

S. SHAFEEDEEN
v.
THE SRI LANKA STATE PLANTATIONS CORPORATION

SUPREME COURT.
G. P. S. DE SILVA, C.J.
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 18/93.
H.C. GALLE APPEAL NO. 70/92.
L.T./NO./4/M/7051/87.
NOVEMBER 18, 1993.

Industrial Dispute – Employment on probation – Industrial Disputes Act, (Cap. 131) sections 31(b) (4), 31(c) (1) – Bona fides.

Whilst the management is entitled to terminate the services of a probationer without adducing any reason, it is open to the Industrial Tribunal to enquire whether the order of termination has been effected in the *bona fide* exercise of its power conferred by the contract; and where the impugned termination is *mala fide* or so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in *bona fide* exercise of the power arising out of the contract, it is open to the tribunal to interfere with the order of the management and to afford proper relief to the employee.

Even though a decision has to be just and equitable whether or not the workman is a probationer, the common law rights of the employer in respect of a probationer, cannot be totally disregarded; and no rigid rule can be laid down that where the termination of a probationer's service is on a specific allegation, a formal charge and a domestic inquiry is a prerequisite to a valid termination.

Failure to account for 10 rolls of barbed wire improperly taken into his custody by the workman was a good ground for termination of a probationer's services without a formal charge and a domestic inquiry.

Cases relied on:

1. *Moosajeets Ltd. v. Rasiah* [1986] 1 Sri LR 365 (C.A.)
2. *Liyanagamage v. Road Construction & Development (Pvt) Ltd.*, S.C. Appeal No. 3/93 S.C. Minutes of 23.8.1993.
3. *Utkal Machinery Ltd. v. Santi Patnaik* AIR (1968) S.C. 398, 400.

APPEAL from the judgment of the High Court of Galle.

Faiz Musthapha P.C. with *S. Jayawardene* for appellant.
Shirley M. Fernando P.C. with *Miss Hyacinth Fernando* and *Hamilton Amerawickrema* for respondent

January 18, 1994.

KULATUNGA, J.

The appellant was employed by the respondent (Sri Lanka State Plantations Corporation) as an Assistant Superintendent on 05.11.85. In terms of his letter of appointment (P1) his appointment was subject to one year's probation. In the normal course, the appellant would have been confirmed in his appointment by the end of 1986. However, it would appear that he had not been so confirmed and hence continued to be a probationer when by a letter dated 08.01.87 (P2) his services were terminated on the ground that he was not trustworthy in view of the fact that he had failed to account for 10 rolls of barbed-wire. His application to the Labour Tribunal for relief was dismissed and an appeal therefrom was dismissed by the High Court. Appellant now appeals to this Court.

The letter of termination (P2) states that the appellant was Assistant Superintendent, Andapana Estate; that investigations revealed that there had been 06 full rolls and 02 half rolls of barbed-wire in stock; that the appellant had purchased a further 10 full rolls, out of estate funds; that he kept the barbed-wire at his bungalow instead of in the stores on the estate where it should have been stored and notwithstanding the fact that it was not one of his functions to have custody of such goods; and that at the inspection conducted it was revealed that he had only 01 1/2 rolls of barbed-wire when the correct balance should be 11 1/2 rolls. The letter further states that the appellant's explanation for the shortage of 10 rolls of barbed-wire cannot be accepted; and that his probationary service is terminated with immediate effect as he had betrayed the trust and confidence placed in him.

At the inquiry before the Labour Tribunal, the respondent called evidence. The appellant did not give evidence; nor did he allege that the termination of his services was *mala fide* either in his application or in the course of cross-examination of the respondent's witnesses. Nevertheless, the learned President of the Labour Tribunal states that he went into inquiry to satisfy himself as to the presence of any element which would taint the termination with *mala fides* or victimisation. His finding is that the available evidence does not show the existence of any facts which would establish *mala fides* or

victimisation. On these facts, the Labour Tribunal dismissed the appellant's application, on the authority of the decision in *Moosajees Ltd. v. Rasiah* ⁽¹⁾ where it was held that the employer was not bound to show good cause where he terminates the services of a probationer and that the tribunal cannot sit in judgment over the decision of the employer; and that it can examine the grounds of termination only for the purpose of finding out whether the employer had acted *mala fide* in doing so.

The appellant appealed to the Court of Appeal. The said appeal was transferred to the High Court of Galle in terms of section 12 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. Both before the High Court and in this Court the grievance of the petitioner appears to arise from the fact that in applying the principle laid down in *Moosajees case (supra)* the Labour Tribunal said:

"Since it is clear that the applicant's post was subject to probation and since he remained a probationer even on the date of the termination of his services, **the Tribunal cannot consider whether the termination of his services were unjust and inequitable; malice or victimisation was neither alleged nor proved by the applicant**" (emphasis is mine)

Learned Counsel for the appellant submits that under section 31(b)(4) of the Industrial Disputes Act, the tribunal is not bound by the provisions relating to termination, laid down in the contract of service and that furthermore, section 31(c)(1) empowers the Tribunal to make an order that may appear to it as "just and equitable". Hence the President of the Labour Tribunal was in error in applying the principle in the terms quoted above. Counsel submits that the decision in *Moosajees case (supra)* has by its failure to consider section 31(b)(4) of the Act, denuded the rights of a probationer as against a confirmed workman when in the light of the definition of 'workman' in section 48 there is no justification for doing so; that the High Court erred in giving a restrictive interpretation to section 31(b)(4) of the Act; and that the correct principle is that both in the case of a probationer and a confirmed workman the employer must prove to the satisfaction of the Tribunal that the termination of services is justified. Counsel drew our attention to the observation of

the High Court Judge that " ... it may be that section 31(b)(4) of the Act has a very restrictive meaning" and submitted that this view is contrary to the provisions of the Industrial Disputes Act.

While there is some justification in the appellant's objection to the particular formulation of the principle by the Labour Tribunal I see no serious error in the decision of the Tribunal dismissing the appellant's application, on the facts and circumstances of this case. As regards the observations of the learned High Court Judge referred to above, even assuming that the said observations are open to objection, I find that the High Court Judge has addressed himself correctly to the question before him when he specifically referred to section 31(c)(1) and stated that under that section "The Labour Tribunal must make an order in equity and good conscience acting judicially". He added that in the light of the facts before him he saw no reason to interfere with the decision of the Labour Tribunal.

I am also of the view that there is no error in the decision in *Moosajeets case (supra)*. That decision has not varied the requirement that it is the duty of the Labour Tribunal to make a just and equitable order. In *Liyangamage v. Road Construction & Development (Pvt) Ltd.* ⁽²⁾ this Court held (adopting the decision in *Utkal Machinery Ltd. v. Santi Patnaik* ⁽³⁾ that whilst the management is entitled to terminate the services of a probationer without adducing any reason, it would be open to the industrial tribunal to enquire whether the order of termination has been effected in the *bona fide* exercise of its power conferred by the contract; and where the impugned termination is *mala fide* or "so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in *bona fide* exercise of the power arising out of the contract", it is open to the Tribunal to interfere with the order of the management and to afford proper relief to the employee. The decisions in *Moosajeets case (supra)* and in the judgment of the High Court which affirmed the order of the Labour Tribunal are within the law as so stated.

In his written submissions the appellant's Counsel submits that there is no proof of the allegation against the appellant and that the absence of a charge sheet and a domestic inquiry raises "substantial

questions pertaining to the *mala fide* motivations of the respondent". This submission cannot be supported either on the basis of precedent or in the context of the rights of probationers. Even though a decision has to be just and equitable whether or not the workman is a probationer, the common law rights of the employer in respect of a probationer cannot be totally disregarded; and no rigid rule can be laid down that where the termination of a probationer's service is on a specific allegation, a formal charge and domestic inquiry is a prerequisite to a valid termination.

For the foregoing reasons, I affirm the judgment of the High Court and dismiss this appeal, but without costs.

G. P. S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.
