UPALI MANAGEMENT SERVICES LTD.
v
PONNAMPALAM

SUPREME COURT
BANDARANAYAKE, J.
EDUSSURIYA, J. AND
JAYASINGHE, J.
SC APPEAL No. 63/2002
HIGH COURT No. HCA LT 51/2000
LT CASE No./ADDI/815/96
MAY 9, JULY 29 AND SEPTEMBER 12, 2003

Industrial Dispute – Constructive termination or voluntary resignation – Perverse order for payment of compensation – Duty of Labour Tribunal to make an equitable order.

The respondent (the workman) was employed by the appellant (the employer) for 31 years. In 1972 he had accepted in writing (RI) that his employment was on the basis that the age of retirement was 55 years. On 11.8.1995 he was informed that he would reach the age of retirement on 26.10.1995. He was offered gratuity for 31 years treating that his employment was unbroken though he had resigned in 1988. He was offered Rs. 978.520 for 31 years after deducting a loan of Rs. 290.000/= paid to him in 1984. The workman showed surprise on his retirement and tendered a letter of resignation on 22.08.1995 to be effective from 31.8.1995 as he was entitled to leave until 26.10.1995.

Thereafter the workman complained to the Labour Tribunal that he was compelled to resign and that his services were in fact wrongfully terminated.

Notwithstanding RI (his consent in writing that he would retire at 55) and his letter of resignation, the Labour Tribunal held that the termination of the workman's services was unlawful and forced and sought to give him *compensation and gratuity etc., up to the year 2000 on the basis the he was entitled to relief until October 2000 viz.,* up to the age of 60 years. The amount ordered by the Tribunal was Rs. 6.085.378/=.

The High Court upheld the order of the Tribunal disallowing only the petrol allowance and entertainment allowance. The High Court reduced the compensation to Rs. 4,243,378.00.

Held:

(i) In terms of section 31B(4) of the Industrial Dispute Act ("The Act") the Labour Tribunal had the power to grant equitable relief against harsh terms imposed by the employer and that the Labour Tribunal had the power to make just and equitable orders. It does not have "the freedom of the wild ass"

(2) The order of the Tribunal regarding compensation was perverse.

(3) There was no constructive termination of the workman's services by the employer.

Cases referred to:

1. *Walker Sons and Company Ltd* v *Fry* – (1996) 68 NLR 73
2. *National Union of Workers* v *Scottish Ceylon Tea Comp. Ltd,* – (1975) 78 NLR 133
3. *Brook Bond Ceylon Ltd* v *Tea, Rubber, Coconut and General Produce Workers' Union* – (1975) 77 NLR 6
4. *Jayasuriya* v *Sri Lanka State Plantations Corporation* – (1995) 2 SRI LR 379

APPEAL from the judgment of the High Court

Gamini Marapana, P.C. with *Nandapala Wickramasooriya* and *Naveen Marapana* for appellant.

R.K.S. Suresh Chandra with *V.Wimalarajah* for respondent.

Cur.adv.vult

JANUARY 29, 2004

SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of the 01
Western Province dated 08.05.2002. By that judgment the findings of the learned President of the Labour Tribunal, Colombo, that there was an unjustifiable termination of the employment of the applicant-respondent-respondent (hereinafter referred to as the respondent) was affirmed. The respondent-appellant-appellant (hereinafter referred to as the appellant) appealed and this Court granted special leave to appeal.

The only question that has to be considered is, whether the respondent voluntarily resigned from the appellant company or

whether his services were constructively terminated by the appellant.

The facts in this appeal, *albeit* brief, are as follows:

The respondent made an application to the Labour Tribunal on 30.01.1996 alleging constructive termination of employment and seeking *inter alia*, adequate compensation up to his 60th year for loss of his career in lieu of reinstatement. The appellant while denying any termination of employment, constructive or otherwise stated that,

(a) the respondent had accepted that he would have to retire at the age of 55 which fell on 26.10.1995;

(b) by letter dated 22.08.1995, the respondent tendered his resignation with effect from 31.08.1995;

(c) the appellant by letter dated 22.08.1995 accepted such resignation with effect from 31.08.1995; and

(d) the respondent on 22.08.1995 accepted a net sum of Rs. 858,845/- after deductions from the appellant Company.

After the inquiry learned President of the Labour Tribunal granted the relief prayed for by the respondent stating that there is no retirement rule in the appellant Company and that the said Company was in error when it asked the respondent to leave employment on reaching his 55th year. The Labour Tribunal also granted the respondent a sum of Rupees Six Million Eighty Five Thousand and Three Hundred Seventy Eight (Rs.6,085,378) as just and equitable relief. On appeal, learned Judge of the High Court while affirming the order of the Labour Tribunal set aside the award of Rs.6,085,378/- and made order directing the appellant to pay the respondent a sum of Rs. 4,243,378/- as compensation.

The main contention of the appellant was that, both the Labour Tribunal and the High Court had failed to consider the legal effect of document marked R1 dated 31.03.1972 issued by the appellant to the respondent. Learned President's Counsel for the appellant submitted that in the light of the said letter, it is abundantly clear that there was no such termination of service of the respondent by the appellant, but the appellant on his own volition resigned from his position.

The respondent had commenced his employment with the appellant Company as a clerk on 01.04.1964. At the time of his departure

from the said Company he was holding the position of a Director attached to Upali Management Services Ltd. and Upali Confectionary Products Ltd., being appointed to such positions on 01.05.1990 and 12.01.1993, respectively. The respondent contended that on 11.08.1995(A2) he received a memo from the Group Finance Director of the appellant Company which came to him 'as a bolt from the blues' as that was the first time he was told that there was an age limit for retirement.

However, it appears that the appellant had issued the letter marked R1 in March 1972 to the respondent. The contents of the letter refers to the existing contract of employment between the appellant Company and the respondent and states that,

"Your placement on an improved scale of salary and the salary increment now granted do not alter the existing contract of employment between you and the Company including the retirement rule applicable to all employees in the Company that they retire from service on completion of 55 years of age.

The Company however permits retirement at the request of an employee after completion of 10 years continuous service. Likewise the Company reserves the right to exercise the option to retire employees if such necessity does arise."

When this letter was sent in March/April 1972, it was necessary for the recipient to acknowledge the receipt of it and to accept the pronounced terms. In fact the respondent has signed in acknowledgment of the receipt of this letter and even had stated thereon that 'I accept same'. Therefore, the respondent cannot be heard to say that he was not aware of the applicable rules for the employees of the appellant Company as the aforementioned letter had very clearly stated that they have to retire from service on completion of 55 years of age.

It is not disputed that the respondent had reached the age of retirement on 26.10.1995.

It appears that the Group Finance Director of the appellant Company had a discussion with the respondent on the retirement of the latter in or around August 1995. This is confirmed by the letter, dated 11.08.1995 where the Group Finance Director in his memorandum to the respondent (A2) had stated that,

"I refer to the discussion I had with you and write to confirm that you will be reaching the date of normal retirement on 26th October 1995.

As per the Group Chairman's memo to you of 20th October 1993, your service is considered unbroken despite the fact that you resigned in 1988 and was paid your retiring gratuity amounting to Rs. 290,000/. On this basis the current gross retirement gratuity entitlement is as follows:

31 months and Rs. 40,920	-	Rs. 1,268,520.00
less: Advance paid in 1984	-	Rs. 290,000.00
Balance due	-	Rs. 978,520.00

Please note that the above would be subject to the normal tax retention.

Since you are entitled to 42 days leave, this would have to be utilized prior to 26th October and the latest date on which you could proceed on leave would be 26th August 1995..."

The respondent had shown complete surprise in response to the aforementioned letter and tendered his letter of resignation on 22.08.1995, to be effective from 31.08.1995 as he had unutilized leave covering the period up to 26th October 1995 (A3 and A6). This was accepted by the appellant Company (A7).

In his application to the Labour Tribunal, the respondent had however made no mention of the fact that he had decided to resign from his position rather than retiring from the appellant Company. The respondent at the Labour Tribunal has categorically stated that his services has been constructively terminated by the appellant, as he was compelled to resign which fact has been accepted by the Labour Tribunal.

However, it is abundantly clear that the respondent was a Director of the Company who had a total amount of 31 years of service. Would it be possible for a person of such stature and standing in the appellant Company to be compelled to tender his resignation? If for a moment, it is to be considered that a Group Director had compelled the respondent to tender his resignation, what are the steps he should have taken as a prudent man? There is no evidence to indicate that

he had taken any steps to lodge a complaint with the Chairman or with the Board of Directors of the appellant Company. The only step he took was to make an application to the Labour Tribunal 5 months after his resignation indicating that this too was made as an afterthought.

The respondent had admitted not only that he had received the document marked R1, but also that he had signed the acknowledgment slip. On a consideration of the correspondence between the respondent and the appellant company it appears that the respondent did not desire to wait until 26.10.1995 so that he could retire from the Company, but wished to resign with effect from 31.08.1995(A6).

The Labour Tribunal has not taken notice of the fact, which was abundantly clear that, the respondent had signed the document marked R1, accepting the terms and conditions of R1 which included the age of retirement to be 55 years of age. Ignoring this vital piece of evidence, President of the Labour Tribunal had come to the conclusion that,

"On an overall analysis of the evidence, I am constrained to think that the applicant's employment came to an end, not by a voluntary act of his."

It is also of considerable importance to note that the manner in which the Labour Tribunal had thought it fit to grant compensation to the respondent.

As stated in his evidence, the respondent had asked for 2 months salary for each year of service as gratuity and compensation up to his 60th year.

According to the Resolution passed by the Board of Directors on 05.06.1986, only the Directors having continuous service for over ten years was to be paid two months gross salary for each year of service. The respondent admittedly had been a Director of the appellant Company only for about 5 years. Further, learned President's Counsel for the appellant submitted that, the Company Directors are appointed annually by the shareholders, and even assuming that the respondent was allowed to continue in service up to his 60th year, there was no guarantee that the shareholders would have re-elected him to hold office as a Director until 60 years of age.

Irrespective of all these considerations, the Labour Tribunal had sought to award compensation on the following basis.

(i) Compensation for 5 years up to 60 years reckoning 10% increment. His salary according to A9 was Rs.40,920/-.

From October 1995 to October 1996 at the rate of Rs. 40,920/- x 12	-	Rs.	491,040.00
From October 1996 to October 1997 at the rate of Rs.45,012/- x 12	-	Rs.	540,144.00
From October 1997 to October 1998 at the rate of Rs.49,513/- x 12	-	Rs.	594,156.00
From October 1998 to October 1999 at the rate of Rs.54,464/- x 12	-	Rs.	653,568.00
From October 1999 to October 2000 at the rate of Rs. 59,910/- x 12	-	Rs.	718,920.00
Total compensation	-	Rs.	2,997,828.00

(ii) Gratuity at the rate of 2 months salary for each year of service

(a) He was paid at the rate of one month's salary for each year of service for 31 years (31 months).

(b) Gratuity at the rate of 2 months salary for each year of service for the 5 year denied service at the last salary in reaching 60 years (10 months)

Total gratuity payment - (a) + (b)
- (31 + 10) x Rs. 59,910.00
- 41 x Rs. 59,910.00
- Rs. 2,456,310.00

(iii) Petrol allowance for 5 years (60 months)

Total petrol expenses - Rs. 12,000 x 60
- Rs. 720,000.00

(iv) Entertainment allowance for 5 years (60 months)

Total entertainment expenses - Rs. 18,700 x 60
- Rs. 1,122,000.00

Grand total - Rs. 2,997,828.00
Rs. 2,456,310.00
Rs. 720,000.00
Rs. 1,122,000.00
Rs. 7,296,138.00

less -

(1) payment already received at the time of cessation of employment	-	Rs.	978,520.00
(2) ex-gratia payment already received by the applicant	-	Rs.	232,240.00
Total of (1) + (2)	-	Rs.	1,210,760.00

Total balance due - Rs. 7,296,138.00 – Rs. 1,210,760.00
Rs. 6,085,378.00

Although the Labour Tribunal had granted the aforementioned amounts exceeding Rupees Six Million as compensation, no reasons or basis had been adduced for the said decision.

Learned Judge of the High Court had only decided to reduce the payment of petrol allowance and the entertainment allowance and ordered that a sum of Rs. 4,243,378.00 be paid as compensation.

While the learned President's Counsel for the appellant submitted that the manner in which the Labour Tribunal has sought to award compensation is totally perverse, learned Counsel for the respondent contended that in terms of section 31(B)(4) of the Industrial Disputes Act, the Labour Tribunal has wide powers to grant relief notwithstanding anything to the contrary in the contract of employment. He relied on the decision in *Walker Sons & Co. Ltd.* v *Fry*[1] and submitted that Sansoni, CJ., had interpreted section 31(B)(4) to empower the Labour Tribunal to give relief against any harsh terms the employer may have imposed in the contract. He also cited the decision in *National Union of Workers* v *Scottish Ceylon Tea Co.Ltd*[2] where it was held that the power conferred on Labour Tribunals by section 31(B)(4) enabled a Tribunal to disregard contractual terms relating to the assessment of gratuity where it is found legally due under a contract or under a settled scheme.

In terms of the provisions of the Industrial Disputes Act, where section 31(C) provides the Tribunal to make 'such order as may appear to the Tribunal to be just and equitable' admittedly a Labour Tribunal has very wide powers. However it is to be noted that the Tribunal does not possess an unfettered authority. As observed by H.N.G.Fernando, J. (as he then was) in *Walker Sons & Co.Ltd.* v *Fry (Supra)*, a Labour Tribunal does not have the 'freedom of the wild ass'.

Although there is no doubt that the Labour Tribunal has wide powers it cannot be taken that such powers are beyond any kind of control. As has been pointed out in *Brook Bond (Ceylon) Ltd.* v *Tea, Rubber, Coconut and General Produce Workers' Union* (3) 'considerations of justice and equity must necessarily control and limit the powers of Labour Tribunals.'

Discussing the concept of what is termed as 'perverse' Amerasinghe, J. in *Jayasuriya* v *Sri Lanka State Plantations Corporation* (4) stated that,

"Perverse' is an unfortunate term, for one may suppose obstinacy in what is wrong, and one thinks of Milton and how Satan in the Serpent had corrupted Eve, and of diversions to improper use and even of subversion and ruinously of wickedness. Yet, in my view in the context of the principle that the Court of Appeal will not interfere with a decision of a Labour Tribunal unless it is 'perverse', it means no more than that the Court may intervene if it is of the view that, having regard to the weight of evidence in relation to the matters in issue, the Tribunal has turned away arbitrarily or capriciously from what is true and right and fair in dealing even handedly with the rights and interests of the workman, employer and in certain circumstances, the public. The Tribunal must make an order in equity and good conscience, acting judicially, based on legal evidence rather than on beliefs that are fanciful or irrationally imagined notions or whims. Due account must be taken of the evidence in relation to the issues in the matter before the Tribunal. Otherwise, the order of the Tribunal must be set aside as being perverse (emphasis added)."

On the respondent's own admission, at the time he resigned, he was paid a sum of Rs.2,189,760/- which included a sum of Rs.1,268,520/- as gratuity and a sum of Rs. 232,240/- as an exgratia payment. He was permitted to purchase a car worth of Rs. 500,000/- for Rs.200,000/- which gave him a further monetary benefit of Rs. 300,000/-. From the compensation computed by the Labour Tribunal, only a sum of Rs.1,210,720/- has been taken into consideration, whereas the said amount should be Rs. 2,189,760/-.

On a consideration of the totality of the material placed before this Court, I am of the view that there was no constructive termination of services of the respondent by the appellant Company. I am also of the

view that the order of the Labour Tribunal regarding the payment of compensation is perverse.

For the aforementioned reasons this appeal is allowed. The order of the Labour Tribunal dated 12.07.2000 and the judgment of the High Court dated 08.05.2002 are accordingly set aside. The appellant is entitled to costs in appeal in a sum of Rs.5000/- (Rupees Five Thousand).

EDUSSURIYA, J. – I agree.

JAYASINGHE, J. – I agree.

Appeal allowed.

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