

PIYADHARSHANA AND TWO OTHERS
v
SRI LANKA PORTS AUTHORITY

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
RAJA FERNANDO, J.
BALAPATABENDI, J.
SC 75/2006
HCALT 838/04
SPL LA NO. 250/2006
LT 1/180/06, 1/81/00, 1/408/98, 1/472/98

Termination of employment – Tendering forged documents in order to gain employment – Dismissal of employee – Justified? – Labour Tribunal just and equitable order – Granting of compensation after holding that dismissal lawful and justifiable – On Probation – Lawful?

The three petitioners were dismissed from their employment as they were found guilty after an inquiry – for submitting fraudulent/forged documents with the intention of misleading the respondents in order to gain employment. Their applications filed in the Labour Tribunal were dismissed, however compensation was awarded except to petitioner P.

The High Court dismissed the applications but awarded compensation to P, on the basis that the order of the Labour Tribunal would not be just and equitable if compensation was not awarded to one applicant out of four.

The 3 petitioners-appellants sought to set aside the two orders and claiming reliefs prayed in their applications.

Held:

- (1) The impugned termination of services was justified.

All the petitioners were on probations at the time of their termination of their employment. No malice or *mafa fides* on the part of the respondent for termination of employment had been alleged or averred at any stage.

- (2) The essence of a probationary appointment is that the employer retains the right not to confirm the appointment after a specific period particularly on the ground of capability. A probationer has no right to be confirmed in the post and the employer is not bound to show good cause where he terminates the services of a probationer.
- (3) The termination of the services of the probationers been lawful and justifiable, the employees are not entitled to an additional order of compensation. The awarding of compensation of 6 months salary to the petitioners who were on probation is without any basis. The petitioners have gained employment dishonestly and fraudulently, hence illegally – the petitioners are not entitled to get any compensation for their dismissal from their employment.

APPEAL from the judgment of the High Court.

Cases referred to:

1. *G.H. Lily Perera v Chandani Perera and others* BASL News 5.5.1992 CA 223/77(F).
2. *Esquire Garments Industries Ltd. v Bank of India* BASL News 1.12.1999 CA 663/89(F).
3. *University of Sri Lanka v Ginige* 1993 1 Sri LR 362.
4. *State Distilleries Corporation v Rupasinghe* 1994 2 Sri LR 395.
5. *Ceylon Cement Corporation v Fernando* 1990 1 Sri LR 361.
6. *Piliyandala Polgasowita MPCS Union Ltd. v Liyanage* 74 NLR 138.
7. *Brown & Co. Ltd. v Samarasekera* 1996 1 Sri LR 334.
8. *Jayasuriya v Sri Lanka State Plantation Corporation* 1995 2 Sri LR 379.
9. *Pfizer v Rasanayagam* 1991 1 Sri LR 290.

Uditha Egalahewa for appellant-appellant-petitioners.
Suharshi Herath SC for respondent-respondent-respondent.

August 24, 2007

JAGATH BALAPATABENDI, J.

The three applicant-appellant-petitioners (hereinafter referred to as petitioners) were employed by the respondent-respondent-respondent Sri Lanka Port Authority (hereinafter referred to as 'Respondent').

The facts in brief are as follows:

The three petitioners with two others were dismissed from their employment, by the respondent, as they were found guilty after an inquiry for the following charges:-

- a) For submitting fraudulent – documents or forged documents with the intention of misleading the respondent in order to gain employment;
- b) In securing the employment each of them acted fraudulently to mislead the respondent;

The three petitioners (with the other two employees) filed applications in the Labour Tribunal against the dismissal from their employment. The learned President of the Labour Tribunal found:

- (a) The petitioners guilty for the alleged charges,
- (b) the dismissal of the petitioners from the employment were lawful and justifiable, but awarded compensation for others except for the petitioner Piyadharshana.

In the appeal to the High Court, the learned High Court Judge held that the Order of the learned President of the Labour Tribunal was lawful and correct, but awarded compensation for the petitioner Piyadharshana also, as the Order of the Labour Tribunal would not be a just and equitable, if compensation was not awarded to one applicant, out of four.

In this Court the petition had been filed only by three petitioners namely Piyadharshana, Nimalasiri and Weerananda and in the Prayer to the petition they prayed:

- a) to set aside the Judgment of the learned High Court Judge,
- b) to set aside the Order of the learned President of the Labour Tribunal;
- c) to grant reliefs prayed for in the Prayers of the applications of the petitioners filed in the Labour Tribunal marked as P1A, P1B and P1C on the facts stated therein.

Now I will deal with the evidence (facts) available against each of the petitioners separately:

It is pertinent to note that all three petitioners were on **PROBATION** at the time of dismissal from their employment. It was an admitted fact that clause (12) of the letter of Appointment issued to the petitioners states that the Applicant is liable to be terminated from his services in the event of any document forwarded to gain the employment reveals that it is false or forged. Also it was admitted that the procedure which prevailed at that time for recruitment of un-skilled employees was on the list of names of the candidates given by the Hon. Minister in charge of the respondent Sri Lanka Ports Authority. Hon. Minister prepares the list of candidates to be selected on the quota given to the Members of the Parliament. Once the Applications are received from the candidates with the Hon. Minister's endorsement, they are called for an interview and selected. Later the names of the employees selected, are checked with the 'List' sent by the Hon. Minister.

The Petitioner - Piyadharshana - The contention of this Applicant was that, having heard from a friend already employed with the respondent that there are vacancies, he submitted an application to the respondent with a letter of recommendation from Mr. Atula Nimalasiri, the Member of Parliament for Mahara. Later he was selected as a Driver after an interview. He joined the respondent on 30th April 1997 till his employment was terminated on 2nd September 1997. (About 04 months in service).

The evidence led at the Labour Tribunal revealed that the Application form of the petitioner does not indicate the category of the Job he applied for and whether he has got a driving licence.

The respondent alleged that even though there was an endorsement placed on the application of the petitioner deemed to

be by the Hon. Minister, the Applicant petitioner's name did not appear in the list sent by the Hon. Minister. Thus, the said endorsement was a forgery.

The petitioner had admitted the fact that he told a lie at the Domestic Inquiry about the letter given by the Member of Parliament for Mahara. Further he had stated, that he was surprised when he got the letter of appointment to wit - (මට රැකියාව ලැබුණු විදිය ගැන ප්‍රභූත භික්ෂකයා මේ රැකියාව ලැබුණු ක්‍රමය කියන්න දකමැනිම.)

The finding of the learned President of the Labour Tribunal was that on the facts elicited at the inquiry, the petitioner was guilty to the charges, and hence the dismissal was justified.

The Petitioner - Daya Nimalasiri - The alleged charges were the same against this petitioner and his contention was that he submitted an application to the respondent with a letter attached to it issued by the Hon. Minister Atula Nimalasiri Jayasinghe. Later he was selected as an Assistant Manager after an interview. He has joined the respondent on 23rd April 1997 and his services were terminated on 11th July 1997 (about 2 1/2 months in service).

The finding of the learned President of the Labour Tribunal was that, the petitioner had given contradictory evidence on the letter issued by Hon. Minister Atula Nimalasiri Jayasinghe and his name was not in the 'List'. Thus, the Hon. Minister in charge of the respondent (Ports Authority) Mr. Ashroff could not have put any endorsement on the Application form. Hence, the endorsement which appear on the Application form is a forgery. (at page 276 of the brief, and at page 11 of the Order) Therefore he had justified the dismissal of the petitioner. But awarded compensation of 6 months salary.

The Petitioner - Weerananda - The alleged charges were the same against this petitioner also. His contention was that he submitted an application to the respondent with a letter attached to it, issued by Hon. Minister Atula Nimalasiri Jayasinghe. He was selected as a Security Guard after an interview, and joined the respondent on 2nd May 1997. his services were terminated after 4 months of service on 2nd September 1997.

The learned President of the Labour Tribunal had found that even though the petitioner stated that he attached a letter to the Application form issued by the Hon. Minister and handed it over to one Kumara, an employee of the respondent, the said letter was not found with the Application form and his name did not appear in the list sent by the Hon. Minister. Hence Hon. Minister Mr. Ashroff could not have put any endorsement on the application form. It was elicited at the domestic inquiry that his application was dated 20th January 1997, he joined the respondent on 2nd May 1997, whereas the date of the endorsement deemed to have put by the Hon. Minister was on 20th July 1997, after he gained the employment with the respondent. Thus, it is clear the endorsement of the Hon Minister was a forgery (document R10). Hence the termination of the employment of the petitioner was justified. But awarded compensation of 6 months salary by the President Labour Tribunal.

The witness Musakil had given evidence on behalf of the respondent and had stated that he worked more than ten years closely with the late Hon. Minister Ashroff as he is a relative and he is very familiar with the signature and handwriting of the late Hon. Minister. At the time he gave evidence he was the Personal Assistant to the Vice Chairman of the respondent. He testified with certainty that the endorsement and the signature that was on each Application form forwarded by the three petitioners was not the signature and handwriting of the late Hon. Minister Mr. Ashroff.

The learned President of Labour Tribunal after careful analysis of the evidence led arrived at a finding that the signature of the late Hon. Minister appears on the Application forms was forged. Therefore, in no uncertain terms has found that the dismissal of the petitioners from the employment were justifiable.

The learned High Court Judge on analysis and evaluation of the evidence led at the Labour Tribunal against the three petitioners and also on the findings of the President of the Labour Tribunal on the question of law, had come to a conclusion that the termination of the employment of the three petitioners were lawful and justifiable, but awarded compensation of 6 months salary to the petitioner Piyadharshana also.

Special Leave to Appeal was granted by this Court to the three petitioners on the following questions of Law:

- (i) The learned High Court Judge of the Province has not considered the fact that the Order of the learned President of the Labour Tribunal is against the weight of the evidence adduced.
- (ii) The learned High Court Judge of the Province has not taken into consideration the fact that since the Order of the Labour Tribunal has ordered compensation in lieu of employment the decision arrived at by the learned President of the Labour Tribunal that the termination is justifiable is wrong;
- (iii) The learned High Court Judge of the Province has not observed that in the absence of any probable evidence to prove the misconduct and/or the allegations leveled against the petitioners, the Labour Tribunal President's conclusion to that effect is vague.
- (iv) The learned High Court Judge of the Province has misdirected himself in respect of the oral and documentary evidence adduced.

The Counsel for the three petitioners contended that the petitioners forwarded duly filled Application forms to the respondent and thereafter they were selected for employment with the respondent after an interview. They were unaware of any endorsement put on their Application forms as alleged by the respondent. This position appears to be made up as the recruitment procedure adopted by the respondent (also known to the applicants) was only on recommendation of the late Hon. Minister, Mr. Ashroff by placing an endorsement with his signature on the Application Forms.

Further he contended that the alleged Application Forms were sent to the EQD by the President Labour Tribunal for examination, and the EQD in his report has stated that he is not in a position to express any opinion on the signature and the handwriting of the late Honourable Minister, thus the President of the Labour Tribunal has not evaluated the evidence against the

petitioners and he has based his findings on the evidence of the witness Musakil.

Section 47 of the Evidence Ordinance deals with: When it is sought to prove the handwriting of a person other than by expert evidence the Court should follow:

(a) opinions of persons acquainted with the handwriting of the person concerned.

A person is said to be acquainted with the handwriting of another:

- i) when he has seen a person write the document in question or of other documents;
- ii) when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person;
- iii) when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. ("Habitually" means usually, generally or according to practice);

In the case of *G.H. Lily Perera v Chandani Perera and others*⁽¹⁾ it was held that '*the onus probande*' in a case where a Last Will is alleged to be a forgery is upon the party propounding a Will – he must satisfy the conscience of the Court. A Court need not accept the evidence of a handwriting expert in a case where such expert cannot express a definite opinion.

In the case of *Esquire Garments Industries Ltd. v Bank of India*⁽²⁾ held that "Section 47 of the Evidence Ordinance describes opinion by non-experts as to handwriting could be elicited for the purpose of a Court coming to a conclusion as to the person by whom any document was written or signed. Thus, the opinion of any person acquainted with the handwriting of such person would be relevant."

The Law of Evidence, (Volume I), by E.R.S.R. Coomaraswamy, at page 648, it is stated, that testimony as to handwriting under Section 47 is for various reasons better than expert testimony. This is because there is no question of bias or suspicion of partiality since the knowledge was acquired incidentally and unintentionally and not for the purpose of litigation.

Murphy on Evidence at page 596 states as follows:

"There is an obvious relevance in evidence which proves the authenticity of the handwriting of the person purporting to be the signer or executer of the document. Handwriting may be proved in any of the following ways:

"..... Non-expert witnesses who are familiar with the signature of the purported signer, or who have on other occasions received documents bearing the purported signature or made in the purported handwriting of the purported signer, may state their opinion that the document is signed by the person by whom it purports to be signed. The weight of such evidence may, of vary very considerably according to the circumstances of the case including the degree of the witness's familiarity with the handwriting".

Hence, I take the view that the findings of the President of the Labour Tribunal was correct in Law.

In this appeal, it was admitted that –

- (a) All the petitioners were **ON PROBATION** at the time of termination of their employment (few months of service in the said relevant posts).
- (b) Clause (12) of the Letter of Appointment of each of the petitioners states "that their services could be terminated in the event of, if they have made any misrepresentation or forwarded any fraudulent documents to gain the employment with the respondent."
- (c) Scheme of recruitment was only on the recommendation of the Hon. Minister, sent to the respondent by way of a 'List' containing the names of candidates to be recruited;

No malice or *mala fide* on the parts of the respondent for termination of their employments had been alleged or averred by the petitioners at any stage. If the respondent (Employer) had acted *mala fide* the employee Probationer has a right to relief.

The essence of a **PROBATIONARY APPOINTMENT** is that the employer retains the right not to confirm the appointment after a specific period particularly on the grounds of capability. A probationary employee must know that he is on trial and must

therefore establish his suitability for the post. The employer must show that he acted reasonably in dismissing a probationer. If an employee is told that his appointment is subject to a probationary period of a certain length of time, this does not give the employee a legal right to be employed for that length of time, and the employer may lawfully dismiss him before that period has expired. Further, it is for the employee to prove that he was dismissed, it is for the employer to show the reason for dismissal. It will then be for the Industrial Tribunal to find out on the basis of evidence presented whether or not the employer had acted reasonably in treating that reason as a sufficient ground for dismissal. A decision on whether the employer acted reasonably is a question of fact for the Industrial Tribunal to decide, which can only be challenged if the decision was perverse or based on incorrect perception of the Law.

In the case of *University of Sri Lanka v Ginige*⁽³⁾. It was held that "during the period of probation, the employer has the right to terminate the services of the employee if he is not satisfied with the employee's work and conduct. Where the employee is guilty of misrepresentation of facts, use of unbecoming language and misconduct, the termination is justified and *bona fide*, if the employer has acted *mala fide* the probationer has the right to relief".

In the case of *State Distilleries Corporation v Rupasinghe*⁽⁴⁾. It was held that "the acceptance of the principle that Labour Tribunal has jurisdiction to examine whether a termination is *mala fide*, necessarily involves the corollary that the employer must disclose to the Tribunal his reasons for termination and that means that he should have some reason for termination". Further, it was held that "if the termination took place during the probation period the burden is on the employee to establish unjustifiable termination and the employee must establish at least a *prima facie* case of *mala fide*, before the employer is called upon to adduce evidence as to reasons for dismissal".

In the case of *Ceylon Cement Corporation v Fernando*⁽⁵⁾. It was observed that "the employer is the sole Judge to decide whether the **service of a Probationer** are satisfactory or not. A Probationer has no right to be confirmed in the post and the employer is not bound to show good cause where he terminates the **services of a**

Probationer at the end of the term of probation or even before the expiry of that period. The Tribunal cannot sit in judgment over the decision of the employer. It can examine the grounds for termination only for the purpose of finding out whether the employer had acted *mala fide* or with ulterior motives or was actuated by motives of victimization".

In the instant case the respondent had conducted a disciplinary inquiry against the petitioners and found them guilty of forwarding application forms with the signature of the Hon. Minister forged. Thereafter, the President of the Labour Tribunal having considered the evidence led before him had come to a conclusion that the petitioners have forged the signature of the Hon. Minister in their Application forms forwarded to the respondent, therefore the termination of the employment of the Probationer were justified. The learned High Court Judge had affirmed the decision of the President of the Labour Tribunal.

For the reasons aforesaid it is my view that the Employer-respondent had given satisfactorily good reasons for the termination of the services of the petitioner-employees who were on probation. Hence the termination of the employment of the petitioners were lawful and justifiable.

In the case of *Piliyandala Polgasowita Multi-Purpose Co-operative Societies Union Ltd. v Liyanage*⁽⁶⁾. Here the applicant-respondent was appointed on 15th February 1968 to a post on condition that if during a probationary period of one year, the employer was not satisfied with him, his services were liable to be discontinued. About five months afterwards his services were terminated because the Employer-Appellant discovered that the respondent had been charged in 1946 in the Magistrate's Court for offences involving **DISHONESTY** and dealt with under Section 325 of the Criminal Procedure Code. It was held that "the termination of the applicant-respondent's services was justified. In such a case the employee is not entitled to an alternative order of compensation".

In the case of *Brown & Co. Ltd. v Samarasekera*⁽⁷⁾. It was observed that "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**".

In the case of *Jayasuriya v Sri Lanka State Plantation Corporation*⁽⁸⁾. It was observed that "the Tribunal must make an order in good equity and conscience, acting judicially based on a legal evidence rather than on beliefs that are fanciful or irrationally imagined notions or whims". Further, it was observed that "for just and equitable verdict the reasons must be set out in order to enable the parties to appreciate how just and equitable the verdict is. Where **no basis for compensation** award is given the order is liable to be set aside. The essential question is the actual financial loss caused by the unfair dismissal because compensation is an indemnity for the loss".

In the case of *Pfizer Ltd. v Rasanayagam*⁽⁹⁾. It was held that "in assessing compensation the essential question is this. What is the actual financial loss caused by the **unfair dismissal?**"

In the instant case I am of the view that the learned President of the Labour Tribunal and the learned High Court Judge have awarded compensation of 6 months salary to the petitioners who were on probation without any basis.

It is obvious that the petitioners have gained employment dishonestly and fraudulently, hence illegally with the respondent as probationers and worked only for about 4 months, therefore I am of the opinion that the petitioners are not entitled to get any compensation for their dismissal from their employment.

For the reasons aforesaid, I affirm the decisions of the learned President of the Labour Tribunal and the learned High Court Judge on the termination of the employment of the petitioners. And set aside the decisions of both the Labour Tribunal and the High Court of awarding compensation of 6 months salary to the petitioners. Appeal is dismissed. No costs.

DR. SHIRANI BANDARANAYAKE, J. - I agree

RAJA FERNANDO, J. - I agree.

Appeal dismissed.

The decisions by the Labour Tribunal and the High Court to award compensation set aside.