

GOMES
v.
SRI LANKA STATE TRADING CORPORATION
AND ANOTHER

SUPREME COURT

WIMALARATNE, J., COLIN-THOME, J. AND ABDUL CADER, J.

S. C. APPEAL NO. 54/82, C. A. NO. 186/77, LT. NO. 1/A/264/74.

NOVEMBER 18 1983.

Industrial Dispute — Change of employment — Absorption of department into different institution — Retirement.

Held —

(1) Public Administration Circular dated 24.6.1970 in terms of which employees would not be entitled to extensions of service beyond the age of 55 years superseded the Co-operative Wholesale Establishment — Rules of Procedure, Administrative and Financial Part 1, on age of retirement. The termination of the applicant's services as a stenographer when she reached 55 years was regular.

(2) The change of employer by Governmental action will not affect the right to gratuity.

Cases referred to :

1. *Kulatunga v. The Board of Directors of the C.W.E.* S.C. 7/81 — Minutes of 3.10.81.
2. *K.S.G.N. de Silva v. The Sri Lanka State Trading (Textiles) Corporation.* S.C. 39/76 — Minutes of 9.8.78
3. *Lanka Salu Sala v. Wickremāyake* — S.C. 47/75 L.T. No. 8/554/75— Minutes of 9.4.75.

APPEAL from order of Labour Tribunal.

H. L. de Silva, SAAL with *L. A. T. Williams* for applicant-appellant.

D. H. M. Jayamaha for respondent-respondent.

Cur. adv. vult

16 December, 1983

WIMALARATNE, J.

The Applicant-Appellant was employed as an English Stenographer in the Cooperative Wholesale Establishment (C.W.E.) from 3.3.52. In accordance with a government policy decision the textile department of the C.W.E. where the applicant worked was handed over to the Lanka Salu Sala Ltd. from 1.10.67, and employees in the textile department of the C.W.E. were offered employment in Lanka Salu Sala Ltd. on terms and conditions similar to those that obtained in the C.W.E. The applicant accepted such appointment without a break in service. After the coming into operation of the State Trading Corporations Act, No. 33 of 1970, Lanka Salu Sala Ltd. was incorporated in this Corporation, which is the 1st respondent-respondent, and became an employee of the 1st respondent.

A government policy decision relating to retirement of public officers and public sector employees was incorporated in a Public Administration Circular dated 24.6.70, in terms of which employees would not be entitled to extensions of service beyond the age of 55 years. The Board of Directors of Salu Sala Ltd., acting upon that circular decided at a meeting held on 27.6.70, that no extension of service would be granted to its employees after the age of 55 years. Certain changes in government policy resulted in a rule that extension of service from the 55th to the 58th year could be granted by the Minister in charge of the Department or Corporation concerned, while extensions beyond age 58 up to 60 could be granted only by the Cabinet of Ministers. That decision had been conveyed by the Cabinet Secretary to all Secretaries of Ministries by circular dated 25.4.73.

The applicant completed her 55th year on 5.1.74, and before that she was given notice by letter dated 31.7.73 that she would be retired as from the date she completed her 55th year. Her appeals to the Board of Directors of the 1st respondent as well as to the Minister met with no success. Hence this application to the Labour Tribunal for relief in respect of what she says is wrongful dismissal.

Both the Tribunal and the Court of Appeal have dismissed her claim, and she has appealed to this Court claiming relief in a sum of Rs. 36,000/- as damages for breach of contract, and Rs.13,200/- by way of gratuity.

A document which was at the forefront of the applicant's case before the Tribunal as well as in the Court of Appeal, and before us is the document marked A3 which is a part of a booklet, the first page of which has the words "Cooperative Wholesale Establishment — Rules of Procedure, Administrative & Financial, Part 1" printed in bold type. In support of her case that employees of the C.W.E. had a right to remain in service up to age 60, Counsel relied upon the following rules in A3.

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**RETIREMENT
OPTIONAL
AT 55 YEARS**

Permanent employees of the CWE will be permitted to retire, if they so desire, on reaching the optional age of retirement (55 years). They may not be permitted to continue in service after reaching this age when it is possible to effect retrenchment by retiring an officer who has attained the age of 55 or his efficiency is definitely below normal.

An employee whom it is proposed to retire compulsorily for the reasons stated above should not be allowed an extension on compassionate grounds.

**COMPULSORY
RETIREMENT
AT 55 YEARS**

An officer who is compulsorily retired from service after reaching the age of 55 years should, in ordinary circumstances, be given 3 months notice of the date of retirement.

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**AUTOMATIC
RETIREMENT
AT 60 YEARS**

All employees shall be automatically retired on reaching the age of 60, unless the sanction of the Board of Directors has been received beforehand to retain their services after reaching the compulsory age of retirement ;"

It has been argued that when the applicant was appointed to the C.W.E. she had a reasonable expectation of working until she completed 60 years unless she was retired either on the ground of

retrenchment or on the ground of inefficiency. Neither of those grounds were relied upon for termination of her services. This, indeed, had been the interpretation placed on those Rules by this Court in the case of *Kulatunga v. The Board of Directors of the C.W.E.* (1); Learned Counsel for the respondents sought to distinguish that case on two grounds. The first is that the employee in that case continued to be employed in the CWE until he was retired, unlike in this case, where there was a change of employer. It must be noted, however, that both corporations are public sector corporations and a circular dated 24.11.68 by the General Manager of Salu Sala Ltd. expressly stated that till such time as a separate set of rules etc. were formulated, the CWE Rules & Regulations would apply to all members of the staff. The second ground on which that case is sought to be distinguished is more substantial. None of the Public Administration Circulars which were produced in this case had been produced in that case. Had there been such proof the result in **Kulatunga** may well have been different, for it is difficult to see how the Cabinet decisions relating to age of retirement, subsequently adopted and circulated at the instance of the Board of Directors of Salu Sala Ltd. can be ignored. That, indeed, had been the decision in *K. S. G. N. de Silva v. The Sri Lanka State Trading (Textiles) Corporation* (2).

I am, however, unable to agree with the Tribunal and the Court of Appeal that A3 contains only some **draft** rules which had never been adopted by the Board of Directors of the CWE. They bear the date stamp of "The McCallum Stores" under date 17.8.69, and the oral evidence established on a balance of probability that those were the Rules and Regulations acted upon by the CWE, and subsequently adopted by Lanka Salu Sala Ltd. The subsequent Public Administration Circular had, however, the effect of overriding those rules as far as age of retirement is concerned.

Learned Counsel for the appellant stressed the relevance of the reasonable expectation the appellant had of working till age 60 at the time she was appointed to the CWE in 1952. In the absence of any stipulation as to the retiring age in the letters of appointment to the CWE and to Lanka Salu Sala Ltd. one would

expect some evidence to have been led before the Tribunal as to the date when the Rules A3 came into operation. In the absence of such evidence how could it be inferred that way back in 1952 she had this reasonable expectation. I am therefore of the opinion that the termination of the applicant's service was not unlawful. The claim for damages (or rather compensation) for wrongful termination has therefore been correctly refused.

The applicant prayed not only for compensation but also for any other relief; it was therefore open to the Tribunal to have awarded the applicant relief by way of gratuity for 22½ years meritorious service as an English Stenographer, 15½ years under the 2nd respondent and 7 years under the 1st respondent. It is significant that both respondents are public sector corporations. The work undertaken by the textile department and the textile storage point of the CWE at Jawatta was **handed over** to the Lanka Salu Sala Ltd. also at Jawatta with effect from 1.10.67. Employees of the textile branch of the CWE were to be paid on the same salary scales they enjoyed, and leave and other conditions of employment were to continue under the Lanka Salu Sala Ltd. Just as a rose by any other name would smell as sweet, so also would the employees of the textile department of the CWE have felt justifiably that their transfer to the Lanka Salu Sala Ltd. would give them the same sweet benefits enjoyed by them earlier notwithstanding such change. It would thus be unjustifiable to deprive them of a gratuity which they had earned solely because of a metamorphosis not of their making. The applicant should therefore be given gratuity for the entirety of the 22½ years of her services.

But the 2nd respondent was discharged by the President on 4.2.75 as a result of a technical objection. I do not think that should alter the position because the new employer the 1st respondent has "cooperated to effect this metamorphosis as a result of a policy decision" as observed by the Court in *Lanka Salu Sala Ltd. v. J. M. Wickramanayake* (S.C.47/75 LT. No.8/5544/75 — minutes of 9.4.76).

The computation of gratuity has given us some concern because the statistics necessary for such computation have not

been led in evidence. There is a document marked R17 not produced by any witness, but which purports to be a statement of E.P.F. due to the applicant in a sum of Rs.17,101.48 up to 31.12.73. If we were to remit the case to the Tribunal for the limited purpose of computing gratuity, it would result in time and expense not commensurate with the claim of Rs. 13,200/- as gratuity before us. We are of the view that the award of that sum is just and equitable under the circumstances of this case.

In the result, we dismiss the appeal relating to compensation for termination of services, but we allow the appeal relating to the claim for gratuity in a sum of Rs. 13,200/- payable by the 1st respondent. There will be no costs of this appeal.

COLIN THOME, J. — I agree.

ABDUL CADER, J. — I agree for different reasons. (See separate Order.)

ABDUL CADER, J.

I agree with Wimalaratne J. that the rules and regulations in "A3" were acted upon by the C.W.E. and later adopted by Lanka Salu Sala Ltd. A further reason, if need there be, is that this is the first occasion in litigation of this nature that this defence was put forward. On this conclusion, I am of the view that whatever the date be that these rules began to be observed, the petitioner, even if she had been employed earlier, would have been entitled to believe that these same terms will be applicable to her, too. If it was different, the burden was on the respondent to establish it and this has not been done. ("R1" has no reference to the period of service.)

But her appointment to Salu Sala Ltd. made a vital difference. By "R4" she was informed that "your services under the C.W.E. will terminate on 30th September, 1967, and that an attached letter sets out the terms and conditions of your employment there." She is required to sign the copy of the letter and to return it. Presumably, she did it and thereafter she received the

appointment letter "R4" from Salu Sala. Para 9 of the letter reads as follows :

"You will be subject to the rules, regulations and departmental orders obtaining in Lanka Salu Sala Ltd., and any other orders, rules or regulations which may be issued from time to time by the Board."

Therefore, whatever may have been her expectations in the C.W.E. she bound herself to the conditions that her appointment to Salu Sala was subject to "rules which may be issued from time to time."

The rules under which she was discontinued fall into this category and it cannot be said that they were motivated by bad faith as they were based on a Cabinet direction. I am, therefore, of the view that the petitioner is not entitled to damages for the termination of her services. (For a similar view, see S.C. No. 39/76 — Minutes of 9.8.78.) (2).

As regards gratuity, when she was discontinued from the C.W.E. she could have then made the claim from the C.W.E. It is true that she had been lulled into a sense of trust by the provisions of Clause 10, but carefully analysed, it means that the Salu Sala would grant her the privilege of a gratuity on the same terms as in the C.W.E., but contains no promise to pay the gratuity due from the C.W.E. I am, therefore, of the view that the petitioner will be entitled to gratuity for the period of service under Salu Sala Ltd. only.

However, in view of the fact that a majority has decided to grant the petitioner gratuity in a sum of Rs. 13,200/- and in view of the more enlightened thinking in respect of gratuity now prevailing, I agree to the order made by Wimalaratne J.

Compensation not allowed.

Gratuity allowed.