SUPERINTENDENT OF PUSSELLA STATE PLANTATION, PARAKADUWA
v.
SRI LANKA NIDAHAS SEVAKA SANGAMAYA

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 86/95
H.C. AVISSAWELLA NO. 6/93
MARCH 5, 1996.

Industrial Dispute – Status of Workman – Casual or permanent – mere lable – "casual employee" not sufficient.

The respondent Union on behalf of M. a workman, applied to the Labour Tribunal for relief in respect of the termination of services of the workman who was an employee of the appellant. The appellant's case was that the workman was initially employed in a temporary capacity and was thereafter continued as a casual worker after which his services were terminated; hence he had no right to relief.

Held:

Whilst there is no legal objection to the employment of temporary or casual employees who do not have the rights of permanent employees, the mere label is not sufficient to classify a workman as a casual employee, if the real character of his employment is that of a permanent employee.,

Cases referred to:

1. *Merril Fernando & Co., v. Deimon Singho* (1988) 2 Sri L.R. 242, 245.
2. *Lanka Walltiles Ltd., v. K.A. Cyril* S.C. Appeal 55/88 S.C. Minutes of 9th June 1992; BASLJ Reports (1992) Vol. IV Part II P. 40.
3. *Ratnasabapathy v. Asilin Nona* 61 N.L.R. 548.
4. *Nanayakkara v. The Director General Central Cultural Fund* S.C. Appeal 33/91 S.C. Minutes of 27th January, 1995.
5. *Free Lanka Trading Co., Ltd., v. Commissioner of Labour* 79 N.L.R. (II) 158.

APPEAL from the judgment of the High Court of Avissawella.

L. C. Seneviratne, P.C. with *Lakshman Perera, H. V. Situge, Miss V. H. K. Wickramasighe* for appellant.

Daya Guruge with *Nimal Jayasinghe* for respondent.

Cur. adv. vult.

March 18, 1996
G. P. S. DE SILVA, C.J.,

The respondent union on behalf of M. R. Melinghton, a workman applied to the Labour Tribunal for relief in respect of the termination of services of the said workman who was an employee of the appellant (The Superintendent of Pussella State Plantation) and the Sri Lanka State Plantations Corporation who was the 2nd respondent to the application.

The Labour Tribunal held that the workman was initially employed in a temporary capacity and was thereafter continued as a casual worker after which his services were terminated; hence he had no right to relief. Consequently, the application was dismissed. On an appeal by the union the High Court reversed the order of the Labour Tribunal holding that on the facts of the case, the character of employment of the workman was that of a permanent employee and ordered that he be reinstated with back wages. Hence this appeal.

In 1992 the workman was 27 years of age. He says that his parents had been employed on the Galpussellawa Estate for about 30 years and lived in the estate quarters provided by the estate, until retirement.

The workman was recruited in May 1990 along with others (the total number being about 17 men) to make logs of and remove about 3000 rubber trees which had fallen due to a gale. He says that they completed that work in about one month. But he continued to be employed thereafter until 01.04.91. During that period he was paid monthly, but on a daily rate of Rs. 48/-. He had been employed as a labourer for removing uprooted trees, weeding, clearing roads, tapping rubber, replanting trees and applying fertilizer. It is clear that such work was given to him only on a limited number of days in a month. Hence he had received wages ranging from Rs. 420/- to Rs. 850/- a month. He has thus worked on 173 days when his services were terminated.

Subject to one contradiction the workman also said that he occupied the quarters where his father resided during his employment on the estate. This, however, was denied by witness Chandrasiri, Field Officer who testified for the appellant-employer.

In support of his claim to permanent status, the workman said that Employees' Provident Fund deductions, Trade Union subscriptions, defence levy and welfare society contributions were made from his wages; and that he was also paid new year and festival advances. A monthly deduction of Rs. 35/- was also made from the petitioner's wages as charges due to the Dhobi who washed the clothes of the estate labourers.

The witnesses for the employer admitted the fact that the workman was given a variety of jobs as deposed to by him. But they maintained that such work was only casual in that they so employed him when permanent workmen were not available. Witness Chandrasiri said that this workman's name appeared in R1, the register of casual employees; and that casual employees are not entitled to the facility of purchasing goods on credit from the estate Co-operative Society subject to payments due for such goods being deducted from their salary at the end of the month and remitted to the Society.

The president of the Labour Tribunal held that the workman was not entitled to reinstatement or compensation. In making his decision he relied on views expressed by S. R. de Silva in 'Legal Framework of Industrial Relations in Ceylon', *Merril Fernando & Co. v. Deimon Singho* [1] and the decision of this Court in *Lanka Walltiles Ltd. v. K. A. Cyril.* [2] According to these authorities, a temporary employee employed for a particular job or a casual employee viz. a person whose employment is "by chance and without regularity" does not enjoy the rights available to permanent employees.

The High Court was of the opinion that on the facts, the employment of the workman was of a continuous nature; R1 the casual register was a document maintained for the benefit of the employer; the true character of his employment was permanent; and that the authorities relied upon by the tribunal had no application to this case. Accordingly, the High Court directed reinstatement with back wages, on the basis of Rs. 1248/- a month, calculated at the daily rate of Rs. 46/-.

Mr. L. C. Seneviratne P.C. for the appellant argued that it was legitimate for the employer to have engaged the services of the

workman initially on a temporary basis and thereafter as a casual worker. He relied particularly on the *Lanka Walltiles Ltd. case* (*Supra*). It was submitted that in that case the facts were very much similar to the instant case, but this Court set aside the order made by the Court of Appeal in favour of the workman being of the opinion that as the employment originally offered to the workman was of a temporary nature, he cannot claim wrongful termination of employment.

Mr. Daya Guruge for the respondent union relied on the judgment of T. S. Fernando J. in *Ratnasabapathy v. Asilin Nona* [3] where it was held that whether a workman is casual or a regular employee is a question of fact to be decided on evidence. Mr. Guruge submitted that the Labour Tribunal President had misdirected himself on the evidence but the High Court made the correct decision.

In *Nanayakkara v. The Director General Central Cultural Fund* [4] (where the workman had been employed as a casual worker for a longer period than in the instant case viz. three years), this court held that the mere label is not sufficient to classify a workman as a casual employee. The Court cited *Asilin Nona's case* (*Supra*); also *Free Lanka Trading Co. Ltd. v. Commissioner of Labour* [5] where it was held that an agreement which is facade, to avoid the obligation of the employer and which described the employee as an "independent contractor" would be disregarded by Court; and such workman would be entitled to the protection under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971.

Although *Asilin Nona's case* (*Supra*) is helpful on the principle to be followed in deciding the true nature of employment, the facts there are not similar; for that was a claim under the workmen's Compensation Ordinance where the deceased who had been employed to repair a house for about 5 weeks on daily pay died of an accident in the course of employment. Compensation was allowed on the basis that he was a regular employee.

I am of opinion that the *Lanka Walltiles Ltd. case* (*Supra*) can be distinguished. There too the workman enjoyed facilities which are claimed in the instant case such as EPF contributions. The Court opined that such factors were equivocal. But the important fact is that

the workman was employed on a casual basis as a "fitters mate" for the establishment of a new factory, during the period of installation of machinery at the work site. The Court was of the view that on the basis of the workman's own evidence there was insufficient evidence to show that the workman continued to work, after the production commenced. The evidence in the case before us is different.

It is also relevant to note that in this case, the evidence given on behalf of the employer, itself shows that the description of the workman as a casual employee was a facade. The employer's witnesses have said that as a mater of policy the employment of the workmen in the casual register was being interrupted every month; that for that purpose they were not permitted to work throughout the month; and that this policy was maintained by the establishment, on legal advice.

It seems to me, thereafter, that whilst there is no legal objection to the employment of temporary or casual employees who do not have the rights of permanent employees, in the instant case the facts show that the description of the workman as "casual" is not true; and that the real character of his employment is that of a permanent employee; hence I am in agreement with conclusion of the High Court in that regard and the order made for reinstatement.

However, the order for the payment of back wages, at the rate of Rs. 48/- per day is not justified. In fact, the workman did not engage in regular work. he was content to receive wages on a "casual" basis; there is no evidence that since the termination of his services on 01.04.91, he remained unemployed. Hence, I would vary the order of the High Court for the payment of back wages and direct that the workman be reinstated as a permanent employee, without back wages with effect from 15.04.1996. Subject to this variation, I dismiss the appeal and affirm the judgment of the High Court. The appellant is directed to pay the respondent union costs in a sum of Rs. 1500/-.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed, subject to variation of the order for payment of back wages.