LIYANAGAMAGE

v.

ROAD CONSTRUCTION & DEVELOPMENT CO. (PVT) LTD.

SUPREME COURT,
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 3/93.
H.C. COLOMBO NO.
H.C. A.L.T. 2/90.
LT. NO. 2/84/88.
JULY 22, 1993.

Industrial Dispute – Probationary employment – Unfair Labour Practice – Mala Fides – Rights to terminate services during pobationary period.

(1) The appellant accepted a probationary appointment under the respondent though at the time he was a confirmed employee of Eng-Seng the predecessor of the respondent. Although the appellant was an experienced technical officer his status under the contract of employment was that of a probationer who is liable to be discontinued at the option of the employer.

(2) But the further question arises whether the termination of services was *mala fide:* There was no allegation of unsatisfactory service. An attempt was made to appoint him (despite his being a trained officer) a trainee technical officer, the termination was oral without a report on his work though it was indicated a report

would be forthcoming and an allegation of irresponsible behaviour during an inquiry into a theft incident at the worksite was made without any evidence of such an inquiry being produced.

On the available evidence the termination of services savours of an arbitrary act. Hence the impunged termination was *mala fide*.

Cases referred to :

1. *Moosajees Ltd. v. Rasaiah* [1986] 1 Sri LR 365 (CA).
2. *Caltex India Ltd. V. Second Industrial Tribunal High Court Calcutta* (1963) LLJ 156.
3. *Ceylon Cement Corporation v. Fernando* [1990] 1 Sri LR 361.
4. *Utkal Machinery Ltd. v. Santi Patnaik* A1R 1968 SC 398, 400.

Appeal from judgment of the High Court.

Faiz Mustapha, P.C. with *Amarasiri Panditharatne* and *M. Welikala* for Appellant.
P. A. Ratnayake S.S.C. for Respondent.

Cur. adv. vult.

August 23, 1993.
KULATUNGA, J.

The appellant complained to the Labour Tribunal against the termination of his employment by the respondent company on 11.10.87. The respondent's defence was that the impugned termination was effected whilst the appellant was under probationary employment and that in the absence of evidence that the respondent was actuated by *mala fides*, the tribunal was not competent to examine the ground of the said termination.

The Labour Tribunal held that the appellant was in fact a permanent employee of the respondent company, having been recruited into its service on 01.07.87 from service under its predecessor Eng-Seng Engineering (Pvt) Ltd. ("Eng-Seng"); that the imposition of a period of probation as a condition of the appellant's new employment was an unfair labour practice; and hence, the termination of his employment without assigning any reason was unjustified. In the result, the tribunal directed the reinstatement of the appellant with effect from 01.10.90 and the payment of 23 months salary amounting to Rs. 82,250/-.

The High Court set aside the order of the Labour Tribunal and dismissed the appellant's application being of the opinion that the appellant had clearly consented to employment under the respondent subject to probation and was liable to be discontinued during the period of probation. The Court relied on the decision in *Moosajees Ltd. v. Rasaiah* [1] which held that the employer is not bound to show good cause where he terminates the services of a probationer and that the tribunal cannot sit in judgment over the decision of the employer. It can examine the grounds of termination only for the purpose of finding out whether the employer had acted *mala fide* in doing so. The appellant appeals to this Court.

The appellant served as a Technical Officer under Eng-Seng from 01.11.85. Eng-Seng was engaged in a joint venture with the Road Development Authority (a public corporation under the Ministry of Highways). The appellant was in charge of work in the Tambuttegama area coming under the Anuradhapura Construction site. At that stage it was decided to continue the joint venture work by a new company to be incorporated whose employees would consist of all the employees of Eng-Seng and those of the R.D.A. who were attached to the joint venture, subject to such employees consenting to be employed by the proposed new company.

By a letter dated 23.06.87 (A1), the Chairman R.D.A. offered the appellant employment in the proposed new company on a salary not less than that paid by Eng-Seng. He was requested to signify acceptance before 30.06.87 and informed that a formal letter of appointment containing the detailed conditions of employment in the proposed new company would be issued to him upon its incorporation. Thereafter, the new company (the respondent company) had been incorporated and it is common ground that the appellant became an employee thereof with effect from 01.07.87 in the same capacity and salary as he enjoyed under Eng-Seng. He also continued with the same work. No formal letter of appointment was issued to the petitioner until the lapse of some time.

In the meantime, Director Works R.D.A. by his letter dated 14.07.87 (A4) addressed to the appellant informed him that the respondent company is owned by the R.D.A. and requested the appellant to perfect the annexed application form (A5) for employment in the respondent company and to return the same

immediately. A4 states that the emoluments and conditions of service in such employment will generally be not less than those enjoyed in the R.D.A.

We next have the perfected application form of the appellant (R2) according to which he had 15 years working experience in civil work, 3 years in the U.A.E. as a Pre-cast Foreman, 1 year in Saudi Arabia as a Road Works Foreman and 1 1/2 years at the Victoria Project as a Section Foreman (executive grade). Thereafter, he served Eng-Seng from 1985 as a Technical Officer. In the space reserved for remarks in his application there is an official endorsement which reads:

> "He is an able technical officer for concreting, sand sealing and metal consolidation".

On these facts it would appear that at the time of his appointment by the respondent, the appellant was a confirmed employee under Eng-Seng. The respondent has not produced any evidence to the contrary.

Notwithstanding the above facts a letter of appointment dated 27.07.87 (the office copy of which has been produced marked R1) was issued to the appellant, appointing him as a Technical Officer with effect from 01.07.87 subject to probation for a period of 6 months from the date of his appointment. It is not clear as to exactly when the appellant received the original of R1 but there is a typed statement at the foot thereof which has been signed by the appellant on 19.08.87 whereby he accepts the appointment, subject to the terms and conditions set out therein. In his evidence the appellant states that he signed it when it was brought to his work place by the site engineer.

The circumstances of the termination of the appellant's employment are quite interesting. Thus, according to his evidence (which has not been denied) on 11.10.87 the Project Manager told the appellant that it was necessary to transfer him to another section and directed him to meet the General Manager. Accordingly, the appellant met the G.M. who told him that the proposed transfer would be considered on receiving a report from the Project Engineer about

his work pending which he should stay at home. He therefore kept away from work and met the G.M. again on 16.11.87 when he was informed that his services have been terminated and that he will receive a further communication regarding his earned wages. He then received a telegram (A2) directing him to meet the G.M. on 05.02.88 which he did. On the G.M.'s instructions the appellant met the Personnel Manager who requested him to fill a form for recruitment as a Trainee Technical Officer; whereupon the appellant replied that there was no necessity for such training as he had training abroad. Thereafter he went home.

According to his evidence before the Labour tribunal, the appellant's position is that he never became a new employee of the respondent company but that he was absorbed into its service from Eng-Seng with effect from 01.07.87 and continued to work in the same capacity as he held under the previous employer. He does not accept the period of probation imposed by R1. On behalf of the respondent, it is contended that in view of his written consent to R1, the appellant is bound by the condition as to probation. This contention is tenable. Hence his status under the contract of employment is that of a probationer who is liable to be discontinued at the option of the employer.

In defence of the termination of the appellant's services learned Senior State Counsel cited the following passages from *Caltex India Ltd. v. Second Industrial Tribunal High Court Calcutta* [2] –

> "Whether a probationer has put in satisfactory service or not rests with the satisfaction of the petitioner company. That satisfaction cannot be objectively tested and an employer is not bound to give any reason if he does not confirm a probationer on the expiry of the period of probationship".

Counsel also cited *Ceylon Cement Corporation v. Fernando* [3] in which the employer's position was that he terminated the employment of the applicant during the period of probation on the ground that his work was found to be unsatisfactory. It was held that in the absence of *mala fides* the employer's decision cannot be impeached before the Labour Tribunal.

Learned President's Counsel for the appellant cited *Utkal Machinery Ltd. v. Santi Patnaik* [4] (Five Judges) where the law has been stated thus:

> ". . . The management has the right to terminate the services of the respondent without assigning any reason. But if the validity of the termination is challenged in an industrial adjudication, it would be competent to the industrial tribunal to enquire whether the order of termination has been effected in the *bona fide* exercise of its power conferred by the contract. If the discharge of the employee has been ordered by the management in the *bona fide* exercise of its power, the industrial tribunal will not interfere with it, but it is open to the industrial tribunal to consider whether the order of termination is *mala fide* or whether it amounts to victimization of the employee or an unfair labour practice or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in *bona fide* exercise of the power arising out of the contract. In such a case it is open to the industrial tribunal to interfere with the order of the management and to afford proper relief to the employee".

Counsel submits that on the facts of this case, the termination of the appellant's employment was *mala fide* and amounted to an unfair labour practice.

In *Moosajee's* case (*supra*) the Court of Appeal found that the workman was not putting in satisfactory services to the satisfaction of the employer and the termination of his services was not *mala fide*. In the Ceylon Petroleum Corporation case (*supra*) the Court observed that there was no material placed before the Labour Tribunal touching on *mala fides* and hence the Labour Tribunal should not have interfered with the impugned termination of services. In the instant case, the Labour Tribunal decided that the appellant is a permanent employee and hence his discontinuance without cause was unjustified. The finding that the appellant is a permanent employee is contradicted by his letter of appointment. Hence the basis of the Tribunal in giving him relief is faulty. But the matter does not end there because even accepting that the appellant is a probationer it has to be considered whether the termination of his services was *mala fide*. The following facts are relevant in that regard.

1. Mr. K. M. Silva, the Personal Manager of the respondent company was the only witness called by the management. He produced R1 (the appellant's letter of appointment) and said that the appellant's services were terminated during his period of probation but did not claim to have done so on the ground that the appellant's services were unsatisfactory. The appellant himself gave evidence and called Mr. Berny Wijesuriya the General Manager of the respondent company. Even during their cross-examination the management did not claim to have discontinued the appellant on the ground of unsatisfactory service.

2. On the other hand, the evidence clearly shows that the appellant has over fifteen years experience, both here and abroad and was recommended for appointment as being an "able Technical Officer" who had specialised in particular types of work. Hence, (in the absence of an allegation of unsatisfactory service) it is difficult to understand why the management discontinued him during his probationary period or attempted to appoint him as a **Trainee Technical Officer** when he met the G.M. on 05.02.88.

3. The termination of services on 11.10.87 was oral, pending a report on the appellant by the Project Engineer. There is no evidence of any such report but on 16.11.87 the G.M. orally confirmed the fact that his services have been terminated. It is also relevant to note that in the respondent's answer before the Labour Tribunal it is alleged that in the course of an inquiry into a theft at his site, it was revealed that the appellant had acted in an irresponsible manner; but no evidence whatever of such inquiry has been produced.

4. In the light of the available evidence the impugned termination of services savours of an arbitrary act.

In the circumstances, I am satisfied that the impugned termination is *mala fide* or "so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in *bona fide* exercise of the power arising out of the contract". The learned High Court Judge was in error when he observed that there was no allegation of *mala fides* on the part of the employer.

Learned Senior State Counsel submitted that in any event the relief of reinstatement granted by the Labour Tribunal is not justified in that in his letter dated 25.11.87 (R3) addressed to the management the appellant only demanded his earned wages whilst in his application made to the Labour Tribunal he only sought compensation. However, the appellant had at no stage declined reinstatement. The proceedings before the Labour Tribunal show that the learned President has considered the nature of the relief which was appropriate in this case. I, therefore, see no reason to interfere with the order made by the Labour Tribunal.

For the foregoing reasons, I allow the appeal, set aside the judgment of the High Court and restore the order made by the Labour Tribunal. I also direct the respondent to pay the appellant costs in a sum of Rs. 2500/-.

G. P. S. De SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.