SINGER (SRI LANKA) LTD.

v.

RASHEED AND ANOTHER

SUPREME COURT.
WIMALARATNE, J., COLIN-THOME, J. AND ABDUL CADER, J.
S.C. APPEAL No.21/83 – C.A. APPLICATION No. 540/80 – L.T. 17/7057
DECEMBER 13, 1983

Writs of Certiorari and Mandamus–Effect of delay – Res Judicata.

The respondent had been employed by the appellant as the managing salesman in their shop at Wellawatte. After a domestic inquiry at which he was found guilty of being involved in the misappropriation or breach of trust of some sewing machine needles, his services were terminated. He filed two applications before the Labour Tribunal complaining of unlawful termination of his services : One before the Tribunal at Narahenpita (on 6.5.77) which was dismissed owing to his absence ; the other before the Vauxhall Street Tribunal where the employer-appellant raised the plea of res judicata relying on the order of dismissal made by the Narahenpita Tribunal. The latter application was transferred to the Narahenpita Tribunal which re-numbered the application and proceeded to hear it. The plea of res judicata was raised again by the appellant This was upheld by the Tribunal and the application was dismissed by its order of 28.11.79. The respondent did not appeal from either of the orders dismissing the application. Instead, he invoked the writ jurisdiction of the Court of Appeal and sought a writ of certiorari to quash the order made by the Labour Tribunal on 28.11.79 and a writ of Mandamus to compel the Tribunal to proceed with the inquiry into the re-numbered application on the ground that the proceedings in the first application had been heard exparte and without notice to him and that its dismissal did not operate as res judicata

Held–

There was ample opportunity for the respondent to have lodged an appeal from the first order of dismissal of the Labour Tribunal as he had notice of the order a few days after it was made and even of the proceedings before that Instead of doing so he had, six months later, invoked the extraordinary jurisdiction of the Court of Appeal. Although a six month delay is not by itself a ground for refusing relief, the circumstances of this case did not warrant excusing the delay

APPEAL from a judgment of the Court of Appeal.

R D C de Silva for appellant.

Siva Rajaratnam with *S. C. Crosette Thambiah* and *K. Thevarajah* for 1st respondent.

Cur. adv. vult.

January 12, 1984.

WIMALARATNE, J.

This is an appeal from a judgment of the Court of Appeal allowing an application for a Writ of Certiorari quashing an order of the Labour Tribunal which had dismissed an application by the workman (1st respondent) praying for reinstatement and back wages. The workman who had been employed as managing salesman in the employer's shop at Wellawatte alleged that his services were unlawfully terminated by letter dated 15.3.77. He filed two applications in respect of the same termination, one before the Labour Tribunal at Narahenpita on 6.5.77 and the other before the Tribunal at Vauxhall Street on 9.5.77. He says he filed two applications because he was not certain as to which tribunal was possessed of jurisdiction in respect of the termination.

The first application was numbered LT 17/5838/77, and notices were issued on 10.5.77 requiring answer to be filed on 20.6.77. The applicant was absent on 20.6.77 and the Tribunal appears to have appointed 3.8.77 as the date on which he was required to purge his default. He was absent on that date as well. The Tribunal has therefore dismissed his application by order dated 18.8.77.

The second application at Vauxhall Street was numbered LT2/9614/77. The employer filed answer on 2.6.77 in which he referred to the fact that LT 17/5838/77 was pending. The employer pleaded that the applicant and some others had been involved in the misappropriation or breach of trust of 83,000 sewing machine needles valued at Rs. 124,500 and as the applicant's explanation was unsatisfactory a domestic inquiry was held at which he was found guilty ; hence his services were lawfully terminated. When this second application was taken up for inquiry on 2.12.77 the employer raised the plea of res judicata, as by then the first application in respect of the same termination had been dismissed by the Tribunal at Narahenpita. The Tribunal then made order on 2.12.77 that the second application be transferred from Vauxhall Street to Narahenpita.

The Tribunal at Narahenpita re-numbered this application as LT 17/7057. The plea of res judicata was again taken on 28.11.79. That Tribunal heard arguments of Counsel for both parties on that date, and by its order of that date (apparently dictated) upheld the plea and dismissed the application.

. The applicant did not appeal from either of the orders dismissing his application. Instead he invoked the jurisdiction of the Court of Appeal by his application dated 21.5.80 and sought a Writ of Certiorari to quash the order made on 28.11.79 and a Writ of Mandamus to compel the Tribunal (2nd respondent) to proceed with the inquiry in LT 17/7057 on the ground that the proceedings in the first application were held ex parte and without notice to him, and that the 2nd respondent erred in holding that that order operated as res judicata. He pointed to the fact that notice in the first application had been addressed to "22 Wekanda Road, Colombo 6" whereas his correct address is "22 Vivekananda Road, Colombo 6".

The Court of Appeal has taken the view that the Tribunal had failed to address its mind to the main issue in the case, which was as to whether the applicant had in fact received the notice requiring his attendance before the first Tribunal on 20.6.77 and/or 3.8.77. The Tribunal, in the opinion of the Court of Appeal had erred in holding that the first application had been "looked into and disposed of" and thus upholding the plea of res judicata.

Before us learned Counsel for the appellant contended that–

(*a*) the order of 28.11.79 was an appealable order from which the 1st respondent had not appealed ;

(*b*) that there has been a long delay of over five months after that order was delivered before the Writ jurisdiction of the Court of Appeal was invoked ; and

(*c*) that the 1st respondent had suppressed material facts in that he had not intimated to the Court of Appeal that he had received a copy of the order of dismissal of the first application within a few days of that order.

The Court of Appeal has taken the view that as the 1st respondent could not obtain certified copies of the relevant documents till about January 1980, his failure to lodge an appeal was excusable. Of the documents relevant to an appeal, the pleadings in the two applications and the order in the first application were already in the possession of the 1st respondent and were marked P1 to P4 when his case was argued on 29.11.79. The only other relevant document was P5 the order of that date. That order was a brief order made in the presence of Counsel. There was, therefore ample opportunity for the 1st respondent to have lodged an appeal.

Instead, six months later he invoked the extraordinary jurisdiction of the Court of Appeal. The Court of Appeal has taken the view that a delay for a period of six months *by itself* is not a ground for refusing relief. I am in entire agreement ; but the circumstances of this case did not warrant the extension of that latitude to the 1st respondent. In the first place, he ought to have been aware that the employer had received notice of the first application because the employer in its answer filed in the second application on 2.6.77 had disclosed the fact that the first application was pending. That averment should have alerted the 1st respondent, especially in view of the serious allegation of misappropriation levelled against him. Between 2.6.77 and 3.8 77 he had two months in which to make inquiries regarding the stage of proceedings in the first application. Had he made any sort of inquiry he would have found out the relevant dates. As the Tribunal has, in its order in the first application correctly held, if the employee wanted relief from that Tribunal, the employee should have been vigilant.

The 1st respondent produced at the arguments before the Tribunal. on 28.11.79 a letter dated 26.8.77 by the first Tribunal to him which was marked A4. He did not, however file it of record either in the Tribunal or in the Court of Appeal. The appellant makes a point of this suppression, because according to that letter the 1st respondent had received intimation of the order of 18.8.77 made in the first application within a few days after it was made. If that be so he had ample opportunity to either appeal from that order or to seek to have that order set aside on the ground that he had no notice. The order in the first application refers to the fact that the notice which had been sent to the 1st respondent by registered post had not been returned. The Tribunal has presumed correctly that the 1st respondent had notice of the date 20.6.77.

I am therefore of the view that the Court of Appeal ought not to have exercised its jurisdiction to quash by way of Certiorari the order of the Labour Tribunal dated 28.11.79. I would accordingly set aside the judgment of the Court of Appeal, and restore the order of the Labour Tribunal dismissing this application. The appellant will be entitled to costs of this appeal payable by the 1st respondent.

COLIN-THOME, J.– I agree.

ABDUL CADER, J.

The 1st respondent filed two applications in respect of termination of his employment, one before the Labour Tribunal at Narahenpita on 6.5.77 and the other before the Labour Tribunal at Vauxhall Street on 9.5.77. The first one was given the number L.T./17/5838/77 and the other L.T./2/9614/77. L.T./17/5838/77 was dismissed on 18.8.77 as the 1st respondent was absent after notice. The 1st respondent has stated that he did not receive notice. Wimalaratne, J. has referred to "A4" but it has not been produced in the Court of Appeal or in this Court. I shall assume, therefore, that there is no proof before this Court that the 1st respondent had notice of the inquiry into that application.

When the second application was taken up, it was dismissed on the ground that the dismissal of the first application operated as res judicata. That was an appealable order and I agree with Wimalaratne, J. that the reasons urged by the 1st respondent for his failure to lodge an appeal within the prescribed time are not sufficient to grant the petitioner extraordinary relief by way of writ filed long after the appealable period.

There is yet a further circumstance that militates against the 1st respondent. When the second application was taken up for inquiry on 2.12.77, the employer raised the plea of res judicata. The first application had been dismissed on 18.8.77 – 4 months earlier. Even assuming that the 1st respondent had no notice of that dismissal, he would have been then aware on 2.12.77 that the first application had been dismissed. It was then open to him to move to purge his default in the first application so as to vacate the order of dismissal. When the second application came up for inquiry on 28.11.79. 2 years later, his failure to take steps in the earlier application permitted the appellant to raise the plea of res judicata, which the Tribunal validly upheld. Therefore, it was the negligence on the part of the petitioner in failing to re-open proceedings in the first application that led to the dismissal of the second application by way of res judicata.

Under the circumstances, I agree with the order made by Wimalaratne, J.

Appeal allowed.