SUNIL SIRILANKA AND OTHERS
v.
CEYLON STEEL CORPORATION LTD. AND OTHERS

SUPREME COURT
FERNANDO, J.,
WADUGODAPITIYA, J. AND
GUNAWARDENA, J.
S.C. APPLICATION NOS. 283-295/97
MAY 15, 1998

Fundamental rights – Sale of a Government owned Company to a foreign company – Compensation to employees who were unwilling to serve the new Management – Discrimination in payment of compensation – Article 12 (1) of the Constitution.

The Government entered into an agreement for the sale of 90% shares of the Ceylon Steel Corporation Ltd. to the 4th respondent company. This was followed by the offer by the Government through the 2nd respondent, Secretary to the Ministry of Finance and Planning of a compensation package to the employees of the company who did not wish to serve under the new management. The workmen were not agreeable to this offer in view of its terms. Next, there was a second offer. The closing date for its acceptance was 6. 1. 97. 727 employees, but not the petitioners, applied by 6. 1. 97. With the intervention of the 3rd respondent, the Commissioner of Labour negotiations continued and at a discussion on 10. 1. 97 a third package was made "for workers who have opted to retire"; it was twice more favourable than the second offer; and the trade unions accepted it. But the 2nd respondent implemented it only in respect of the aforesaid 727 plus another person who was included on humanitarian grounds after his death. Consequently, 728 employees were paid in terms of the third package and thereupon deemed to have retired. The petitioners were not offered any compensation on the ground that they had failed to opt to retire before 6. 1. 97.

Held:

The 2nd respondnent acting on behalf of the state infringed the petitioner's fundamental rights under Article 12 (1) of the Constitution by the failure to offer them compensation on the basis of the package which was implemented in favour of 728 employees.

APPLICATION for relief for infringement of fundamental rights.

R. K. S. Sureshchandra for the petitioner.

H. Fernando SC for the 2nd, 3rd and 5th respondents.

C. D. Bakmeewewa for the 6th added respondent.

No appearance for the 1st and 4th respondents.

Cur. adv. vult.

June 04, 1998.

FERNANDO, J.

These thirteen applications were taken up together as they involved the identical question.

The facts are not in dispute. The 1st respondent company (the successor to the Ceylon Steel Corporation) was wholly owned by the Government of Sri Lanka, the shares being registered in the name of the Secretary to the Treasury, the 2nd respondent. In 1996 the Government entered into an agreement to privatize that company by selling and transferring 90% of the shares to the 4th respondent company. such a change in the ownership of its shares would not have altered the status of the company as a legal entity, or its continued corporate existence, and the subsisting contracts of employment between the company and its employees – about 1,350 in number – would have continued, unaffected by that change of ownership and by any consequent change in management.

It does not seem that it was a condition of the sale agreement that the transferee would exercise its powers as controlling shareholder so as to ensure the retention in service of the entire workforce. Learned counsel for the petitioners did not contend that the Government was the employer, or that it was under any legal obligation either to impose such a condition or to compensate employees who were not retained in service after privatization. However, our decision in this case does not turn on whether the Government was the employer, or whether there was any such condition or obligation, or whether it was breached.

It is common ground that the Government, through the 2nd respondent, did offer all employees who did not wish to continue in employment under the new management a compensation package based on length of service. 728 such employees were offered compensation on or about 26. 2. 97. They were later paid a total of Rs. 292,864,972.46, which works out to an average of about Rs. 402,000 each.

The petitioners' complaint is that the failure to offer and pay them compensation on the same basis – although they too did not wish to continue in service under the new management – was in violation of their fundamental rights under Article 12 (1).

It was out of the employees' objections to the privatization, the refusal of the majority to work under the new management, and the fears of retrenchment of others, that the compensation package evolved. On 6. 12. 96 the 2nd respondent made the first offer; the details are not relevant, and it is enough to say that it was related to length of service, and was subject both to a minimum of ten months' salary as well as a maximum of Rs. 250,000; and the closing date for applications was 20. 12. 96. Dissatisfaction among the employees continued. On 16. 12. 96 the 2nd respondent made his second offer:

5 years or less	:	12 months' salary
5 to 9 years	:	25 months' salary
9 to 13 years	:	35 months' salary
13 to 17 years	:	45 months' salary
Over 17 years	:	50 months' salary,

subject to a maximum of Rs. 260,000.

The closing date for applications was the same. The General Manager of the 1st respondent informed the workforce by a notice dated 17. 12. 96.

Industrial unrest continued. The 3rd respondent, the Commissioner of Labour, intervened in an attempt to bring about a settlement. The trade unions made a counter-offer on 26. 12. 96, suggesting

compensation ranging from Rs. 100,000 (for less than one year's service) to Rs. 600,000 (for over 15 years' service). That was not accepted.

On 27. 12. 96, the 3rd respondent wrote to the General Manager of the 1st respondent calling for information before 6. 1. 97:

> ". . . I understand that some employees would *opt to retire with the compensation package offered* to them.
>
> I wish to know the names of those employees *who opt to retire on account of the change of management* with their last drawn salary and the period of service . . . in order to ascertain the exact number of employees who will be retiring".

That letter was copied to the trade unions, who pointed out on 30. 12. 96 that the first sentence appeared to be connected to the second and gave rise to an ambiguity. They asked that it be changed, so as to ascertain whether the employees consented to accept compensation as agreed between the trade unions, on the one hand, and the Minister and the 3rd respondent, on the other hand. Accordingly, on 1. 1. 97, the 3rd respondent wrote again to the General Manager, asking for the list of employees who, while being unwilling to work under the new management after privatization, were willing to retire *in terms of the compensation scheme to be agreed upon after discussion by the Minister, the 3rd respondent and the trade unions.*

What is of vital importance is that 3rd respondent had wanted the names of all those who wished to retire upon the change of management following privatization, and not only the names of those who agreed to compensation in terms of the second offer.

The respondents do not claim that a notice in terms of the 3rd respondent's letter of 27. 12. 96 was issued to the employees. Further, the General Manager of the 1st respondent issued another notice on 31. 12. 96. That reproduced a letter from the 2nd respondent purporting to extend (to 6. 1. 97) the deadline set out in the letter

of 16. 12. 96 (ie the second offer), and did not ask employees to exercise their option to retire, in the manner stipulated by the 3rd respondent on 27. 12. 96. There is no evidence that the General Manager made any change even after the 3rd respondent's letter of 1. 1. 97. 727 employees – but not the petitioners – applied by 6. 1. 97.

Negotiations continued, and at a discussion on 10. 1. 97 about the compensation package for "workers who have opted to retire" – and not, let me stress, just for those who had opted for the second offer – the 3rd respondent suggested the following:

Under 5 years	:	26 months' salary
5 to [9] years	:	52 months' salary
9 to 13 years	:	78 months' salary
13 to 17 years	:	90 months' salary
over 17 years	:	100 months' salary,

all subject to a maximum of Rs. 500,000, or the loss of salary up to the time of retirement, whichever was less.

The trade unions accepted that offer. They did not accept on the basis that it was only for those who had applied in response to the second offer; but, as is clear from the 3rd respondent's letter dated 11. 2. 97 which I quote below, as being applicable to the workers who *opt to retire* on or before 6. 1. 97. On 15. 1. 97 the trade unions informed the members of the 3rd respondent's offer.

After the deadline most of the petitioners appear to have applied for compensation, giving various excuses for the delay. Those applications have not been produced, but it must be presumed that it was for compensation in terms of the 2nd respondent's second offer because there is no evidence that they were asked to opt on any other basis. The fact that they applied, even after the deadline, shows that they did not wish to continue in service under the new management.

On the basis of information provided to the 3rd respondent on 29. 1. 97, he wrote to the 2nd respondent on 11. 2. 97 as follows:

". . .The trade union representatives finally agreed to the following package of compensation *in the event the workers opt to retire on or before 6th January 1997 . . .*"

Having repeated the terms of the package proposed on 10. 1. 97, he added:

"The option for retirement was opened till 6th January 1997 as (at) that date 727 (have) applied for compensation. One who has opted to retire had died later and his name (is) also included (in) the schedule. Another person who (is) said to have committed suicide is also (included) purely on humanitarian grounds. Hence the total figure is 728."

It is clear, therefore, that the foundation of the package, when it was first suggested and when it was agreed upon, was that it applied to those who had opted to retire on or before 6. 1. 97. The 3rd respondent's letter dated 11. 2. 97 makes reference to "727 (who have) applied for compensation": I think that what he had in mind were those who had exercised "the option for retirement". In any event, it was not open to him at that stage to alter the basis which had been agreed upon earlier.

The employees were never given an opportunity to opt on the basis stipulated by the 3rd respondent; and were forced, instead, to decide whether or not to accept the second offer.

In my view, the 3rd respondent had been misled into thinking that the 727 who applied for compensation in terms of the second offer were persons who had been given, and exercised, the option he had stipulated on 27. 12. 96. It is unfortunate that he does not seem to have realised this at least when he submitted his affidavit in these proceedings.

On 26. 2. 97 the 2nd respondent sought to implement that package, but only in relation to those 728 employees; they were paid and thereupon deemed to have retired. The petitioners were not offered compensation on the same basis or even on the basis of the second offer.

The principal basis on which learned State Counsel, appearing for the 2nd, 3rd and 5 respondent, sought to justify the failure to pay compensation to the petitioners was that they had not applied for compensation by the stipulated deadline of 6. 1. 97, while the others had. He also submitted that the final package was binding because it was a settlement negotiated by the Commissioner of Labour.

Although learned counsel for the petitioners as well as learned State Counsel argued this matter as if only employees who had opted for the second offer were entitled to the benefit of the 3rd respondent's package, I hold that all employees who had exercised their option to retire before 6. 1. 97 were entitled, and that the 1st, 2nd and 3rd respondents had failed to ensure that the petitioners were given the opportunity to exercise that option. The evidence before us suggests that if they had been given that option, they would have opted to retire. They must therefore be treated on that footing.

But I must add that the final package could not have been made conditional on acceptance of the second offer by 6. 1. 97. On 26. 2. 97 the petitioners were in the same class as the other 728, insofar as they did not wish to continue in service under the new management. The fact that the petitioners had not accepted the second offer was certainly a factor which differentiated them from others; but not for all purposes. If the issue had been whether it was proper to give the others, and to refuse only them, benefits *on the basis of the 2nd respondent's second offer, clearly the answer* would have been in the affirmative. If an offer is made to all of the same class, and some accept while the rest do not, it is perfectly proper to treat those who accept differently – ie by giving them the benefit of the offer which they accepted, while refusing to the others that same benefit which they declined. But any such acceptance or refusal is of no relevance to a subsequent, and indeed very different, offer. One employee, who had long years of service, might well have said "I will not leave for Rs. 260,000, but I will for Rs. 500,000", while another might have agreed to leave for Rs. 260,000. That can never be a rational basis for a refusal to pay the former Rs. 500,000, while paying the latter Rs. 500,000, to his colleague who would have been quite satisfied with Rs. 260,000.

I must also refer to the factual background. First, what was involved was the cessation of employment, and not just a minor or incidental benefit; employees, and particularly those within ten years of retirement, might have foreseen difficulties in getting other employment; and the compensation package might thus have had to provide for them and for their families for some years. Second, they were given only a short time to take a decision of such vital importance to them. Third, the final package was not just a marginal amendment of the original, but was almost twice as good, and so it cannot be treated as if it were just a mere variation of the original.

Further, if the option to accept the second offer is treated as the proper basis of differentiation, the 728 employees received a windfall – twice what they applied for – while the petitioners received nothing. Such a result makes it seem as if it were a lottery or a game of chance that was taking place, rather than a serious negotiation about matters of paramount importance to the employees. The employees should have been told clearly, completely, accurately, and in good faith, what they were being offered, and allowed reasonable time for consideration. Here the 3rd respondent wanted them to exercise an option, but putting their trust in the trade unions, the Minister, and himself as to the financial terms – and even that has been denied to them.

Thus on any view of the matter. I hold that the petitioners' refusal to accept the 2nd respondent's second offer (ie their failure to apply before the deadline) did not afford a rational basis for refusing them the benefit of a substantially different subsequent offer made to their colleagues.

As for learned State Counsel's second contention, the fact that the final package was the result of intervention, conciliation or negotiation by the 3rd respondent, as Commissioner of Labour makes no difference. If the terms of a compensation package infringe Article 12 – as for instance by conferring benefits on employees of one race (or religion or sex) which are denied to employees of another race (or religion or sex) although they are otherwise similarly circumstanced, the latter are entitled to relief under Article 126, despite the sanction

of the Commissioner of Labour. Here the terms of the package deny equal treatment to the petitioners, and therefore infringe Article 12 (1).

I must add that it was not contended that the 3rd respondent's intervention resulted in an order, award or settlement binding on the employees under and in terms of the Industrial Disputes Act, and so I do not have to decide whether such an order, award or settlement would preclude relief under Article 126 – although it seems to me that that would make no difference. And what is more, the package in question did not involve a matter between employer and employee: because the 2nd respondent, acting on behalf of the Government, was no more than a shareholder of the employer, and I doubt whether the 3rd respondent's jurisdiction under that Act extends to persons other than employers.

I therefore hold that the 2nd respondent, acting on behalf of the State, has infringed he petitioners' fundamental rights under Article 12 (1). I direct the state to pay each of the petitioners on or before 1. 7. 98 (*a*) compensation in terms of the package set out in the 3rd respondent's letter dated 11. 2. 97, together with interest at the rate of 12% p.a. from 1. 3. 97 up to the date of payment, upon the terms that the recipient will be deemed to have retired on the date of such payment (as well as any other benefits due under that package), and (*b*) a sum of Rs. 1,000 as costs.

I am constrained to comment on the pleadings in these cases.

The Ceylon Heavy Industries & Construction Company Ltd, the 6th (added) respondent, filed a motion dated 5. 9. 97 alleging that :

> "That 1st respondent, namely Ceylon Steel Corporation (*sic*). . . is no more in existence as 90% of its shares had been sold to HANJUNG COMPANY of Korea. Consequent to the said Sales Agreement in place of Ceylon Steel Corporation (*sic*) there now stands Ceylon Heavy Industries & Construction Company Limited as a different entity. In view of above, petitioner may have to effect substitution in the room of the Ceylon Steel Corporation (*sic*) as same is non-existent."

It is not clear from the journal entry of 24. 9. 97 whether that company was substituted in place of the 1st respondent, or added. It filed no statement of objections or affidavit or documents, but only written submissions in which it described itself as the 6th *added* respondent, and submitted that it was a private company "owned by Hanjung Company of Korea". Neither the motion nor the written submissions explain how or why the 1st respondent ceased to exist when 90% of its shares were sold, or how or why the 6th respondent became its successor; nor the relationship between the 4th respondent and the "Hanjung Company of Korea"; nor how the latter company's alleged ownership of the 6th respondent gives the latter any right or interest in this matter. Such vague, disjointed and slipshod pleadings serve no purpose except to cloud the issues and to delay the proceedings.

The petition in SC No. 283/97 contains an averment that the petitioner had handed over his application in terms of the earlier package on 6. 1. 97; but this is contradicted, by the very next averment that later he explained the circumstances regarding his failure to hand it over on 6. 1. 97. Indeed, it was admitted at the hearing, that *none* of the petitioners had handed over such applications on or before 6. 1. 97. Those averments have been blindly copied in almost all the other petitions. I have not regarded this as vitiating the petitioners' case because it is clearly a careless mistake. Further, in almost all the cases, the supporting affidavit consists of a photocopy of the petition; and on the third page of those affidavits – which page contains the averments I have referred to – there are over twenty handwritten interpolations and alterations. Some of the affidavits, copying others, refer to an annexed document, without actually annexing one. It is only because these careless pleadings did not actually cause any prejudice to the other parties, that I have refrained from depriving the petitioners of their costs.

WADUGODAPITIYA, J. – I agree.

GUNAWARDANA, J. – I agree.

Relief granted.