CEYLON MERCANTILE UNION
v.
CEYLON COLD STORES LTD. AND ANOTHER

SUPREME COURT.
AMARASINGHE, J.
DHEERARATNE, J.
WIJETUNGA, J.
S.C. APPEAL NO. 51/95
C.A. NO. 941/84
SEPTEMBER 5, 1995.

Industrial Dispute – Termination of services of probationer within the probationary period – Right to strike – Amendment to Section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 by Act No. 51 of 1988.

The 'confirmed' and 'probationary' employees are obviously not similarly circumstanced. Though both categories are 'workmen' in the sphere of Industrial Law, their rights and privileges are not the same.

In the case of the probationer, the employer is not required to show good cause in respect of termination during the period of probation, so long as he acts *bona fide*. The grounds of termination can be examined only for the limited purpose of ascertaining whether the employer has acted *mala fide* or whether such termination amounts to victimisation or an unfair labour practice.

A probationer has as much a right to strike as a confirmed workman and the proper exercise of that right cannot place the probationer in jeopardy insofar as the employer's right to terminate his services during the period of probation is concerned.

It is axiomatic that a probationer who joins a Trade Union should enjoy all the rights and privileges that go with such membership and should not be discriminated against on the basis of his rank and/or status as a probationer.

Cases referred to:

1. *Venkatachrya v. Mysore Sugar Co. Ltd.* A.I.R. 1954 Mysore 175.
2. *State Distilleries Corporation v. Rupasinghe.* SC 91/93 SCM 2.3.1994
3. *Moosajee Ltd. v. Rasiah* [1986] 1 Sri L.R. 365.
4. *Ceylon Cement Corporation v. Fernando.* [1990] 1 Sri L.R. 361.
5. *Elsteel Ltd. v Jayasena* SC 20/88 SCM 6.4.1990.
6. *Brown & Co. Ltd. v. Samarasekera.* SC 20/95 SCM 19.5.1995.
7. *Tramp Shipping Corporation v. Greenwich Marine Inc.* [1975] 2 All ER 989.

8. *Assam Oil Co. Ltd. v. Its Workmen* (1960) 1 LLJ 587 (SC)
9. *National Tobacco Co. of India Ltd. v. 4th Industrial Tribunal* (1960) 11 LLJ 175 (Cal).

APPEAL from judgment of Court of Appeal.

Gomin Dayasri with *Aravinda Aturupana* for 2nd Respondent-Appellant.

S. C. Crossette Thambiah with *A. Sivendran* for Petitioner-Respondent.

Cur. adv. vult.

October 25, 1995

WIJETUNGA, J.

The 2nd respondent-appellant (appellant) is a Trade Union duly registered under the Trade Unions Ordinance. The petitioner-respondent (1st respondent) is a Company duly incorporated under the Companies Ordinance. The 1st respondent-respondent (2nd respondent) was the Arbitrator appointed by the Minister of Labour to whom an industrial dispute between the appellant and the 1st respondent was referred for settlement by arbitration. The appellant and the 1st respondent had entered into and were bound by a valid Collective Agreement No. 7 of 1981. The Minister made the reference to arbitration by his order dated 5.4.83 under the powers vested in him by Section 4(1) of the Industrial Disputes Act as amended, read with the Industrial Disputes (Special Provisions) Act No. 37 of 1968.

The matters in dispute between the parties were whether the 1st respondent was justified in –

(a) terminating the services of the workmen referred to in Schedule A who are members of the Ceylon Mercantile Union by letters dated 15.11.82; and

(b) terminating the probationary employment of the workmen referred to in Schedule B, who are members of the Ceylon Mercantile Union by letters dated 19.11.82.

The workmen referred to in Schedule A numbering 8 were initially employed by the 1st Respondent on a casual or temporary basis and

were thereafter given permanent employment with effect from 15.11.82, subject to a period of 6 months' probation on the terms and conditions set out in their letters of appointment. One of the said terms was that they will be required to register the times of arrival and departure by punching a Time Card provided for the purpose by the 1st respondent. Each of the said workmen signed and returned the duplicate copies of the letters of appointment, as required by the 1st respondent, signifying their acceptance of the appointments on the terms and conditions stipulated therein.

On 15.11.82, seven of the said eight workmen reported for work but refused to mark their attendance in the manner stipulated in their letters of appointment. The 8th workman reported for work on the following day, but she too refused to mark her attendance in the said manner. The 1st respondent's Chief Executive called upon the said workmen to mark their attendance by punching the Time Cards as stipulated and on their failure to do so, the services of the said workmen were terminated with immediate effect.

The appellant Union thereupon called a strike of its members who were employees of the 1st respondent and the said strike continued up to 10th April, 1983.

The workmen referred to in Schedule B were 20 in number, who were also probationary employees of the 1st respondent. The appellant states that they too struck work as from 10.30 a.m. on 16.11.82 as indicated by the Union. The 1st respondent terminated their services by letters dated 19.11.82 (P.6), on the ground that they kept away from work without the prior sanction and approval of the management.

The inquiry of the aforesaid arbitration commenced on 13.7.83 and was concluded on 21.3.84. The 2nd respondent delivered his Award dated 26.4.84 holding that on the evidence led before him, the termination of services of the said workmen in Schedules A and B was unjustified and granting them the relief of reinstatement with back wages.

The 1st respondent being aggrieved by the said Award made an application to the Court of Appeal for a Writ of Certiorari (CA. 941/84) to quash the same.

The Court of Appeal by its judgment dated 27.1.95 held that the Award was bad in law and granted a Writ of Certiorari quashing it.

The appellant sought **special leave** to appeal to this Court from the judgment of the Court of Appeal. This Court granted special leave to appeal only in respect of the workmen referred to in Schedule B of the terms of reference aforesaid, on the following **questions of law** as agreed upon by Counsel:–

(i) Was the termination of the 20 workmen referred to in Schedule B who are probationers justifiable, when the respondent Company continued in employment the other employees who participated in the same strike?

(ii) Can persons holding the status of probationer be victimized and/or discriminated against in the event they participated in a strike?

(iii) If the respondent Company condones the employees who are not probationers for any act for which a probationer is punished, would it amount to victimization and/or discrimination?

The Court of Appeal in holding the Award of the 2nd respondent to be bad in law, made reference to the following matters which it considered to be errors:–

(i) holding that even though the workmen were probationers, the management should yet have asked for their explanation before the termination of their services,

(ii) considering the matter on the basis of equity without resting it on the evidence,

(iii) failure to treat the matter on a **just and equitable** basis not only from the point of view of the employees but also from that of the employer,

(iv) not taking note of the fact that it is settled law that the services of a probationer can be terminated without any reasons being adduced unless the action of the management was based on malice or *mala fides.*

Learned **Counsel for the appellant** agreed that the workmen in the 2nd Schedule were on probation. He complained that all the workmen who went on strike and returned to work after the strike, other than those on probation, were permitted to continue in employment; but the services of the probationers were terminated on the basis that they 'kept away from work from 17th November, 1982, without the prior sanction and approval of the management'. He contended that, under the statutes in the realm of Industrial Law, including the Industrial Disputes Act and the Trade Unions Ordinance, all workmen are treated equally and uniformly and are entitled to the same protection, whether they be probationers or otherwise. As every workman has a legitimate right to strike, the fact that he is a probationer does not deprive him of that right. It was his submission that the 1st respondent had terminated the services of *those workmen who held the status of probationers* purely because they held that rank and/or status. He further submitted that the probationers are also entitled to the benefits of the 'just and equitable rule' enshrined in the Industrial Disputes Act, in the event the termination was in consequence of a *mala fide* reason, victimization or discrimination. He sought to base his claim of alleged victimization and/or *mala fides* on the premise that the employer failed to treat the probationers and the non-probationers on an equal footing and that the probationers' services have been terminated on the basis of their rank and/or status. He argued that an employer who treats the employees on a subjective basis is guilty of *mala fides.*

He also adverted to the constitutional right guaranteed to every citizen under Article 14(1)(d) to join a Trade Union. Where, therefore,

a workman has the right to join a Trade Union, the question arose whether he can be penalized for participating in Trade Union action. He submitted that a probationer enjoyed no lesser rights in that regard than any other workman. The Court of Appeal had proceeded merely on the basis that where a workman was a probationer, his services can be terminated without a reason being adduced, but had failed to examine the question of *mala fides* and victimization and whether the reason for termination or the punishment meted out was justifiable.

On the other hand, learned **Counsel for the 1st respondent** submitted that the 20 probationers in Schedule B, who at that time were not members of the appellant Union, had applied to join the Union shortly before the strike commenced in order to participate in the strike and had kept away from work without any intimation to the management as regards their absence. The respondent thereupon served on them the letters of termination aforesaid on the basis that they kept away from work during the probationary period without the prior sanction and approval of the management. There was no victimization or discrimination on the part of the management in arriving at this decision. He submitted that it is settled law that if the employer in good faith is not satisfied with the conduct of a probationer, he has the right to terminate his services and the reasons for such termination cannot be objectively assessed. The grounds of termination can be examined only for the limited purpose of ascertaining whether the element of *mala fides* exists. The reason for terminating the employment of the said 20 workmen, he submitted, cannot be considered to be irrational, arbitrary, capricious or so unreasonable as could lead to the inference that it had been exercised *mala fide.* This was a *bona fide* exercise of the employer's right to be the sole judge of the probationer's suitability for continued employment.

It is relevant to note that the 20 probationers were not members of the petitioner Trade Union up to the time that the Union decided to call a strike and that they had applied to the Union for membership with a view to participating in the strike. Learned Counsel for the

appellant himself conceded that their names were not included for purposes of 'check-off' as at the date of this strike, which meant that there was no intimation by these workmen to the employer that they were members of the appellant Union. This fact assumes much significance in the light of the letters of termination sent by the 1st respondent (P6) where it is stated *inter alia* as follows:-

> "You have during the period of probationary employment, kept away from work, from 17th November, 1982, without the prior sanction and approval of the management. We have to date not received any intimation from you as to the reason for your absence.
>
> We, therefore, write to advise you that your probationary employment has been terminated with effect from 17th November, 1982."

The learned Arbitrator, in the course of his award states that "the only intimation that the management gets of an employee of their joining the Union is through the authorisation by such a member for the deduction of Union dues (dues check-off) from his salary" and "it was evident from their affidavits that practically all the workmen in Schedule B had handed over their applications for membership of the Union by 15th November, 1982".

Although where the Branch Union is concerned, their acceptance of the workman's application may be the acceptance of his membership, it does not follow that the employer thereby has notice of such workman's membership of the Union.

The Arbitrator then goes on to state that "If the management found the absence of the 20 workmen in Schedule B from work inexplicable, seeing that, according to their books, these workmen were not members of the Union and a strike by Union members was on, the recognised course of action for the management was to have called for explanation of their absence from the concerned workmen, without resorting to the drastic course of action of summary dismissal; the fact that the workmen were on probation did not place them outside the coverage of this course of action."

I am unable to agree with this proposition. There was no duty cast on the employer to call for explanation of their absence from these workmen, who admittedly were probationers.

As was stated in *Venkatacharya v. Mysore Sugar Co. Ltd.*, [1] "obviously a probationer is not in the same position as others in service. He is in a state of suspense... *prima facie* his rights and claims against the employer are less than those of others. The period denotes the time up to which he will be on trial and not an assured duration of service."

In *State Distilleries Corporation v. Rupasinghe* [2], Fernando, J. dealing with the two categories of confirmed and probationary workmen states as follows: "What then is the principal difference between confirmed and probationary employment? In the former, the burden lies on the employer to justify termination; and this he must do by reference to objective standards. In the latter, upon proof that termination took place during probation, the burden is on the employee to establish unjustifiable termination, and the employee must establish at least a *prima facie* case of *mala fides*, before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was objectively justified."

The 'confirmed' and 'probationary' employees are obviously not similarly circumstanced. Though both categories are 'workmen' in the sphere of Industrial Law, their rights and privileges are not the same. The cause for termination of services of a confirmed workman would mostly fall within the ambit of misconduct or on disciplinary grounds. A tribunal is thus competent to examine not merely whether such termination is unlawful but also whether it is unjust. The burden is on the employer to justify the termination, viewed objectively.

But, in the case of the probationer, the employer is not required to show good cause in respect of termination during the period of probation, so long as he acts *bona fide*. The grounds of termination can be examined only for the limited purpose of ascertaining whether the employer has acted *mala fide* or whether such termination amounts to victimization or an unfair labour practice –

Moosajee Ltd. v. Rasiah [3], *Ceylon Cement Corporation v. Fernando* [4], *Elsteel Ltd. v. Jayasena* [5], *Brown & Co. Ltd. v. Samarasekera* [6].

Malhotra in The Law of Industrial Disputes (1968 edition) states at pages 479 - 481 : "It is, however, for the party alleging *mala fides* to lead reliable evidence in support of the said plea. A finding that the management has not acted *bona fide* will ordinarily not be reached if the materials are such that a reasonable man could have come to the conclusion which the management has reached... In taking disciplinary action an employer would be considered to be acting not *bona fide* if he is prompted or motivated by 'unfair labour practice' or 'victimization'... The line of demarcation between the cases of 'unfair labour practices' and 'victimization' is very slender and quite often invisible. The concepts if not synonymous at least considerably overlap".

Relying on the amendment to Section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 by Act No. 51 of 1988 the **appellant submitted** that in terms thereof, it becomes imperative even in the case of probationers for the employer to notify such workmen the reasons for termination in writing. The amending Act has no application to the instant case as the termination took place in November, 1982. In any event, the reason for termination has been set out in the letters dated 19.11.82 (P. 6).

The position of the employer is that the workmen concerned kept away from work from 17.11.82 without the prior sanction and approval of the management and no intimation had been received as at 19.11.82 indicating the reason for their absence. The appellant on the other hand states that these workmen were on strike, the right to which is a legitimate weapon in the armory of every employee, whether he be a probationer or otherwise.

There is no dispute that "the right to strike is one of the most fundamental rights enjoyed by employees and their Unions and is an integral part of their right to defend their collective economic and social interests" - S. R. de Silva. The Legal Framework of Industrial Relations in Ceylon, at page 117.

Under the Trade Unions Ordinance, a strike 'means the cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are, or have been, so employed, to continue to work or to accept employment'. It has the same meaning under the Industrial Disputes Act too.

In the words of Lord Denning, 'A strike is a concerted stoppage of work by men done with a view to improving their wages or conditions, or to give vent to a grievance or make a protest about something or other, or supporting or sympathising with other workmen in such endeavours.' – *Tramp Shipping Corporation v. Greenwich Marine Inc.*, [7].

I have no hesitation in holding that a probationer has as much a right to strike as a confirmed workman and the proper exercise of that right cannot place the probationer in jeopardy insofar as the employer's right to terminate his services during the period of probation is concerned. For, as Malhotra *(ibid)* states at pages 480 – 481, citing *Assam Oil Co. Ltd. v. Its workmen* [8] and *National Tobacco Co. of India Ltd. v. Fourth Industrial Tribunal* [9], "It is not open to an employer to punish or dismiss his employee solely or principally for the reason that he had joined a trade union. Where, therefore, the circumstance that an employee had joined a trade union had at least partially weighed with the employer, it would be an act of victimization, and the punishment inflicted on the workman on this consideration would be unjustified". It is axiomatic then that a probationer who joins a Trade Union should enjoy all the rights and privileges that go with such membership and should not be discriminated against on the basis of his rank and/or status as a probationer.

But, I cannot agree with the learned Arbitrator that if the management found the absence of the 20 workmen in Schedule B from work inexplicable, seeing that, according to their books, those workmen were not members of the Union and a strike by Union members was on, the recognised course of action for the management was to have called for explanation of their absence from the concerned workmen, without resorting to the drastic course of action of summary dismissal.

There is no such duty cast on the employer; nor do I know of such a 'recognised course of action'. To accept such a proposition would be to place an unwarranted burden on the employer vis a vis a probationer and is contrary to the well settled law as expressed in the numerous decisions of our courts, as well as those of other jurisdictions.

In my view, the petitioner has failed to discharge the burden placed upon it to establish unjustifiable termination of the probationary workmen, based on the alleged *mala fides* of the employer. The Union's failure to duly inform the employer that the 20 workmen concerned were its members and were in fact participating in the strike, cannot be blamed on the employer, when the 1st Respondent legitimately terminated their services on the ground that they kept away from work without the prior sanction and approval of the management. That cannot amount to a *mala fide* act. It is well to remember that trade union action is a double edged weapon.

Not being similarly circumstanced with the confirmed workmen, the probationers do not stand comparison with their counterparts. Consequently, the question of unlawful discrimination as between these two distinct categories of workmen does not arise. Nor has the appellant been able to satisfy the Court, as indicated above, that the probationers have been victimized and/or discriminated against on the ground of their participation in the strike. In that background, the applicability of the 'just and equitable rule' as regards probationers, contended for by learned Counsel for the petitioner, needs no consideration. I must, however, state that an employer who treats the case of a probationer on a subjective basis cannot be said to be guilty of *mala fides*, as such a proposition is against the weight of authority on the subject, as well as the very concept of probation.

For the reasons aforesaid, I dismiss this appeal, but make no order as regards costs.

AMERASINGHE, J. – I agree.

DHEERARATNE, J. – I agree.

Appeal dismissed.