colombo 2. On 8th June 1988 the workman filed an application in the Labour Tribunal alleging that his services were wrongfully terminated by the appellants and sought reinstatement with back wages. When this application came up for inquiry on 28.06.1991 before the Labour Tribunal the parties sought to settle the dispute. The terms of settlement were that the appellants agreed to reinstate the workman without a break in service with effect from 01.07.1991 and to pay him six months back wages at the rate of Rs. 1,250/- per month. The settlement order was entered accordingly by the Labour Tribunal. (Vide P4).

In terms of the settlement order the workman had reported for work on 01.07.1991, but the appellants had requested him to report for work upon the receipt of the settlement order. However, at the request of the workman a letter was issued by the appellants stating that he reported for work on 01.07.1991 and that he should report for work only after the receipt of the settlement order. (Vide P7). The workman took up the position that after the receipt of the settlement order he reported for work on several occasions, but he was not

given work. Thereafter he had complained to the Commissioner of Labour that the settlement order had not been complied with. Accordingly, the proceedings were instituted in the Magistrate's Court of Colombo (Fort) against the appellants by the complainant respondent in terms of section 40 (1) (q), an offence punishable in terms of section 43 (1) (2) & (4) of the Industrial Disputes Act, No. 43 of 1950 as amended.

When the said case filed against the appellants came up for inquiry before the learned Magistrate on 14.07.1993, time had been obtained by the appellants stating that a settlement was possible. However, the parties had not been able to reach a settlement.Thereafter it would appear that on 13.10.1993 the Magistrate had ordered that all documents and other evidence relating to the charge be submitted to Court. Surprisingly when the case came up for inquiry before the Magistrate on 08.06.1994, the Labour Officer purporting to act on behalf of the Commissioner of Labour informed the Magistrate that the settlement order, meaning the settlement reached on 28.06.1991 had been complied with. At that stage the counsel who appeared for the workman had indicated to Court that there had been no such compliance with the said order. The learned Magistrate however disallowed the intervention of the workman or his counsel stating that the case had been instituted by the Commissioner of Labour and therefore they had no right of representation in the case. Accordingly on 08.06.1994 the Magistrate having accepted the statement of the Labour Officer that there had been compliance with the settlement order discharged the appellants.

Thereafter, the workman moved the High Court, Colombo in revision against the said order of discharge. The learned High Court Judge after hearing the revision application by her order dated 01.03.1995 set aside the said order of discharge dated 03.06.1994, stating that the failure to do so would result in a miscarriage of justice. She also remitted the case for re-adjudication before another Magistrate. The new Magistrate after inquiry by his order dated 31.12.1996 held that the appellants have deliberately failed to comply with the said settlement order of the Labour Tribunal dated 28.06.1991 and directed the appellants to reinstate the workman with effect from 15.01.1997 and to pay him his back-

wages at the rate of Rs. 1250/- per month from 01.07.1991. The appellants appealed to the High Court against the said order dated 31.12.1996 and the learned High Court Judge after hearing the appeal by his order dated 03.04.2001 dismissed the said appeal.

The appellants who were aggrieved by the said order of the High Court Judge moved for special leave to appeal and this Court granted leave to appeal on the question "has the aggrieved party respondent (workman) by his conduct frustrated the efforts of the accused appellants petitioners (appellants) in complying with the order of the Labour Tribunal?"

At the hearing, learned counsel for the appellants submitted that the workman had not reported for work in terms of the settlement order even though he had been specifically requested to do so. Besides the appellants had given in writing on 01.07.1991 (P7) that they would comply with the said settlement order once the said order of the Labour Tribunal was received. However, the counsel argued that the workman had not taken any action in this regard to resume work after the receipt of the settlement order. Further it was pointed out that after the receipt of the settlement order a letter dated 23.07.1991 had been written to the workman requesting him to report for work (vide V3) and in addition the failure of the workman to report for work was even brought to the notice of the Commissioner of Labour on 07.02.1992 (vide V5). Learned counsel therefore contended that the workman had deliberately frustrated the endeavour of the appellants to comply with the said settlement order of the Labour Tribunal.

It is very clear from the settlement entered into by the parties before the Labour Tribunal on 28.06.1991, that the appellants had to comply with two conditions. First the appellants had to reinstate the workman without a break in service with effect from 01.07.1991. Secondly they had to pay six months back wages at the rate of Rs. 1250.00 per month. Therefore as submitted by learned counsel for the workman, when he (workman) reported for work on 01.07.1991 it was incumbent on the part of the appellants to reinstate the workman by giving him employment. The request they made to the workman to report for work after the receipt of the settlement order was an additional condition that was not there in the settlement entered into by the parties before the Labour Tribunal on

28.06.1991. In other words what the appellants had done by placing this additional condition on the workman was to dodge the issue of reinstatement by giving the excuse that they should wait until the settlement order was received. This was not the way to give effect to a settlement entered into by the appellants before the President of the Labour Tribunal. Besides the date for reinstatement of the workman was clear and unambiguous. Further it would appear that on 28.06.1991, the appellants agreed to reinstate the workman on 01.07.1991, knowing very well that the settlement order would not reach the parties by 01.07.1991 and it is now a known fact that the President of the Labour Tribunal had signed the settlement order only on 04.07.1991. It is well to remember that in view of the settlement entered into by the parties on 28.06.1991, the workman had to be reinstated on 01.07.1991, on his reporting for work. There was no requirement for the workman to meet the appellants thereafter begging for his job, even though from the available evidence it is very clear that the workman had done so. Hence, the conduct of the appellants in this instance was a clear violation of the settlement entered into by the parties on 28.06.1991. Further, the position taken up by the appellants at the hearing, that they waited for the settlement order to be sure of its contents is an unacceptable proposition, in view of their undertaking before the Labour Tribunal to reinstate the workman on 01.07.1991.

The only reasonable explanation for their failure to reinstate the workman on 01.07.1991 and even thereafter appears to be that they were not genuinely interested in reinstating the workman despite their undertaking. This conclusion finds support from the evidence of the workman who stated that even after the receipt of the settlement order his request for reinstatement was refused by the appellant. It was thereafter that the workman had complained to the Bambalapitiya Police on 22.07.1991 (vide P8) and to the Commissioner of Labour on 23.07.1991 and 13.08.1991 (vide P 11 & P 12) against the appellants.

Much has been said on behalf of the appellants about the failure of the workman to mention in his police complaint that he met the appellants seeking reinstatement after the receipt of the settlement order. It is to be noted that the Police complaint had been made by the workman on 22.07.1991 for his future protection.

Further he has stated there that no inquiry was necessary. Therefore the failure to mention in the Police statement the dates he met the appellants seeking reinstatement after 01.07.1991 would not matter. The workman had given evidence that he met the appellants several times after 01.07.1991 and that he did not receive the alleged letter dated 23.07.1991 (V3) sent by the appellants requesting him to report for work. Appellants had failed to prove the sending of his letter (V3) under registered cover. But it is important to note that, consequent to the two complaints made to the Commissioner of Labour, (P11 & P12) he had taken action to prosecute the appellants.

Another submission made on behalf of the appellants was that, having regard to the acceptance of Rs. 55,000/- from the appellants by the Labour Department on 01.10.1993, the complainant respondent had no right to proceed with this prosecution against the appellants. The tenor of this argument was that this sum of Rs. 55,000/- was deposited with the Assistant Commissioner of Labour in full and final settlement of this case with the workman and therefore while this sum of Rs. 55,000/- was retained by the Commissioner of Labour, he was precluded from prosecuting the appellants. It is to be noted here that this deposit of Rs. 55,000/- by the appellants with the Assistant Commissioner of Labour on 01.10.1993 was not made consequent to any order of Court. Further it would appear from the proceedings that the workman was consistently requesting for reinstatement. But for some unknown reason the appellants were taking the initiative of suggesting a pecuniary settlement as an alternative to reinstatement. This position is made clear from the proceedings before the Magistrate's Court on 14.07.1993. After the plaint had been filed and when the case was taken up on 14.07.1993 the appellants made an application to the Magistrate and sought three months time stating that a settlement was possible. If the appellants were interested in reinstating the workman they could have indicated to court even on that day. But they were keen to pay some money in lieu of reinstatement. However no settlement was possible as the compensation offered by the appellant was not acceptable to the workman. From the evidence of the Labour Officer Herath, this position is made very clear. It was the evidence of this witness

Herath that on 02.09.1993 appellants and the workman failed to reach a settlement. However thereafter the appellants had sent a sum of Rs. 55,000/- to the Assistant Commissioner of Labour, Colombo South on 01.10.1993. As a result he (witness Herath) summoned the workman, on 07.10.1993 and discussed with him a possible settlement. At that stage the workman who was represented by a lawyer wanted a payment of Rs. 30,000/- in addition to the Rs. 55,000/- that was offered by the appellants. Any way the Labour Officer Herath in his evidence clearly stated that at no stage he had requested the appellants to deposit a sum of Rs. 55,000/- with the Labour Department. His inquiry notes marked P14 corroborate this position. Therefore the payment of Rs, 55,000/- was a unilateral act on the part of the appellants without any direction from the Labour Department. Hence the argument that a sum of Rs. 55,000/- had been deposited with the Commissioner of Labour in settlement of this case and the Commissioner of Labour was precluded from prosecuting the appellants has no substance or merit. Further it is also appropriate to mention here that at every stage the workman was demanding reinstatement. However when the appellants were trying to force a pecuniary settlement on the workman, he had to respond and therefore he demanded two years salary i.e. Rs. 30,000/- and Rs. 55,000/- offered by the appellants. Surely a sum of Rs. 55,000/- was highly inadequate as compensation to a workman who had put in 22 years of service and dismissed from work for no apparent reason. It is not out of place to mention here the fact that the material available in this case discloses a sad tale of a workman who had been harassed by the appellants at every turn since his dismissal. He had been litigating for 14 long years. To say that the workman was motivated by a desire to extract as much money as he could from the appellants would be a comment very unjustifiable in the circumstances of this case.

The counsel for the appellants also made the submission that the charge against the appellants in the Magistrate's Court was defective in that it referred to an order dated 04.07.1991 which had to be implemented on 01.07.1991. Regard to this objection learned counsel for the workman submitted that this objection was never taken up before the Magistrate's Court. It has been raised here for the first time. Any objection to a charge should be taken first before the original court and not at a later stage. Hence it was contended

that the appellants were precluded from raising this objection to the charge at this stage. It is seen that the main allegation in the charge against the appellants was their failure to reinstate the workman on 01.07.1991. Further that in terms of the settlement before the Labour Tribunal on 28.06.1991, the appellants had agreed to reinstate the workman on 01.07.1991. However, the formal order incorporating the terms of settlement was signed by the President of the Labour Tribunal on 04.07.1991 and therefore reference had to be made to the said order in the charge. What the appellants had to do was to reinstate the workman on 01.07.1991 in terms of the settlement entered into on 28.06.1991. The reference to the order dated 04.07.1991 in the charge did not in any way mislead or prejudiced the appellants as they knew very well the terms of settlement entered into on 28.06.1991. It may be observed that section 166 of the Code of Criminal Procedure Act, No. 15 of 1979 requires that an error or defect in the charge to be material, the accused had to be misled by such error or omission. The defect referred to in the charge in this instance was not a material error so as to cause any prejudice to the appellants resulting in a failure of justice. The charge the appellants had to meet was very clear to them, so that they took no objection to it in the Magistrate's Court. Hence, there appears to be no merit in this objection, which has been taken up so late in the day.

In view of the material referred to above, it is very clear from the conduct of the appellants that they had refused to reinstate the workman on 01.07.1991 or even thereafter. Under these circumstances the question of law namely, has the aggrieved party respondent (workman) by his conduct frustrated the afforts of the accused appellants petitioners (appellants) in complying with the order of the Labour Tribunal has to be answered in the negative.

Therefore in my view there is no basis to vary the decision of the learned High Court Judge and the Magistrate. Accordingly the appeal is dismissed with costs.

S.N. SILVA, C.J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal dismissed.