NATIONAL INSURANCE CORPORATION
v
WIJESINGHE

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
AMARATUNGA, J.
SOMAWANSA,J.
SC 97/2006
SC Spl LA 93/06
HCALT 936/2005
LT/1/Add - 116/2002
JUNE 5, 2007

Industrial Disputes Act – Section 31 B (1), Section 31 B (1) (a) – Granting of extensions upto 60 years – Employee retires – Jurisdiction of the Labour Tribunal – Retirement and termination by employer?

The applicant-respondent alleged that the appellant employer had constructively terminated his service by not granting further extensions of service upto 60 years. The position of the appellant-employer was that the respondent retired from the service upon the expiration of his extension of the services for one year and that the services were not terminated, but that the employee had retired, therefore the Labour Tribunal did not have jurisdiction to entertain the application. The Labour Tribunal held that the services were terminated unfairly and awarded him compensation, the High Court upheld the order of the Labour Tribunal. On appeal, to the Supreme Court,

Held:

(1) The application related to an alleged constructive termination of the respondent's services – Section 31B (1) (a) of the Industrial Disputes Act and in terms of the provisions of the said Act the Labour Tribunal has no jurisdiction to entertain an application unless there has been a termination of services of the workman by the employer.

(2) The respondent's own conduct further establishes that he accepted the decision of the employer to retire him by not granting any further extensions, for which the respondent was informed in writing that he

would not be granted the second extension, the respondent neither appealed nor protested to the employer-appellant that he had a right to work until he reached 60 and to re-consider its decision.

Held further:

(3) The respondent workman had no legal right to invoke the jurisdiction of the Labour Tribunal and in terms of the Section 31B(1)a – the Labour Tribunal had no jurisdiction to entertain the respondent's application.

APPEAL from the judgment of the High Court of Colombo.

Case referred to:

(1) *Gunaratne* v *De Zylva* SC 463/87 SCM 17.9.68

Gomin Dayasiri with *Chanaka de Silva* and *Ms. Manoli Jinadasa* for appellant.

P.L.S. Bandara with *Iranga Siriwardane* for respondent.

Cur.adv.vult.

September 07, 2007

ANDREW SOMAWANSA, J.

The applicant-respondent-respondent (hereinafter referred to as the respondent) filed an application in the Labour Tribunal of Colombo alleging *interalia* that the respondent-petitioner-petitioner (hereinafter referred to as the petitioner) had constructively terminated his services by not granting him further extensions of service up to the age of 60 years and prayed for arrears of salary related to the period he claimed he would have been able to continue in employment and compensation for wrongful termination.

The position of the petitioner was that the respondent retired from the service of the petitioner on 13.12.2001 upon the expiration of his extension of service for one year and that the service of the respondent was not terminated but that he retired. Thus the respondent was not entitled to have and maintain this instant application before the Labour Tribunal and moved for a dismissal of the same.

After an inquiry the learned President of the Labour Tribunal of Colombo delivered his order on 25.01.2005 holding that the services of the respondent was unfairly and unjustly terminated and awarded him compensation of 12 months salary amounting to a sum of Rs. 227,052/-

The petitioner lodged an appeal from the aforesaid order to the High Court of the Western Province holden in Colombo and the High Court Judge of the Western Province by his judgment dated 03.03.2006 affirmed the order of the learned President of the Labour Tribunal.

The petitioner thereafter sought leave to appeal from the aforesaid judgment of the High Court Judge of the Western Province and this Court has granted special leave to appeal from the said judgment on the questions of law as set out in paragraphs 'o' and 'p' of paragraphs 8 of the petition of the petitioner dated 10.04.2006 which reads as follows:

(o) Did the learned High Court Judge fail to appreciate that the Labour Tribunal had no jurisdiction to entertain the applicant's application?

(p) Did the learned High Court Judge, having made a finding that it was the petitioner's discretion to refuse extending the services of the applicant by one year, err in law and misdirect himself in concluding that the retirement of the applicant consequent to non-extension of employment amounted to a termination by the petitioner of the applicant's services?

It is to be seen that the jurisdiction of the Labour Tribunal is conferred by Section 31 B(1) of the Industrial Disputes act which states as follows:

31 B(1) "A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters:

(a) the termination of his services by his employer.

(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits:

(c) such other matters relating to the terms of employment, or the conditions of labour, of a workman as may be prescribed."

As the instant application related to alleged constructive termination of the respondent's services the applicable section would be Section 31 B(1) (a) of the Industrial Disputes Act and in terms of the said section the Labour Tribunal has no jurisdiction to entertain an application unless there has been a termination of services of the workman by the employer. In the case of *Gunaratne* v *De Zylva*[1] this Court held that in order to make an application under Section 31 B(1)(a) there must be a termination in law.

It is to be seen that the respondent's own testimony before the Labour Tribunal clearly demonstrates that the retiring age of employees of the petitioner company is 55 years and if any employees desired to continued in service after reaching the age of 55, such an employee had to make an application to the petitioner requesting an extension of service for a period of one year at a time. However it is apparent that extensions of service were not given automatically but must be applied for and even then such an application can be made only for a period of one year and the approval of the extension of service is at the discretion of the petitioner's management. In the circumstances, there was no automatic right to serve in the petitioner's company up to 60 years. In the instant case the respondent in his evidence admits that prior to reaching the age of 55 years he applied for an extension of his services for one year and the petitioner's management approved the same. However when the respondent made a further application for his second extension prior to the expiry of his first extension of service the respondent was informed by the petitioner that a further extension of service would not be granted.

In fact, the respondent's own conduct further establishes that he accepted the decision of the petitioner to retire him by not granting any further extensions. For when the respondent was informed in writing that he would not be granted the second extension of service the respondent neither appealed nor protested to the petitioner that he had a right to work until he reached the age of 60 years and to re-consider its decision. In fact his subsequent conduct clearly establishes that not only did the respondent accept the decision of the petitioner to retire him at the expiry of the first extension of service but that he acted upon it by writing several letters to the petitioner company manifesting his intention to retire. By letter dated 12.11.2001 marked R1 the respondent requested the petitioner to furnish him with his balance leave entitlements and also inquired as to whether any payment would be made in lieu of his unutilised annual leave. He further requested the petitioner to take charge of all documents in his custody as he intend taking leave before retiring. By his letter dated 29.11.2001 marked R2 addressed to the petitioner the respondent states that as he is due to retire from service of the corporation with effect from 13.12.2001 he would consent to the deduction of the balance sums of money due from him on all loans taken by him from the petitioner from his gratuity dues. Thus it could be seen that documents R1 and R2 clearly establish that the respondent had every intention to retire and had accepted the petitioner's decision not to extend his services by another year beyond his retiring age.

Counsel for the respondent contended that the learned President of the Labour Tribunal as well as the learned High Court Judge have correctly come to the conclusion that some others worked until the age of 60 years and the application of the respondent for a further extension of service for one year should have been considered properly, duly and fairly. I am unable to agree with the aforesaid conclusion for the reason that the respondent has failed to produce any evidence whatsoever either documentary or oral to establish his assertion that the retiring age for employees of the petitioner was 60 years and not 55 years. In fact the petitioner in his evidence admits that if he did not submit the application for extension he would have retired from service upon reaching the age of 55 years. The contention

that others worked until the age of 60 years is also not supported by any evidence either oral or documentary. Though the respondent alleged that other employees had worked until 60 years surprisingly he failed to give any particulars as to who these other workers were in his examination-in-chief. Instead under cross-examination he conceded that several employees who worked with him were not granted extension of service until the age of 60. Strangely however in re-examination the respondent mentioned for the very first time that there were about 5 employees who had been granted extensions but was able to give the name of only one such employee whose services he claimed had purportedly been extended until the age of 60. This item of evidence introduced at the time of re-examination and without being tested for its veracity under Cross-examination cannot be relied upon to come to the conclusion that others worked until 60. Unfortunately, the learned President of the Labour Tribunal as well as the High Court Judge has erroneously relied very heavily upon this very item of un-corroborated statement of fact in arriving at the conclusion that others have worked until 60.

It was also contended by counsel for the respondent that the respondent was granted a distress loan by the petitioner which was to be re-paid on 72 installments ending in 2005. However it is to be seen that the respondent himself has admitted in his evidence that this loan was subject to the specific condition that the balance due on the loan had to be re-paid upon retirement or termination of service. It is to be noted that by document R2 the respondent had requested the petitioner to deduct the balance sums of money due on all loans taken by him from his gratuity.

It was the respondent's burden to establish that the retiring age was 60 years which the respondent has failed to discharge. In the circumstances, there was no evidence of legitimate expectation for him to work until 60 years of age.

Evidence led at the inquiry as well as the subsequent conduct of the respondent clearly demonstrates that the respondent was retired from his services. Thus he ceased to be an employee of the petitioner by virtue of his retirement and not because of

termination of service by his employer the petitioner.

In the circumstances, the respondent had no legal right to invoke the jurisdiction of the labour Tribunal as he had failed to satisfy the requirements as set out in Section 31 (B(1)(a) of the Industrial Disputes Act and also in terms of the said Section the Labour tribunal had no jurisdiction to entertain the respondent's application. Thus it appears that the learned President of the Labour Tribunal had erred in coming to a conclusion that there was termination when in fact the evidence conclusively shows that it was retirement and not termination. The learned High Court Judge had also affirmed the order of the Labour Tribunal without considering this aspect of the matter. As such the order of the learned President of the Labour Tribunal as well as the judgment of the learned High Court Judge are perverse and cannot be permitted to stand.

For the aforesaid reasons I would answer the aforesaid two questions of law in the affirmative. In the circumstances I allow the appeal and set aside the judgment of the learned High Court Judge dated 03.03.2006 and also the order of the Labour Tribunal dated 25.01.2005. I also dismiss the application of the respondent tendered to the Labour Tribunal. In all the circumstances, I make no order as to costs.

DR. SHIRANI BANDARANAYAKE, J. - I agree.
AMARATUNGA, J. - I agree.

Appeal allowed.

Order of the Labour Tribunal and the judgment of the High Court set aside.