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The Gazette of the Democratic Socialist Republic of Sri Lanka

EXTRAORDINARY

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No. 2061/29 - WEDNESDAY, MARCH 07, 2018

(Published by Authority)

PART I : SECTION (I) — GENERAL

Government Notifications

My No. : IR/21/59/2009.

THE INDUSTRIAL DISPUTES ACT, CHAPTER 131

THE award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Lake House Employees' Union, No. 35, D. R. Wijewardena, Mawatha, Lake House, Colombo 10 (on behalf of 144 Employees), Sri Lanka Nidahas Sewaka Sangamaya, Lake House Branch, No. 35, D. R. Wijewardena, Mawatha, Lake House, Colombo 10 (On behalf of 1030 Employees) of the one part and The Associated Newspapers of Ceylon Limited, No. 35, D. R. Wijewardena, Mawatha, Lake House, Colombo 10 of the other part was referred by order dated 26.08.2014 made under Section 4(1) of the Industrial Dispute Act, Chapter 131 (as amended) and published in the *Gazette Extraordinary* of the Democratic Socialist Republic of Sri Lanka No. 1881/3 dated 22.09.2014 for Settlement by Arbitration is hereby published in terms of Section 18(1) of the said Act.

A. WIMALAWEERA,
Commissioner General of Labour.

Department of Labour,
Labour Secretariat, Colombo 05.
27th February, 2018.

Ref No. : IR/21/59/2009.

In the matter of an Industrial Dispute

Between

1. Lake House Employees' Union,
No. 35, D. R. Wijewardena Mawatha,
Lake House, Colombo 10.
(On behalf of 144 Employees)

2. Sri Lanka Nidahas Sewaka Sangamaya,
Lake House Branch,
No. 35, D. R. Wijewardena Mawatha,
Lake House, Colombo 10.
(On behalf of 1030 Employees)

Case No. A 3583

of the one Part.
Party of the First Part.

And

The Associated Newspapers of Ceylon Limited,
No. 35, D. R. Wijewardena Mawatha,
Lake House, Colombo 10.

of the other Part.
Party of the Second Part.

1A- G 27248 - 14 (03/2018)

This Gazette Extraordinary can be downloaded from www.documents.gov.lk

AWARD

The Hon. Minister of Labour and Labour Relations Gamini Lokuge do by virtue the powers vested in him by Section 4 (1) of the Industrial Disputes Act, Chapter 131 of the Legislative Enactments, of Ceylon (1956 Revised Edition), as amended by Acts, No. 14 of 1957, 4 of 1962 and 39 of 1968 (read with Industrial Disputes- Special- Provisions) Act, No. 37 of 1968, appointed me as the Arbitrator by his order dated 26.08.2014 and referred the aforesaid dispute to me for settlement by Arbitration.

The statement of the matter in dispute between the above said parties is as follows :-

''Whether the 1174 employees mentioned in the schedule, who were earlier paid the non- recurent cost of living gratuity (NRCLG) based on the Colombo Consumer Price Index (CCPI), have been caused injustice by ex-parte cessation of the said allowance from 01.10.2009 and the introduction of an Annual Lump Sum ; and if so to what reliefs they are entitled."

Appearance :

Mr. Lahiru Welgama Attorney - At- Law appears for the Party of the First Part.

Mrs. Manoli Jinadasa with Rakhitha Abeygoonawardhana Attorneys- At- Low appear for the party of the Second Part.

After both parties mentioned above namely Lake House Employees Union and Sri Lanka Nidahas Sewaka Sangamaya (hereinafter referred to as the Union) and The Associated Newspapers of Ceylon (hereinafter referred to as the Company) have submitted their respective statements that has led to the disputes in terms of Regulations 21 (1) and (2) of the Industrial Disputes Regulations, 1958. I made every endeavour to explore a possibility of an amicable settlement which proved in futility.

In the circumstances I charged the Union to commence proceedings and they led the evidence of Lankapeligedara Dharmasiri- The General Secretary and Wickremaratne Vithanalage Gratiaen Sugith Kumar Fernando - Asst. Electrical Superintendant marking documents A1 to A10, while the Company adduced only the evidence of Dhanapala Mudiyanselage Dhanasena- Company's Head of Fund Management marking documents R1 to R11.

The factual background and legal basis of the relief if any claimed by the Union and the response given by the Company need to be set out briefly.

The Union alleged that the Company has arbitrarily and unilaterally stopped the payment of Non- recurring Cost of Living Allowance (hereinafter called and referred to as the NRCLG) from October 2009 by notice marked A4 (a) an extract of this appended hereunder :-

".... As you are aware payment in *lieu* of the Non-Recurring Cost of Living Gratuity (NRCLG) is due in the month of October, Although the practice of making this payment based on the CCPI Index (Base Index of 1952) continued over the years, the Department of Census and Statistics has currently done away with the official publication of this index. Though the Company still receives the index figures through the Ministry of Labour Relations and Manpower, we have been informed by them that this procedure is likely to be disconnected with effect from December 2009.

Since there is no formal agreement to make the payment of NRCLG based on any other basis, it has been decided that in *lieu* of the lump sum NRCLG payment, a payment of a sum of Rs 162,000/- will be made annually to every employee who is currently in respect of this payment. A monthly advance of Rs. 12,000/- (compared to Rs. 11,000/- now paid as advance against NRCLG shall accordingly be paid to employees entitled to this payment with arrears to be paid in the month of October, In fact the aforestated lump sum payment is higher than any NRCLG payments made in the past history of ANCL. (The payment made in 2008- 2009 is Rs. 158,766/- whilst the amount was Rs. 147,212/- in 2007- 2008).

This payment as in the case of NRCLG shall not attract any consequential benefits such EPF/ ETF, Overtime, Gratuity *etc*. and shall henceforth be known as the "Annual Lump Sum in *lieu* of NRCLG" This scheme will come into effect on 01.10.2009 and the first advance in terms thereof will be made to employees with their salaries in October 2009"

This year alone the Management has enhanced the take home earnings of the employee on many occasions so far,

by providing a Rs 1000/- increase to the basic salaries from 1st January 2009.

by introducing a meal allowance of Rs. 60/- per working day (approx Rs. 1200/- p. m.).

This increase of Rs. 1000/- (*i.e* Rs. 11,000/- to Rs. 12,000/-) to the monthly advance as payment in *lieu* of NRCLG."

which the employees entitled as a fundamental allowance for over a period of time and in terms of the collective agreement marked as A1, it is crystal clear that the said allowance had been given to employees as a fundamental allowance from the very beginning (vide term 2 (ඇ)

COLLECTIVE AGREEMENT 2006

A (ඇ) ජන හා සංඛ්‍යාලේඛණ දෙපාර්තමේන්තුවේ ජීවන වියදම් දර්ශකය සඳහා දැනට ගෙවනු ලබන ඒකකයක් සඳහා රු. 2.25 මුදල රු. 2.35 දක්වා වැඩි කිරීමට එකග වේ.

In response the Company look up the position that the Department of Census and Statistics stopped declaring the cost of living index from the year 2008 which was the basic figure to calculate the NRCLG and thus the Company could not calculate the NRCLG latently realized the mode of calculation was also wrong and that resulted in introducing a New Scheme of paying Annual Lump Sum. (which was paid as fixed monthly installment with the balance being paid at the end of 12 months - in the same pattern of payments as the NRCLG), in the face of a practical difficulty to formulate and calculate the NRCLG, due to the non publication of the *Gazette* Notification with the relevant index figures, is completely just and equitable and also the employees have accepted the new payment and to date are paid on the New formula. No employee has rejected this payment and as such the principles of Approbate and Reprobate apply and the party of the First Part is not entitled to relief.

In fact evidence on record reveals that all employees have accepted this payment and are receiving the same to date. Mr. Lankapeligedara who was the main witness for the union admitted in the cross examination in the proceedings of 25.05.2016 and the NRCLG was in fact not stopped but paid under a different name.

Obviously that as the Union has categorically admitted that all employees (especially the 1174 names in the schedule) accepted the Annual Lump Sum Payment Rs. 162,000/- which was paid in *lieu* of NRLCG and is being paid this amount to date, they are estopped in law from now demanding the NRCLG. The principles of approbate and reprobate applies squarely to this case. Taking the decided case will enlighten the issue.

In Ceylon Plywoods Corporation *v.* Samastha Lanka G. N. S. M. & Rajya Sanstha Sevaka Sangamaya (1992) 1 SLR 157

"The doctrine of approbate and reprobate (quod approbo non reprobo) is based on the principle that no person can accept and reject the same instrument."

Scrution. L. J. observed in Verschures Creameries v. Hull & Netherland Steamship Co. Ltd. (1921) 2 KB 608 at 612)

"A person cannot say at one time that a transactions is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. This is to approbate and reprobate the transactions. "

As Sharvananda, C. J. observed in Ranasinghe v. Premadharma (1985) 1 Sri LR 63 at page 70, the concept has "stood the test of time and has been accepted as part of our law"

It was further held that ;

"In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one he cannot afterwards assert the other, he cannot affirm and disaffirm."

The Indian Supreme Court in their judgement of 14th March 2014 in the case of State of Punjab and others V. Dhanjit Singh Sandhu CIVIL APPEAl Nos. 5698 5699 of 2009 discussing the applicability of the principle approbate and reprobate to individuals held ;

It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground (Vide Maharashtra State Road Transport Corporation vs. Balwant Regular Motor Service Amravati & Ors. AIR 1969 SC 329) in R. N. Gosain *vs.* YashpalDhir, AIR 1993 SC 352, this Court has observed asunder :-

"Laws does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transactions is vaild and thereby obtain some advantage, to which he could only be entitled on the footing that it is vaild, and then turn round and say it is void for the purpose of securing some other advantage."

This Court in Sro Babu Ram Alias Durga Prasad vs. Sri Indra Pal Singh (Dead) by Lrs. AIR 1998 SC 3021, and P. R. Deshpande *vs.* MarutiBalramHaibatti, AIR 1998 SC 2979, the Supreme Court has observed that the doctrine of election is based on the rule of estoppel, the principle that

one cannot approbate and reprobate is *heres init*. The doctrine of estoppelp by election is one of the species of estoppel in pais (or equitable estoppel), which is a rule inequity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

The Supreme Court in The Rajasthan State Industrial Development and Investment Corporation and Anr. *vs*. Diamond and Gem Development Corporation Ltd. and Anr., AIR 2013 SC 1241, made an observation that a party cannot be permitted to "blow hot and cold", "Fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped do deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

It is evident that the doctrine of election is based on the rule of estopped the principle that the one cannot approbate an reprobate is inherent in it. The doctrine of estopped by election is one among the species of estopped in pais equitable estopped), which is a rule of equity, By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."

In the case of Mukhunlal v. Srikrishna Singh (20 NLR at 124) the Privy Council held :

"the maxim applies that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist upon its apparent character 60 prejudice his adversary ..... The maxim is founded not so much on any positive law as on the broad and universally applicable principles of justice."

In visuvalingam v. Liyanage (1983) I Sri LR 203 at page 227, Samarakoon, C. J. using more descriptive language to bring home the essence of denying parties the freedom to "approbate and reprobate", commented that one "cannot blow hot and cold."

Thilak Karunarathne vs. Sirimavo Bandaranaike 1993 (2) SLR 100 at 120.....

"I will now proceed to consider the plea of approbation and reprobation which was placed in the forefront of the submission made by Mr. de Silva. The principle is that a person cannot both approbate and reprobate. A person is not allowed to accept a benefit and rejected the rest....."

In the present case, all of the 1800 employees (and especially the 1174 names in the schedule) have accepted the conversion of NRCLG to an Annual Lump sum payment and is paid this amount to date. No evidence has surfaced of any dissention to this payment, except the grumbling of an ex-employee who is purpotedly spearheading a Trade Union with a very small percentage of members. Once the payment is accepted and received continuously since September 2009, the employees cannot now object to the same. If they disputed this payment, they should not have accepted the payment at all.

Therefore, the Union cannot have and maintain this claim, especially in view of their categorical admission that all employees have accepted the payment of Rs. 162,000/- which was paid in *lieu* of the NRCLG. The Principles of Approbate and Reprobate applies to this case.

There is no proof produced by the Union that employees actually objected to this conversion of the NRCOLG to annual Lump Sum. Neither the Union nor the Company could offer a proper formula to calculate the NRCOLG, which clearly supports the position of the Company that there are practical difficulties in formulating a computation for the calculation of the NRCLG in the absence of the *gazette notification* giving the CCPI index, and justifies their decision to convert to Annual Lump Payment.

The Company has several welfare schemes and grant benefits to all its to all its employees and therefore, has a primary duty to protect this scheme and implement the same in a manner that can be sustainable in the future.

New collective agreement entered into 2016, marked as R8 and R8 (4) which was enterred into two main trade union and the company did not even refer to a NRCLG which reveals that the said Unions were satisfied with the current arrangement.

If the NRCLG is ordered to be paid without a ceiling the company would be unable to pay the same and would lead to the financial collapse of the institution.

In all of the facts and circumstances, and the Union is not entitled to any relief whatsoever with attendant documents and written submission made thereafter the question at issue is whether or not the cessation of the NRCLG and the payment of an ANNUAL LUMP SUM is justified.

In passing it is relevant and apt to state the legal rules and principles regarding the functions and powers of the Commissioner and Arbitrator.

The function of Arbitrator's arbitral power in relation to industrial disputes is to ascertain and declare to the respective right and liabilities of the parties as they exist at the moment the proceedings are instituted. From this it follows that the arbitrator is required to do a great deal more than sit in judgement over the case that each party cares to present before him. If he is to ascertain what ought to be the right, and libailities of parties and not what they are at the institution of the proceedings. The ultimate burden of making a just an equitable order is his. A just and equitable Award is not an ultimate findings as to whether the employer is justified or not. Vade Brown & Co. Lyd V. Ratnayake (1986) Bar Association Law Reports 2008 page 398.

In fact according to the provisions of Industrial Disputes Act, Part II and Part III (B) in general the Commissioner is not given any power to take decisions or force any settlement on the parties. He is only a facilitator for the mutual settlement of disputes. If the parties fail to come to a settlement the Commissioner ceases all powers in respect of Industrial Dispute and may refer as a last resort to compulsory arbitration through the Minister concerned with a view to avoid any interruption to the community life. From these observation a "Section 12 settlement" Especially the S. 12(7) gives procedure to follow when parties fail to come to a mutual settelement. These provisions require the Commissioner to propose or promote a settlement among employees as members of their Union.

Having heard the both parties written submissions with the attendant documents its appears to me on a parity of reasoning the evidence and the factual situation stands in favour of the Company than that of the Union because in law and equity it is justifiable. So much so the evidence of the Company is sound and consistant and acceptable in the light of economic content and in legal principles.

Moreover one cannot approbate and reprobate in the context of equity. And therefore the party of the First Part is estopped from claiming any relief whatsoever in the light of above reasoning one could affirmatively conclude it is equitable in principle and stands to reason in favour of the Company.

In the premises I made order that the conduct of the Company and the stand taken by the Company is just and equitable and make no Award.

Accordingly this Award is just and equitable in the circumstances. I make no Award.

T. E. SANTHARAJAN,
Arbitrator.

Colobmo,
25th January, 2018.

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