BROWN & CO. LTD
V.
SAMARASEKERA

SUPREME COURT.
G.P.S. DE SILVA, C.J.
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 20/95.
L.T. COLOMBO NO. 13/11634/89.
H.C. NO.590/92,
23 JANUARY, 02 MARCH, 03 APRIL, 8 &16 MAY, 1995.

Industrial Dispute - Termination of services - Compensation - Probationer's services - Extension of probation.

The principles relating to the service of a probationer are -

1. (i) Unless the letter of appointment otherwise provides, a probationer is not entitled to automatic confirmation on completion of the period of probation. If then he is allowed to continue his service, he continues as a probationer.

   (ii) Even in the absence of any additional terms and conditions, a simple probation clause confers on the employer the right to extend the probation.

   (iii) The employer is not bound to show good cause for terminating a probationer's service. The Labour Tribunal may examine the grounds of the decision only for the purpose of finding out whether the termination was *mala fide* or amounted to victimization or an unfair labour practice.

   (iv) The question whether the probationer's services were satisfactory is a matter for the employer. If cannot be objectively tested. If the employer decided that the probationer's services were not satisfactory, it would be inequitable and unfair, in the absence of *mala fides*, to foist the view of the tribunal on the management.

   (v) A suggestion of *mala fides* is not sufficient. The Tribunal must make a finding that the termination of a probationer's service was actuated by *mala fides* or ulterior motive.

2. At the time of the impugned termination of services, the Respondent

was a probationer. His services were terminated after giving him two extensions of his period of probation. The fact that such an opportunity was given would negative the existence of *mala fides*. In the circumstances the impugned termination of services was justified and the Respondent is not entitled to compensation.

Cases referred to:

1. *Hettiarchchi v. Vidyalankara University* 76 NLR 47.
2. *Ceylon Ceramics Corporation v. Premadasa* (1986) 1 Sri LR 287 (C.A.)
3. *Elsteel Ltd. v. Jayasena S.C.* Appeal No. 20/88 - S.C.Minutes of 06.4.90.
4. *Moosajees Ltd. v. Rasaiah* (1968) 1 Sri LR. 365 (C.A.)
5. *Utkal Machinery Ltd. v. Santi Patnaik* A1R 1966 S.C. 1051, 1052 (1966) 1 LLJ 398, 400.
6. *Liyanagamage v. Road Construction & Development (Pvt.) Ltd.* S.C. Appeal No. 3/95 S.C. Minutes of 23.08.93.
7. *Shafeeudeen v. Sri Lanka State Plantations Corporation* - S.C. Appeal No. 18/93 S.C. Minutes of 18.01.94.
8. *Caltex India Ltd. v. Second Industrial Tribunal, High Court of Calcutta* (1963) LLJ 156.
9. *Ceylon Trading Co. Ltd. v. The United Tea, Rubber and Local Produce Workers Union* (1986) CALR Vol. 1162 (C.A.)
10. *Ceylon Cement Corporation v. Fernando* (1990) 1 Sri LR 361 (C.A.)
11. *Swarnalatha Ginige v. University of Sri Lanka* S.C. Appeal No. 66/93 S.C. Minutes of 23.05.95.

APPEAL from judgment of the High Court.

S. Sivarasa P.C. with *Gihan Ranawaka* for Appellant.

Gamini Senanayake with *C.L. Wickremanayake* for Respondent.

Cur.adv.vult.

May 19, 1995.
KULATUNGA, J.

The Labour Tribunal, by its order dated 25.08.1992 held that the services of the Respondent workman had been unjustifiably terminated and awarded him compensation in a sum of Rs. 396,000/- being three years salary. An appeal to the High Court by the employer was dismissed. The employer now appeals to this Court.

The workman in his application to the tribunal said that he had been appointed a senior executive under the Appellant on 01.03.88; that his period of probation was twice extended on the ground that his services were not satisfactory; and that upon the expiration of the extended period of probation, his services were terminated, with effect from 31.05.89. He complained that his services were terminated for alleged failure to increase the turn over in the Electrical Department; but such termination was unjustified in that firstly, an increase in the turn over was not a condition of his employment; secondly, there was in fact an increase in the turn over during the period of his employment.

The Appellant pleaded that the workman was by his letter of appointment (R1), appointed subject to a period of nine months probation which was twice extended as his performance was not upto expectations. Thereafter, his services were terminated, in the best interest of the management. The Appellant claimed that the workman was a probationer and was hence not entitled to relief in law or equity, on termination of his probationary services.

At the inquiry, Clive de Silva, Director Engineering gave evidence on behalf of the management and also produced documents R1-R13. He reiterated the defence that the Petitioner was a probationer. He maintained that his services were terminated as his performance was not satisfactory. The workman did not give evidence but produced documents A1-A27.

According to the evidence led at the inquiry, the nine months probation under the workman's letter of appointment was due to expire on 30.11.1988. Prior to that the Director Personnel, by his report dated 28.10.1988 (R13), informed the Director Engineering that as the workman had not performed satisfactorily, he was unable to recommend his confirmation. However, the management did not terminate his services but by letter dated 28.11.88, extended his probation until 15.02.89 with a warning that if there was no improvement in his performance his probationary services will have to be terminated (R3). There followed a correspondence between the workman and the management in the course of which the workman maintained that whilst it was not a condition of his service that he should increase the turn over of his division,

he had in fact achieved such increase. The management by its letter dated 24.02.89 (R7) informed the workman that his explanations were not acceptable. R7 added -

"We are however granting a final extension of three months ending on 15th May, 1989 of your probationary period, at the end of which we would decide on your confirmation"

Thereafter, on 12.05.89 the management terminated the workman's services, with effect from 31.05.89.

The learned President of the Labour Tribunal held that whilst the workman's services could have been validly terminated upon the expiry of the initial period of probation, the impugned termination after extensions of probation, was unjustified in that there was no provision in the contract of employment for extending probation; and that the second extension of probation was made nine days after the expiry of the period of the first extension. Therefore, the question of probation in the termination of the workman's services did not arise. Hence, the management had to rely on its position that the Appellant had failed to increase the turn over. On an analysis of the evidence, the President held that there was an increase in the turn over and on that basis made order in favour of the workman. The President also surmised that the failure to confirm the workman was due to a policy in the company for reducing staff.

The principles relating to the service of a probationer may be summarised thus:

(i) Unless the letter of appointment otherwise provides, a probationer is not entitled to automatic confirmation on completion of the period of probation. If then he is allowed to continue his service, he continues as a probationer. *Hettiarachchi v. Vidyalankara University* [1] *Ceylon Ceramics Corporation v. Premadasa.* [2]

(2) Even in the absence of any additional terms and conditions, a simple probation clause confers on the employer the right to extend the probationary period; *Elsteel Ltd. v. Jayasena* [3]

(3) The employer is not bound to show good cause for terminating a probationer's service. The Labour Tribunal may examine the grounds of the decision only for the purpose of finding out whether the termination was *mala fide* or amounted to victimization or an unfair labour practice.

Moosajees Ltd. v. Rasaiah[4], *Utkal Machinery Ltd. v. Santi Patnaik*[5], *Liyanagamage v. Road Construction and Development (Pvt) Ltd.*[6], *Shafeeudeen v. Sri Lanka State Plantations Corporation.*[7]

(4) The question whether the probationer's services were satisfactory is a matter for the employer. It cannot be objectively tested. If the employer decided that the probationer's services were not satisfactory, it would be inequitable and unfair, in the absence of *mala fides*, to foist the view of the tribunal on that of the management.

Caltex India Ltd, v. Second Industrial Tribunal High Court of Calcutta. [8] *Ceylon Trading Co. Ltd. v. The United Tea, Rubber and Local Produce Workers Union,*[9] *Ceylon Cement Corporation v. Fernando .*[10]

(5) A suggestion of *mala fides* is not sufficient. The tribunal must make a finding that the termination of a probationer's service was actuated by *mala fides* or ulterior motive. *Swarnalatha Ginige v. University of Sri Lanka.*[11]

In *Shafeeudeen's* case (*supra*) it was urged that *Moosajees* case has, by its failure to consider the existence of wide power in the Labour Tribunal under sections 31B(4) and 31C(1) of the Industrial Disputes Act, denuded the rights of a probationer as against a confirmed workman when in the light of the definition of "workman" in section.48 there was no justification for doing so. This Court held that there is no error in the decision in Moosajees case and that the said decision is within the law as stated in *Liyanagamage's* case (*supra*) which adopted the decision in *Utkal Machinary Ltd.* case (*supra*). The Court also observed that even though a decision has to be just and equitable whether or not the workman is a probationer, the common law rights of the employer in respect of a probationer cannot be totally disregarded. A similar argument as was advanced in *Shafeeudeen's* case appears in the written submissions for the Respondent. Learned Counsel appears to submit:

(a) that the prevailing law is more favourable to a probationer than the law as set out in the decisions cited at 4 above; and

(b) that in terms of the law; justifiability of the termination of a probationer's service should be decided on the same principles of equity applicable to a permanent employee.

I am unable to agree with these propositions.

The workman in the instant case was subject to simple probation clause which *inter alia*, provided that "confirmation of employment at the end of the probationary period shall be in writing and at the discretion of the company". Applying the above principles to the facts, I hold that the Labour Tribunal misdirected itself when it held that the Appellant could not validly extend the workman's period of probation and that the question of probation did not arise. That question was in the forefront of the case. But the tribunal failed to decide it. Thereafter, the tribunal proceeded to judge the issue as to whether the workman's services were satisfactory, in derogation of the principle that, in the absence of *mala fides*, the tribunal cannot foist its own view on that of the management.

I hold that at the time of the impugned termination of services, the Respondent was a probationer. His services were terminated after giving him two extentions of his period of probation. The fact that such an opportunity was given would negative the existence of *mala fides*. In the circumstances, the impugned termination of services was justified and the Respondent is not entitled to any compensation.

Counsel for the Respondent submits that as in *Liyanagamage's* case (*supra*), here too there is evidence of an unfair labour practice and the termination was so capricious or unreasonable as to lead to the inference that it had been passed for ulterior motives and not in the *bona fide* exercise of the power arising out of the contract of employment. In support, he submits that the employer was "motivated by the objective of reducing staff". However, in Liyanagamage case, the workman was admittedly an able technical officer with over 15 years experience in his field and the Labour Tribunal held that he had been subjected to unfair labour practice. There were also numerous facts which

indicated that the termination of his probationary service was *mala fide.* Here there is no such evidence, no finding, but only a surmise by the tribunal that the impugned termination was due to a policy in the company for reducing staff. Therefore, *Liyanagamage's* decision is of no assistance in deciding this case.

The learned High Court Judge has held that by failing to raise a preliminary issue that the applicant could not proceed for failure to aver malice and by contesting the case on the issue as to whether the applicant's work was satisfactory, the Appellant had submitted to the jurisdiction of the tribunal concerning the ground on which the termination has been justified. Hence the question of malice was irrelevant; and there was no ground to interfere with the order of the tribunal.

The High Court has misdirected itself on the law in approaching the case as it did. In a case such as this, there is no need for the employer to raise the matter as a preliminary issue; and no question of submitting to the tribunal's jurisdiction arises if the employer were to reagitate the grounds on which he terminated the services of a probationer. Nor does it relieve the tribunal of its duty to decide the matter according to law on the basis of the evidence before it.

For the foregoing reasons, I allow the appeal, set aside the judgment of the High Court and the order of the Labour Tribunal. The Respondent's application made to the tribunal is dismissed. No costs.

G.P.S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.