

CEYLON CERAMICS CORPORATION

v.

G. G. PREMADASA

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND DHEERARATNE, J.

C.A. No. 12/80-L.T. 1/7742/75.

SEPTEMBER 16, 1985.

Industrial Disputes Act - Termination of probationer's services - Meaning of "probation" - Bona fides - Point of law taken for the first time in appeal.

The services of a probationer can be terminated during the period of his probation if his services are not considered satisfactory. Such termination is not unlawful or unjustifiable provided it is bona fide.

Semble:

Where an employee is interdicted during the period of his probation, he continues to be on probation.

A point of law can be raised for the first time at the appeal stage.

Cases referred to:

- (1) *Richard Pieris & Co., Ltd. v. Jayatunge* - 1 *Sri Kantha's Law Reports* 17.
- (2) *Hettiarachchi v. Vidyalkara University* - (1972) 76 *NLR* 47.

APPEAL from judgment of the Labour Tribunal.

Chula de Silva with *N. Casie Chetty* for employer-appellant.

Daya Guruge with *Miss K. Chelliah* for the applicant-respondent.

Cur. adv. vult.

November 15, 1985.

H. A. G. DE SILVA, J.

The applicant was appointed as Storeman in the service of the respondent Corporation by R8 dated 21.4.1978 w.e.f. 1st April 1971. Page 12 of the letter of appointment states that he will be on probation for one year and that within that period, his services could be terminated with one week's notice. Page 14 informs him that if during the period of probation his work is found to be unsatisfactory, it would necessitate his services being terminated.

On 23rd February 1972 by R9 the applicant was interdicted with immediate effect and he was asked to show cause on or before 3.3.1972 why his services should not be terminated on the charges stated therein. A domestic inquiry was held by an outsider, viz: Mr Kohoban Wickrama formerly of the Ceylon Civil Service on charge sheet R10 of 19.4.1972. After due inquiry, the Inquiring Officer found the applicant guilty of the charges and the applicant's services were terminated by R11 of 27.8.1973 with effect from 23rd February 1972, the date of his interdiction.

The applicant on 27.9.73 filed an application in the Labour Tribunal alleging that the termination of his services was unjust, unwarranted and unlawful and prayed for –

- (1) reinstatement with back wages; and
- (2) compensation or gratuity.

The respondent Corporation led evidence to the effect that: the applicant was the only Storeman working at the spare parts store of the Corporation and worked under one L. Perera; an internal audit examination of these stores had revealed that one hundred and nine ball racers were missing from the stores; an examination of some of the requisitions by which the ball racers were withdrawn from the stores, disclosed that copies of those requisitions R3A-R3D and R4A-R4D retained at the stores had been altered to show larger amounts than in fact had been issued; this fact was revealed by a comparison with the other copies of the same requisitions which were not retained at the stores; the Examiner of Questioned Documents expressed the opinion that some of the relevant entries were in the handwriting of the applicant.

The learned President has in his judgment stated that it is not possible for him to hold that the respondent Corporation had satisfactorily discharged the burden of establishing the charges against the applicant and ordered that the applicant be reinstated with immediate effect and to pay him a sum of Rs. 8,000 as back wages for the period of non-employment or in lieu of reinstatement to pay him a sum of Rs. 6,000 as compensation in addition to the back wages ordered. It is from this judgment that the respondent Corporation has appealed.

The learned President has come to strong findings of fact and these were not canvassed before us. Learned counsel for the respondent Corporation relied only on the learned President's failure to consider the fact that the applicant's services had been terminated during his period of probation and as such, so long as the termination was bona fide, it need not be for cause. He cited the case of *Richard Pieris & Co., Ltd. v. Jayatunge* (1) where it was held that—

“if the employer could terminate the services of the workman at the end of the term of probation without good cause, there is no reason why the same principle should not apply when his services are terminated during the period of probation. There is no requirement under the law that an employee should be forewarned orally or in writing so that he may adjust himself to the requirements of his service. The very word ‘probation’ implies that he is on trial.”

According to the Concise Oxford Dictionary, probation means the “testing of conduct or character of a person”. W. E. M. Abeysekera in his treatise on Industrial Law and Adjudication, Vol. II states at page 693—

“A contract of employment may either consist of a stipulation that the employee will be on probation for a period of time, (usually 6 months to one year), or consist of none such. During the period of time so stipulated, the employer has the right to terminate the services of the probationer provided the decision is bona fide. In *Venkatacharya v. The Mysore Sugar Co., Ltd.*, the Court held that a probationer dismissed within the period of probation could make no grievance of it. In *Dhingra v. The Union of India* the Court observed that ‘a service on probation means that the servant so appointed has been taken on trial.... In the case of appointment to a permanent post in Government Service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain.... if his service is terminated at any time’.”

It is now well settled law that the services of a probationer can be terminated, if his services are not considered satisfactory. It is true that the learned President has not adverted to this aspect in his judgment but this aspect does not appear to have been urged by counsel for the respondent Corporation before the Labour Tribunal. In

the answer filed by the respondent Corporation the fact that the applicant's services were terminated during his period of probation has not been averred as a ground justifying termination. It only avers that the respondent Corporation has no longer confidence in the applicant.

At the inquiry when the evidence of D. N. Weerasinghe, the Internal Auditor of the respondent Corporation was led it was elicited that in the letter of appointment of the applicant, R8, there is a clause stating that the applicant is on a period of probation for one year and that his interdiction by R9 was during this period of probation. The written submissions of the respondent Corporation submitted to the Labour Tribunal contains no submission on this aspect of the case. This submission appears therefore to have been made for the first time in the petition of appeal and at the hearing of this appeal.

Since this is a point of law that is being raised I do not think the respondent Corporation would be precluded from raising it at this stage and further as it has been adverted to in the petition of appeal the applicant would not have been taken by surprise.

According to the facts of the instant case, we find that the applicant was appointed as a Storeman by R8 w.e.f. 1st April 1971 on one year's probation and his letter of appointment stated that the applicant's services could be terminated with one week's notice if his work was found unsatisfactory. He was interdicted w.e.f. 23 February 1972, i.e. during his period of probation (R9). His services were terminated by R11 dated 27.08.1973 w.e.f. 23.02.1972, viz: the date of interdiction. Even if the date of termination is taken as 27.08.1973, he still would be on probation especially as he is on interdiction. In *Hettiarachchi v. Vidyalkara University* (2) it was held that—

“a person appointed to a post on probation cannot claim automatic confirmation on the expiry of the period of probation, unless the letter of appointment provides that the appointee shall stand confirmed in the absence of an order to the contrary. If a probationer is allowed to continue on probation after the period has expired, he continues in service as a probationer”.

How much more so then, if the appointee is under interdiction? The fact that a charge sheet was served and a domestic inquiry held would establish, in my view, the bona fides of the employer. Further the employer has stated that he has no longer any confidence in the applicant. In these circumstances, I have no alternative but to hold that the submission of learned counsel for the respondent Corporation must succeed and that the services of the applicant have been terminated not unlawfully or unjustifiably being during his period of probation. I would therefore set aside that part of the learned President's judgment where he orders the reinstatement of the applicant with back wages of Rs. 8,000 or to pay him a sum of Rs. 6,000 as compensation in addition to the back wages ordered in lieu of reinstatement. The appeal is allowed and the application to the Labour Tribunal stands dismissed. Each party will bear his own costs of this appeal and of the Labour Tribunal inquiry.

DHEERARATNE, J. — I agree.

Appeal allowed.
