IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 152/2013
SC/SPL/LA/223/2013
HC/NE/07/2012/LT/ APP
(Previously LT/APP/27/2011)
LT 37/TK/86/2008

Ceylon Estate Staffs' Union
No. 6, Aloe Avenue,
Colombo 3.
On behalf of S. Mahalingam.

Applicant

Vs.

1. The Superintendent
   Troup Estate, Talawakelle.
2. Maskeliya Plantations Limited
   No.310, High Level Road,
   Navinna, Maharagama.

Respondents

AND BETWEEN

1. The Superintendent
   Troup Estate, Talawakelle.
2. Maskeliya Plantations Limited
   No.310, High Level Road,
   Navinna, Maharagama.

Respondents - Appellants

Vs.

Ceylon Estate Staffs' Union
No. 6, Aloe Avenue,
Colombo 3.
On behalf of S. Mahalingam.

Applicant - Respondent

AND NOW BETWEEN

1. The Superintendent
   Troup Estate, Talawakelle.
2. Maskeliya Plantations Limited
   No.310, High Level Road,
   Navinna, Maharagama.

Respondents - Appellants - Appellants

Vs.

Ceylon Estate Staffs' Union
No. 6, Aloe Avenue,
Colombo 3.
On behalf of S. Mahalingam.

Applicant - Respondent - Respondent

Before: Kumudini Wickremasinghe J.

Sobhitha Rajakaruna J.

Sampath B. Abayakoon J.

Counsel: Suren Fernando for the Respondents - Appellants - Appellants

S.Kumarasingham for the Applicant - Respondent - Respondent

Argued on: 09.06.2025

Written Submissions: Respondents - Appellants - Appellants : 11.12.2013

Applicant - Respondent - Respondent : 02.08.2018

Decided on: 23.07.2025

Sobhitha Rajakaruna J.

Applicant-Respondent-Respondent ('Respondent') on behalf of S. Mahalingam ('Employee'), who was serving as a Junior Assistant Field Officer, preferred an application to the Labour Tribunal of *Talawakelle* ('LT') alleging that the Respondents-Appellants-Appellants ('Appellants') terminated his services unjustly and unfairly. The Appellants took the stand in the LT that the Respondent's services were terminated justly and reasonably, after finding him guilty of serious misconduct in the domestic inquiry. The learned President of the LT decided that the said termination of services was unjust and unfair and proceeded to award compensation amounting to a sum of Rs.467,000/- together with reinstatement.

Upon an appeal filed by the Appellants, the High Court of *Nuwara Eliya* affirmed the Order of the LT. Being aggrieved by the said Order of the High Court, the Appellants instituted these proceedings seeking to get both the above Orders of the LT and the High Court varied. This Court granted leave to appeal on the following questions set out in paragraph 9(a), 9(d), 9(e), 9(f) and 9(h) of the Petition (dated 26.08.2013) of the Appellants:

1) Did the learned Judge of the Provincial High Court of the Central Province fail to assess the evidence in deciding that the termination of the employment of the Respondent was not just, equitable and/or reasonable?
2) Did the learned Judge of the Provincial High Court of the Central Province err in law by failing to consider that the Respondent has omitted the same act of serious misconduct in consecutive months which caused substantial losses to the Petitioners on several occasions?
3) Did the learned Judge of the Provincial High Court of the Central Province err in law by failing to consider that the Respondent admitted his misconduct in his statement to the police and/or that he was found guilty of serious misconduct at the domestic inquiry?
4) Did the learned Judge of the Provincial High Court of the Central Province err in law by failing to appreciate that the Petitioners were well within their legal rights

to take appropriate disciplinary action, including that of termination, although the Respondent agreed to compensate the monetary loss suffered by the Petitioners?

5) Is the Order of the learned Judge of the Provincial High Court of the Central Province unsupported by the primary facts and deductions therefrom and resulting in error of law?

Charge Sheet

The Respondent in addition to his usual duties was tasked with distributing flour to the workers and staff of Troup Estate, managed by Maskeliya Plantations Limited (the 2nd Respondent-Appellant-Appellant), and received a monthly allowance for such work. A shortage of flour was a primary reason for the disciplinary measures taken against him. In July 2008, the storekeeper issued the Respondent with 1,630 kg of flour under order No. 62 and 746 kg under order No. 67 for distribution to workers and staff. Subsequently, a shortfall of 101 kg of flour was discovered that month. Following this, a domestic inquiry was conducted after issuing the Charge Sheet dated 04.09.2008, outlining the following charges against the Respondent:

1. *"Being unable to account for a shortage of 101 kg of flour kept for employee issues in the Troup Divisional Stores for the month of July, 2008.*
2. *Being unable to account for a shortage of 110 kg of flour kept for employee issues in the Troup Divisional Stores for the month of August, 2008.*
3. *By attempting to mislead and cheat the management and workers by preparing a list of employees and entering false kilograms of flour against their names, amounting to 110 kg for the month of August, 2008. This list had been forwarded by you to the estate office for deduction from the salaries of the said employees where in fact you had actually not issued this quantity of flour to any of the employees.*
4. *By committing as in the aforesaid paragraphs 1 and 2 you had misappropriated 211 kg of flour kept for employee issues.*
5. *By committing as in the aforesaid paragraphs causing a monetary loss of Rs.15614/- to this plantation.*
6. *By committing as in the aforesaid, you had conducted yourself in a manner that the management cannot repose any further confidence on me, in the future."*

The Inquiry Officer after the domestic inquiry decided that the shortage occurred while the flour was under the Respondent's custody. Consequently, the Inquiry Officer

determined that the Respondent had committed serious misconduct and was guilty of all six charges.

However, the Respondent, citing the testimony of the store's clerk at the LT, argues that the claim that the flour was in his custody is an overly broad statement requiring clarification. He explains that flour is stored at a central location and then transported to a designated point within the division of the Estate for distribution to workers. The Respondent contends that his role was limited to supervising the distribution process, which occurred over a few hours on specific days. He asserts that describing the flour as being in his custody exaggerates his responsibility disproportionately. In the meantime, the store's clerk testified that the flour was not handed directly to the Respondent but to his assistant.

The Respondent claims that the storekeeper issued them a lesser quantity of flour, but he didn't notice the shortage in July because there were sufficient stocks available to distribute to the workers. Additionally, he contends that some of the flour bags given to him contained less flour than expected. Nonetheless, the Appellants assert that this explanation contradicts the Respondent's earlier statement in which he admitted that the flour was lost while under his care.

The Appellants draws the attention of this Court to the averments in paragraph 3 of the Replication dated 16.01.2009 filed in the LT, which reads;

> "With regards to clause No. 5 of the Answer of the Respondents the Applicant states that the workman admitted responsibility for the shortage of flour which was in his custody and agreed to pay the cost of the shortage of 210 kilos of flour in instalments: and such instalments were recovered from his earned salary for August and September, 2008. Thus, the matter was settled amicably. Therefore, the termination of his services is unjustified."

It is significant to note that the Respondent agreed to cover the cost of the flour shortage from his own funds. The Respondent contends that it is unjust to bring charges against him, given that he agreed to let the Appellants deduct the cost of the flour shortage from his salary. Based on this, the Respondent argues that the maxim of *nemo debet bis vexari pro una eadem causa* applies to this case, asserting that no disciplinary action should be imposed

on him once the financial loss to the Appellant has been compensated through deductions from his salary.

Applicability of the Maxim

The maxim *nemo debet bis vexari pro una et eadem causa* is a Latin term which implies that 'nobody should be twice troubled or jeopardized for one and the same matter'. The basis of res judicata in the civil law and of *autrefois acquit* or *autrefois convict* in the criminal law. An accused is normally limited to pleading guilty or not guilty, but if he contends that he has already been acquitted or convicted on exactly the same charge or facts, he may offer whichever of these pleas is appropriate (Vide - **Lawyers' Latin: A Vade Mecum by John Gray**)[1]. *Res judicata* 'a matter which has been adjudicated upon'. If a claimant seeks to litigate a claim all over again, then a defendant may answer it with the plea res judicata, exactly the same matter has been decided already[2]. The doctrine of res judicata rests upon twin principles which cannot be better expressed than in the terms of the two Latin maxims *interest republicae ut sit finis litium*[3] and *nemo debet bis vexari pro una et eadem causa*.[4]

Despite the Labour Tribunal and the High Court addressing the maxim *nemo debet bis vexari pro una et eadem causa*, this Court did not grant leave on the question of whether the learned High Court Judge erred in law by finding the Respondent's termination to be in violation of this maxim. Nevertheless, for the sake of completeness, I must state that the above explicit definition of such maxim does not reflect any logical basis for applying the same to the circumstances of the case before the LT. It is stated in **Law of Delict by R.G. Mckerron**[5] that crime and delict must be regarded as complementary, not mutually exclusive, conceptions, and can only be distinguished by having regard to the different nature of criminal and civil proceedings. It is further stated that the purpose of these two classes of proceedings is fundamentally different and the primary object of criminal proceedings is the punishment of the accused; the primary object of civil proceedings is the enforcement of a right claimed by the plaintiff against the defendant.

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[1]John Gray, Lawyers' Latin, 9th Ed. (2nd Indian Reprint), 2011 pp. 91,92
[2] Ibid p.120
[3] *Interest republicae ut sit finis litium*: it is in the interest of the state that there should be an end to litigation'. Basis of statutes of limitation, of the power to strike out for want of prosecution where delay is excessive and of the equitable doctrine of laches. (Vide- Supra Note 1, p.73)
[4] See *Thrasyvoulou v. S. of S. for the Environment (1990) 2 AC 273* per Lord Bridge of Harwich at p.289. Doctrine considered by Lightman J on 7th November 2002 in *R (Opoku) v Principal and Governors of Southwark College.* (Vide- Supra Note 1, p.120)
[5] 7th Ed (Platinum Reprint) 2007 published by Juta and Co. p.1

Thus, I hold the view that an employer is entitled to both, recover damages from an employee and terminate his/her employment on disciplinary grounds, provided all requisite legal and procedural conditions are fulfilled. Likewise, disciplinary action against an employee should be grounded in established misconduct, rather than whether the associated loss or damage has been recovered. An employee's civil liability and disciplinary proceedings against such employee may occur simultaneously, but are not mutually exclusive.

Admission of the Shortage vis-à-vis Disciplinary Action

Another issue that needs to be addressed in the instant Application is whether an employer has the right to take disciplinary action against an employee who has undertaken to compensate for the financial loss incurred by the employer. This represents another facet of the questions related to the maxim discussed previously. It cannot be presumed that such an admission always dispenses with the requirement of a proper inquiry before disciplinary action is taken. A mere admission by an employee of loss of goods in their possession does not automatically amount to "misconduct" under our labour laws. Whether it constitutes misconduct depends on several key factors. An admission of loss of goods does not by itself amount to misconduct unless accompanied by elements like intentional wrongdoing, gross negligence, or violation of specific service conditions or rules.

However, this proposition may vary depending on the circumstances of each case. For example, an employee admitting to a shortage of flour under his custody until distribution to the workers presents a distinct scenario from a bank officer acknowledging the loss of a substantial amount of cash in his care. In ***State of Punjab v Ram Singh*** (***1992) AIR 2188, 1992 LAB. I. C. 2391***, the Panjab-Haryana High Court observed that the ambit of misconduct must be construed based on the subject matter and context in which it occurs, taking into account the scope of the statute and the public purpose it aims to promote. Soza J. in ***National Savings Bank v. Ceylon Bank Employees' Union (1982) 2 Sri L.R 629*** stated that 'the public have a right to expect a high standard of honesty in persons employed in a bank and bank authorities have a right to insist that their employees should observe a high standard of honesty; this is an implied condition of service in a bank.'

Hence, whether the admission of shortage by the Respondent constitutes a misconduct must be assessed based on the evidence adduced in the LT. I will address this aspect when

examining the evidence related to the justification of the termination of services of the Respondents.

Shifting the Burden of Proof

The Appellant argues that the burden of proof shifts to the Respondent to prove how the shortage occurred, as he has admitted the shortage and undertaken to settle the cost. In ***Hemas (Estates) Ltd. v Ceylon Workers' Congress 76 NLR 59***, it was held that in proceedings before a Labour Tribunal relating to a dispute between a workman and his employer, it is open to the President to accept the more probable version and to decide the case on a balance of probability. The narrow defence taken by the Respondent in the instant Case, to establish how the loss occurred, is that there had been a shortage in the bags of flour issued to him. Above all, the forum for the Respondent or the Appellants to carry out the burden of proof is the LT and the role of the President of the LT is to decide whether the termination was just and equitable. Without any ambiguity, the Appellants have commenced the trial before LT, accepting the burden to justify the termination.

I find it unnecessary to deeply explore the 'voluntariness doctrine' or theories on 'confession' here, as the limitations of the Respondent's admission are clearly set down in the relevant paragraph of his Replication. The standard of proof in civil proceedings differs from that in criminal proceedings. Sometimes, certain circumstances in disciplinary proceedings have a criminal flavour[6]. Nonetheless, I am impressed with the rule in English Law applied in determining the burden of proof for habeas corpus applications, which can be adopted in the question under consideration. 'In cases of habeas corpus, there is a principle which is one of the pillars of liberty': that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act.[7] Accordingly, the detaining authority must be able to give positive evidence that it has fulfilled every legal condition expressly required by statute, even in the absence of contrary evidence from the prisoner'. (Vide -**Wade & Forsyth's Administrative Law by C.F. Forsyth and I.J.Ghosh**[8]).

[6] Also see: C.F. Forsyth and I.J.Ghosh, 'Wade & Forsyth's Administrative Law',12th Ed. published by Oxford University Press at p.225.
[7] Liversidge v. Anderson [1942] AC 206 at 245 (Lord Atkin), confirmed in the Khawaja case (below) at 110 (Lord Scarman). And see R v. Home Secretary ex p Ram [1979] 1 WLR 148.
[8] 12th Ed. published by Oxford University Press at pp. 225-226

Consequently, the burden to prove elements such as intentional misconduct, gross negligence, or breaches of specific service rules rests with the employer, even if the employee admits to the mere loss or shortage of goods. Anyhow, the defence of the employee for such loss or shortfall should be materially considered by the Labour Tribunal in assessing whether the termination of services is justifiable or when ordering reinstatement. Considering the nature of the Respondent's admission and the reasons outlined above, I believe the key issue is identifying who should provide evidence regarding the surrounding circumstances to establish whether the Respondent's actions were entirely voluntary, constituted wrongdoing, or amounted to gross negligence. Hence, I take the view that the arguments of shifting the burden on how the loss of flour occurred do not materially affect the conclusions that I will reach in this judgment.

Whether the Termination of Services is Justifiable

The learned President of the LT noted in his Order that the only evidence presented by the Appellants to prove that the flour shortage resulted from an act of cheating was a statement by Senior Assistant Superintendent (Migara Bandara Meegahakumbura), who reported receiving complaints from a set of workers that no flour was issued to them despite salary deductions. Even such evidence was rejected by the said President, deeming it hearsay. The Appellants failed to substantiate the aforesaid complaints with independent witness testimony or written documentation. The LT disregarded the evidence of the said Senior Assistant Superintendent, stating it did not establish any deceitful act by the Respondent. Likewise, the testimony of Appellants' other witnesses, D. Casi Vishwanadan (Store Keeper) and Wanasundara Mudiyanselage Susantha Wanasundara (Assistant Superintendent), only confirmed the flour shortage and the initiation of disciplinary proceedings against the Respondent, without proving misconduct.

Upon an overall consideration of the evidence led in LT, I observe that the Appellants have failed to present strong, conclusive evidence before LT to justify the termination of the services of the Respondent. The Appellants have not provided compelling, definitive evidence before the LT to demonstrate that the Respondent's admission of the shortage of flour amounts to misconduct. Multiple charges were brought against the Respondent, including accusations of deceiving management and workers by creating a falsified list and recording fictitious flour allocations totalling 110 kilograms, which were submitted to the estate office for salary deductions without actual distribution. However, I find insufficient

evidence to substantiate claims of fraud or intentional misconduct against the Respondent. The evidence presented does not establish any offence or gross negligence. In the absence of strong, conclusive evidence establishing serious culpability, I agree with the decision of the President of the LT to declare the termination unjust and unfair.

Aligning Loss of Confidence with Reinstatement

Having considered the justifiability of the termination of the services of the Respondent, I now need to consider whether the decision of the LT to reinstate the Respondent is just and equitable. In this regard, it is important to assess the submissions made on behalf of the Appellants on 'loss of confidence'. The contention of the Appellants is that the Respondent, who was responsible for the distribution of flour (as an additional duty) to the staff/workers and authorized to deduct amounts from workers' salaries, could no longer be employed because he was allegedly misappropriating goods and authorizing to deduct such values from the workers' pay.

The Appellants place reliance upon several Judgements, including the Judgement of the Supreme Court in ***The Associated Newspapers of Ceylon Ltd - Lake House v. M.S.P Nanayakkara SC Appeal No. 223/2016 SC Minutes of 28.01.2022.*** In the said case, His Lordship Justice Arjuna Obeyesekere, while agreeing with the *dicta* in ***Kosgolle Gedara Greeta Shirani Wanigasinghe v Hector Kobbekaduwa Agrarian Research and Training Institute SC Appeal No. 73/2014 SC Minutes 02.09.2015,*** has taken the view that the trust is one of the core features of an employer-employee relationship. Moreover, His Lordship has held that an employee is expected at all times to serve his employer a) with honesty and integrity, b) in a manner that does not breach the trust that has been placed in him/her c) in a manner that fosters the confidence that the employer has in him or her. The below-mentioned paragraph of the same judgement is very much apt to the issues of the instant Application:

> "I must however, add a word of caution. An employer cannot, merely to justify the termination of the services of an employee, claim that he has lost confidence in an employee. As pointed out by this Court in ***Bank of America v Abeygunasekara (1991) 1 Sri LR 317 at page 328***), *'the mere assertion by an employer is not sufficient to justify the termination of a workman on the ground of loss of confidence. When such an assertion is made it is incumbent on the Labour Tribunal to consider whether the allegation is well*

founded. Therefore it would become necessary for the employer to lead evidence of facts from which such an assertion could be proved directly or inferentially.'"

Amerasinghe J. in ***Premadasa Rodrigo v Ceylon Petroleum Corporation (1991) 2 Sri LR 382 at pages 392-393*** observed that 'an employer cannot claim to have a right to dismiss an employee merely because he says he has lost confidence in an employee'. The Supreme Court in ***The Associated Newspapers of Ceylon Ltd - Lake House***, also referring to the said ***Premadasa Rodrigo*** case, held that;

> "whether an employer has lost confidence in an employee is a matter that must be determined on the facts and circumstances of each case, with factors such as the incident or breach of discipline that gave rise to the loss of confidence, and the position held by the employee being relevant factors in arriving at such determination."

It is noteworthy that on 02.06.2009, the Respondent marked admissions before the LT, with the fourth admission stating that he was the person who was in charge of issuing flour during the time of the incident; he was liable for the loss of 210 kg of flour in his custody; and agreed to settle the relevant loss. While I have formed above, a diverse opinion, regarding the applicability of the maxim *nemo debet bis vexari pro una et eadem causa*, the learned President of the LT held, based on this maxim, that the Respondent's services should not have been terminated since he agreed to repay the value of the lost flour. Conversely, the High Court concluded that there was insufficient proof of the Respondent's guilt in committing fraud, and applied the same maxim to determine that the Respondent's termination was unjustified.

The Appellants argue that neither the LT nor the High Court considered the admission of the Respondent regarding the loss of flour that occurred while under his custody during two consecutive months, as well as his liability to settle the loss. It is paramount to note that the Respondent not only acknowledged the shortage but also agreed to repay the value of the 210 kg of missing flour in instalments. According to the Appellants, the loss has not been fully recovered from the Respondent, although the Respondent indicates in his Replication that such instalments were recovered from his earned salary for August and September 2008. I have already dealt with the admission of the shortage by the Respondent. However, I take the view that the Respondent's undertaking to repay the loss

should be given significant weight and considered independently from the admission of shortfall. The circumstances of this Case, in my view, require such admission to be considered based on its nature and gravity in proportioning the disciplinary action which led to an Order for compensation and reinstatement. The LT computed the compensation to amount to a sum of Rs. 467,000/- being the calculated amount of lost wages for the period the Respondent remained without employment, together with reinstatement.

The Supreme Court in ***Ceylon Ceramics Corporation v Weerasinghe***[9] pointed out that except in cases falling within Sections 33 (3), 33 (5) and 47C of the Industrial Disputes Act, a workman wrongfully dismissed will normally be entitled to reinstatement unless there are special circumstances which justify departure from the general rule. The Court cited Section 33 (6) as fortifying this conclusion and added that the "order for payment of compensation is not a matter of course as an alternative to reinstatement in every case; when there is a finding that the termination of services is not justified, sufficient reasons should therefore exist to justify a departure from the ordinary relief of reinstatement."

On a careful consideration of the whole matter, I take the view that by reason of the special circumstances of this Case, the admission by the Respondent to repay the loss should be considered as a sufficient reason to deviate from the ordinary relief of reinstatement. I believe that the learned President of the LT has not adequately drawn his attention to distinguish between the admission of a shortage of flour and the admission to repay the loss. The Respondent's reasons, if any, to safeguard his admission should be duly considered, as they serve the broader purpose of ascertaining his alleged innocence and demonstrating that he acted with clean hands. It is observed that the Respondent has not sufficiently explained one element of his admission, that is to justify the acknowledgement of liability to repay the cost. In terms of S.106 of the Evidence Ordinance, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. While I maintain my earlier conclusion that the Appellants have failed to justify the termination of services, I am of the opinion that the special circumstances of this Case and the evidence placed before this Court does not underpin an Order to reinstate the Respondent.

[9] SC 24/76, SCM 15/7/78 (Unrep) - [Vide: S. Egalahewa, "A General Guide to Sri Lankan Labour Law" (2018) Stamford Lake at p.695]

Questions of Law

In the totality of the circumstances, I proceed to answer the above questions of law upon which this Court granted leave to appeal as follows:

1) No.
2) No.
3) No.
4) Yes.
5) No.

The formulation of the said question No. 4, in my view, is influenced by the said maxim *nemo debet bis vexari pro una et eadem causa.* I am compelled to answer the above 4th question in the affirmative as both the learned Judge of the High Court and the learned President of the LT have erroneously adopted the said maxim to the circumstances of the case before the LT. Thus, I hold that the Order of the LT should be affirmed, subject to the variation of setting aside the Order for reinstatement of the Respondent.

For the reasons given above, I affirm the Order of the LT and the High Court only to the extent of their findings that the termination of the services of the Respondent was not justified and as such the Respondent is entitled to the compensation that was computed by the President of the Labour Tribunal. I set aside the portion of the Order by the LT to reinstate the Respondent. I make no order for costs.

Judge of the Supreme Court

Kumudini Wickremasinghe J.

I agree.

Judge of the Supreme Court

Sampath B. Abayakoon J.

I agree.

Judge of the Supreme Court