

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal

Seevali Jeyshta Bandara Arrawwawala,
New Town, Udaspaththuwa.

Applicant

SC Appeal 5/2014
SC/(Spl) LA/ 284/2013
High Court Nuwara Eliya No.
HC/NE/13/12 LT Appeal
LT/37/47/2010

Vs

1. Agarapathana Plantations Limited.
No.53-1/1, Sir Baron Jayatilleke Mawatha,
Colombo 1
2. Lanka Tea and Rubber
Plantations (Pvt) Ltd.
No.53-1/1, Sir Baron Jayatilleke Mawatha,
Colombo 1

Respondents

AND

1. Agarapathana Plantations Limited.
No.53-1/1, Sir Baron Jayatilleke Mawatha,
Colombo 1
2. Lanka Tea and Rubber
Plantations (Pvt) Ltd.
No.53-1/1, Sir Baron Jayatilleke Mawatha,
Colombo 1

Respondent-Appellants

Vs

Seevali Jeyshta Bandara Arrawwawala,
New Town, Udaspaththuwa.

Applicant-Respondent

Vs

AND NOW BETWEEN

1. Agarapathana Plantations Limited.
No.53-1/1, Sir Baron Jayatilleke Mawatha,
Colombo 1
2. Lanka Tea and Rubber
Plantations (Pvt) Ltd.
No.53-1/1, Sir Baron Jayatilleke Mawatha,
Colombo 1

**Respondents-Appellant-Appellants
Vs**

Seevali Jeyshta Bandara Arrawwawala,
New Town, Udaspaththuwa.

Applicant-Respondent-Respondent

Before : Sisira J de Abrew J
Prasanna Jayawardena PC J
Murdu Fernando PC J

Counsel : Uditha Egalahewa PC with Damitha Karunaratne and
NK Ashokbharan for the Respondent-Appellant-Appellants
Lal Wijenayake for the Applicant-Respondent-Respondent

Argued on : 7.11.2018

Written Submission

Tendered on : 17.3.2014 by the Respondent-Appellant-Appellants

16.2.2017, 19.11.2018 by the Applicant-Respondent-Respondent

Decided on : 6.3.2019

Sisira J de Abrew J

This is an appeal against the judgment of the learned High Court Judge dated 1/10/2013 wherein he affirmed the order of the learned President of the Labour Tribunal dated 30.9.2011. This court by its order dated 20.1.2014 granted leave to appeal on questions of law stated in paragraphs 14(b),(d),(e) of the Petition of Appeal dated 6.11.2013 which are set out below.

1. Did the Honourable Judge of the High Court misdirect himself, whilst correctly holding that the Respondent is a probationer, but thereafter failing to apply the law applicable to the probationers?
2. Did the Honourable Judge of the High Court misdirect himself on the pivotal question of burden of proof with regard to allegations of malice on the part of the Petitioners?
3. Did the Honourable Judge of the High Court misdirect himself on the question of who should start the case?

Learned President of the Labour Tribunal by the said order dated 30.9.2011 directed the Respondent-Appellant-Appellant (hereinafter referred to as the Employer-Appellant) to reinstate the Applicant-Respondent-Respondent (hereinafter referred to as the Applicant-Respondent) and to transfer the Applicant-Respondent to a different estate controlled by the Employer-Appellant.

The Applicant-Respondent was appointed on 1.7.2009 as an Assistant Manager of an estate owned by the Employer-Appellant. He was placed on probation for a

period of six months from 1.7.2009. By letter dated 28.1.2010 his probation period was extended for a further period of three months from 1.1.2010 to 31.3.2010. By letter dated 17.3.2010 his services were terminated with effect from 1.4.2010 as his performance had not been improved during the period of probation. The Employer-Appellant admitted that the services of the Applicant-Respondent were terminated whilst he was on probation. The learned President of the Labour Tribunal made an order that the Employer-Appellant should begin the case as the Employer-Appellant has admitted the termination of the Applicant-Respondent. Learned President's Counsel for the Employer-Appellant contended that the said order of the learned President of the Labour Tribunal was wrong since the termination of services took place whilst the Applicant-Respondent was on probation. Therefore, one of the important questions that must be decided in this case is whether the Applicant-Respondent was on probation when his services were terminated. Learned counsel for the Applicant-Respondent tried to advance an argument to the effect that when the period of probation of the Applicant-Respondent was extended on 28.1.2010, his period of probation had already come to an end since he had been placed on six months period of probation at the initial stage of his appointment and that this period of probation had come to an end on 31/12/2009. I now advert to this question. In order to find an answer to this question it is necessary to consider the clauses relating to probation in the letter of appointment. They are as follows.

1. Your appointment will be subject to a probationary period of six (06) months commencing from date of your appointment, but we reserve to ourselves the right to extend your probationary period if we deem it necessary.

2. During the period of probation or extended probation, either party may terminate this contract without notice and without pay in lieu of notice and without assigning any reason for such termination.
3. Confirmation of your appointment shall be in writing and at our sole discretion. You will continue to be on probation until you are confirmed.

Thus, according to above clauses in in the letter of appointment, the Employer-Appellant has the right to extend the period of probation. By letter marked R4 dated 26.1.2010, his period of probation has been extended with effect from 1.1.2010. Further, clause 3 of his letter of appointment, says that the Applicant-Respondent will be on probation until he is confirmed in service. The Applicant-Respondent has not been confirmed in service at any stage. For the above reasons, I hold that the Applicant-Respondent was on probation when his services were terminated.

The next question that must be decided is whether the learned President of the Labour Tribunal was correct when he ordered the Employer-Appellant to commence the case. To find an answer to this question it is important to consider the judicial decision in the case of Anderson Vs Husny [2001] 1 SLR 168 wherein His Lordship Justice Fernando held as follows.

“Upon proof that termination took place during probation, 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 his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified.”

In the present case, I have earlier held that the services of the Applicant-Respondent were terminated whilst he was on probation. When the learned President of the Labour Tribunal made an order that the Employer-Appellant should commence the case, his order was contrary to the principles enunciated in the above judicial decision. Applying the principles laid down in the above judicial decision, I hold that when an employer of an employee admitted that the services of an employee were terminated whilst he was on probation, it is the employee who should commence the case in the Labour Tribunal and not the employer. For the above reasons, I hold that the learned President of the Labour Tribunal was wrong when he ordered the Employer-Appellant to commence the case in Labour Tribunal. I further hold that in the present case, the burden is on the Applicant-Respondent to establish unjustifiable termination and that the Applicant-Respondent must establish a prima facie case of mala fides before the Employer-Appellant was called upon to adduce evidence with regard to the termination. In the present case the Employer-Appellant was first asked to adduce his reasons for termination.

For the above reasons I hold that the order of the learned President of the Labour Tribunal dated 30.9.2011 was wrong and cannot be permitted to stand.

The learned High Court Judge whilst holding that the period of probation of the Applicant-Respondent was lawfully extended affirmed the order of the learned President of the Labour Tribunal. For the above reasons, I hold that the learned High Court Judge was also wrong when he affirmed the order of the learned President of the Labour Tribunal 30.9.2011.

For the aforementioned reasons, I answer the 1st and 3rd questions of law in the affirmative. The 2nd question of law does not arise for consideration.

For the above reasons, I set aside the order of the learned President of the Labour Tribunal dated 30.9.2011 and the judgment of the learned High Court Judge dated 1.10.2013 and order a retrial. The learned President of the Labour Tribunal is directed to conclude this case without any delay.

Appeal allowed.

Judge of the Supreme Court.

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.