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

In the matter of an Application for Special Leave to Appeal under and in terms of Article 154P (3) (b) of the Constitution and in terms of the Provisions of Industrial Dispute Act No. 43 of 1950 (as amended) from the Order of the Provincial High Court of the Western Province Holden in Negombo dated 29th June 2015.

SC/APPEAL/ 212/2016
SC/ APPEAL/ 213/2016

S/C Spl LA Case 207/2015

HC Case No. HCALT 736/ 2012

L/T Case No. 21/ 464/ 2000/ N/

Christopher W.J. Silva,
18, Skelton Road, Colombo 05.

Applicant

~Vs~

Sri Lankan Airlines Limited,
Level 19~22 East Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

Respondent

AND BETWEEN

Christopher W. J. Silva,
18, Skelton Road, Colombo 05.

Applicant-Appellant

-Vs-

Sri Lankan Airlines Limited,
Level 19-22 East Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

Respondent-Respondent

AND NOW BETWEEN

Christopher W. J. Silva,
18, Skelton Road, Colombo 05.

Applicant-Appellant-Petitioner

-Vs-

Sri Lankan Airlines Limited,
Level 19-22 East Tower,
World Trade Centre,

Echelon Square,
Colombo 01.

Respondent-Respondent-Respondent

Before: Buwaneka Aluwihare PC. J
H.N.J Perera J
Vijith K. Malalgoda PC. J

Counsel: Mohamed Adamaly with Janaka Abeysundera for the Appellant

Manoli Jinadasa with D.Gunsthilaka for the Respondent-Appellant-Respondent instructed by Pieris & Pieris.

Argued on: 27/06/2017, 12/07/2017, 31/07/2017, 21/11/2017, 22/05/2018, 08/06/2018, and 12/07/2018.

Decided on: 22/03/2019

Aluwihare PC. J.,

The parties to SC Appeal 212/2016 and SC Appeal 213/2016 have come before this Court impugning the High Court Orders in HCALT 761/2012 delivered on 29. 06. 2015 and in HCALT 736/2012 delivered on 02. 09. 2015 overturning the decision given in LT 21/464/2000 N by the Labour Tribunal on 12. 11. 2012.

At the outset, it must be noted that the parties in SC/APL/213/2016 and SC/APL/212/2016 agreed to abide by one common judgment given in respect of both cases.

Special Leave to Appeal has been granted on the following questions of law;

1. Did the learned High Court Judge err in law in failing to appreciate that the application to the Labour Tribunal and the substantive case of the Petitioner was on the premise of the termination of his services as a Flight Control Executive and that the incidents relating to the termination of the Petitioner's Cadet training were only a preamble incident to the termination of the Petitioner's employment?

2. Did the learned High Court Judge err in law in failing to consider the findings of fact in the order of the learned President of the Labour Tribunal, especially as regards the harassment meted out to the Petitioner, the termination of the Petitioner's Flight Cadet Training, the termination of his employment and the blatant fabrication of evidence and documents by the Respondent?

3. Has the learned High Court Judge erred in law in failing to appreciate the established judicial authority that the Court of Original Jurisdiction, viz., the Labour Tribunal, is the best judge of the facts?

4. Did the learned High Court Judge err in law in completely failing to consider the evidence relating to the unlawful and unjust termination of the Petitioner's employment by the Respondent?

5. Has the learned High Court Judge erred in law in failing to enhance the compensation awarded by the Labour Tribunal?

On 27. 06. 2017, the Respondent was permitted to raise an additional question of law as follows;

> "Is the order of the Provincial High Court that the Respondent-Respondent-Appellant's allegation that the Respondent-Respondent-Respondent has intentionally terminated his services is not acceptable is correct and proper in law as per the facts & law of this case?"

The Applicant-Respondent-Petitioner in both cases (hereinafter the "Petitioner") joined Air Lanka (hereinafter the "Respondent"/"Respondent company") in 1985 and held the post of Flight Control Executive where he was responsible for the overall management of the flight program.

It has been the Petitioner's long-standing ambition to become a Pilot. In pursuit of this ambition, the Petitioner in 1998, applied for the post of 'Cadet Pilots' in the Respondent Airline and went through the preliminary selection process. He also subjected himself to a medical examination where he was disqualified on account of a certain medical condition in his eyes. Thereafter, at his own cost he travelled to the United Kingdom and obtained a CAA-UK class 1 medical certificate which was the standard required to become a cadet pilot. (Vide documents marked "A9"

and "A9a") Even after fulfilling the necessary qualifications, the Respondents refused him to proceed to the Cadet Pilot training and at that stage the Petitioner filed a fundamental rights application SC FR 172/99 against the Respondent company. The parties reached a settlement in the matter outside Court and the Petitioner was given a written assurance marked "A11" by the Respondent that he would be allowed to take part in the Cadet Pilot training up to the 'Simulator Check' which is the final step of the course. Where one succeeds at the said Simulator Check or, in aviation parlance knows as the 'Sim Check', one could become a pilot.

After the settlement was reached, in March 1999 the Petitioner left for Singapore to take part in the said Cadet Pilot course. He was only able to join the program midway but showed diligence in covering the missing sessions and took part in the remaining sessions. Details of these sessions, which have been meticulously laid before the Labour Tribunal and form a part of the brief, are unnecessary for the present purpose. Suffice to say that these sessions were conducted by flight instructors. The first 7 sessions were overseen by Chief Pilot M. O. Gooneratne under whose guidance, the Petitioner fared well. Thereafter, Captain Aleem was scheduled to take over the remaining sessions.

The Petitioner successfully completed the first sessions and was thereafter put under the guidance of Captain Aleem to receive training in the second session. According to the Petitioner, Captain Aleem made it very difficult for him to follow the instructions and continue his training.

In November 1999, Captain Aleem instructed the Petitioner to return to Sri Lanka. His training was stopped half way and he could not face the 'Sim Check" as he could never complete his training. He claims that he was never made aware till the constructive termination in March 2000 that he 'failed' the training as a Cadet Pilot. It is also important to note that he stopped receiving the salary post July 1999 (vide "A17") without any reasons being made known to him.

When the Petitioner returned to Sri Lanka in November 1999, he was informed by the Manager Flight Operations that the Company has been restructured and that the post he was serving, "Flight Control Executive", has now been retitled as "Duty Manager". During the same conversation he was asked to apply for the re-designated post. Accordingly, he preferred an application and was called for the interview on 24th January 2000 (video "A15 (B)"). On the said day, when the Petitioner went for the interview, he was informed that the interview was postponed and was asked to come again on 27th January 2000. Upon receiving this news, he immediately informed the management in writing (vide "A16") that he has an 'urgent situation' which prevents him from attending the interview and to consider giving him an alternative date for the interview. This was never responded to by the management. Subsequently upon making inquiries he came to learn that the interviews were in fact held on the 24th January 2000 and pursuant to that interview, Mr. Senaka Athukorala – the subordinate of the Petitioner who was overseeing the work during the Petitioner's leave had been appointed to the said 'Duty Manager' post. (Vide "A49")

Thereafter, he was asked by the Manager Flight Operations to report to work on 06th March 2000 to the post of "Fuel & Performance Executive." (Vide page 93, 94) He complied with this request, but it is his stance that upon learning that the new post belonged to a lower grade and was significantly different to what he was handling previously, he protested against it. It is the Petitioner's position that he never accepted this post and that although he reported to work from 06th March 2000 to 14th March 2000 he didn't have a desk or a chair. He had passed a week in that liminal state as a guest in the work stations of others. In her evidence, Manager Human Resources admits that she had no personal knowledge about whether the Petitioner had been assigned a proper work station. (vide p. 691 and the Labor Tribunal order pages 1609, 1610).

On 14th March 2000 the Petitioner received his letter of appointment (Vide "A20") where it was brought to his attention for the first time that he has failed the cadet pilot test. The letter of appointment also informed that he was placed in "Grade 8B" and was to be put on 'probation' in the said position. The salary was lower than what he earlier drew. Accordingly, on the very following day, he sent a letter informing the management that he considers his employment to have been constructively terminated by them. Thereafter he received a phone call from his superior where he was told that his career in aviation was finished. Several days later, the Respondent sent in a letter ("A 24") asking him to report to work on 06th April 2000, failing which he would be deemed to have vacated his post.

It is over the termination of the employment, that the parties took the matter before the Labor tribunal.

On behalf of the Respondent it is stated that after the aforesaid out of Court settlement in SCFR 172/1999, the Petitioner entered into a separate agreement marked "R 9" which *inter alia* stipulated that the Company could terminate the Cadet Pilot course where the trainee fails to make satisfactory progress in the course of study. They further contended that Captain Aleem's assessment in the second session of the Cadet Pilot Training shows that the Petitioner has shown only incremental progress and on his recommendation the training had to be stopped.

They further submitted that by the time the Petitioner returned to Sri Lanka, his post had ceased to exist and already been re-designated. The advertisement calling for fresh applications for the fresh post is marked as "A 15 (a)" and bears a date 05th November 1999, prior to the Petitioner's arrival in Sri Lanka. The Respondent further stated that, on account of this factor, the management could not have reinstated him in his previous position but that they promptly informed him to apply for the newly designated position. His application was accepted and was called for the interview. It was his failure to be present at the interview that placed him at a disadvantage. Nevertheless, the Respondents asserted, that recognizing his

15 years of service, they offered him an alternative employment in the company and that when he reported to work he accepted the same. But that on his own initiative, he refused to come to work from 06th April onwards which left no choice for the company but to consider as he has vacated his post.

The Respondent has produced a document marked 'R-12' in the Labor Tribunal in an attempt to prove that the Petitioner's post as 'Flight Control Executive' has been terminated retrospectively and that he would be paid only an allowance as a trainee. The genuineness of this document has been vigorously disputed by the Petitioner. The learned President of the Labor Tribunal has agreed that 'R-12' is ingenuine. (Vide pages 1605-1607)

At the end of the trial, the Labor tribunal decided that it was constructive termination and ordered a sum of Rs. 2,195,588. 60/= as compensation. The Respondent-Appellant in HCALT 761/2016 (in the present case the Respondent Company) appealed to the High Court impugning that the Labor Tribunal erred when the Tribunal decided it as constructive termination while Applicant-Appellant in HCALT/ 736/ 2016 (in the present case the Petitioner) appealed to the High Court on the ground of inadequate compensation.

The learned High Court Judge, in appeal overturned the decision and made a finding that there was vacation of post and reduced the compensation to Rs.250, 000/=. It is important to note that there were no oral submissions before the learned High Court Judge and that the matter was decided on written submissions. In his judgment, the learned High Court judge places emphasis on the medical condition of the Petitioner and holds that that Respondent was correct in terminating the Cadet Pilot training. He further observes that the Petitioner was offered an alternative employment and that it was the Petitioner who determined his contract of employment. It is pursuant to this decision that the parties have come before this Court.

Of the questions of law raised, except the question on the quantum of compensation, the rest involve as to whether the learned High Court Judge was correct in the factual determination.

Firstly, I make haste to observe that the learned High Court Judge erred when he concluded that the Petitioner's performance at the Cadet Pilot's training provided a justifiable basis to recall him to Sri Lanka and offer him a different employment.

With due deference, it seems that the learned High Court Judge has concerned himself with an important, yet unconnected matter to the question of termination. There can be no doubt that parties' positions in relation to the medical suitability of the candidate and the events that transpired during the training are highly contentious. A good portion of the Petitioner's cross examination and Captain Aleem's evidence deal with the events that took place in relation to the training. (Vide pages 71-88, pages 316-318, pages 1091-1180 and "R15"- "R22") Although these incidents provide a definite background to what happened thereafter, the issue of termination in fact arises with regard to the restructuring and the interview process and not pursuant to the Cadet Training. As the learned President of the Labor Tribunal has most prudently observed "*ඒ අනුව සලකා බලන විට පමණක් අලීම් නැමති අධීක්ෂණ නිලධාරියා ඉල්ලුම්කරු සම්බන්ධයෙන් සාධාරණ සහ යුක්ති සහගත ලෙසකින් කටයුතු කර නොමැති බව පෙනී ගිය ද , මා විසින් ඉහතින් සඳහන් කර ඇති තත්වය අනුව ඉල්ලුම්කරුගේ යෝග්‍යතාවයන් පිලිබඳ නිර්දේශ ලබා දීමේ හැකියාව ඇත්තේ ඉහත විශේෂඥයින්ට පමණක් බැවින් ඒ සම්බන්ධයෙන් විනිශ්චය සහාව මැදිහත් වීම සාධාරණ නොවන බව පෙනී යන කරුණකි.*" (vide page 1603). It indeed is a sphere that neither the Tribunal nor the High Court could make a pronouncement on.

What matters is the point at which the restructuring took place. And as correctly identified by the learned President of the Labor Tribunal, up to the point of the interview, the post of 'Flight Control Executive' had existed within the company. Manager-Human Resources, Anne Seneviratne has on several occasions admitted

that the actual restructuring took place somewhere in May 2000. (Vide, pages 815, 822-823) No doubt, by then the managerial plans to remove the said post have already crystalized. There can be no variance in that regard. For, even at the point the Petitioner came to Sri Lanka, the advertisement calling for application was in circulation. Nevertheless, it is also true that till such time the interview was held and a new officer was chosen, a different officer, other than the Petitioner, was overseeing the work assigned to that post. (Vide evidence in pages 834-844) In fact, evidence has been led to show that it is customary to reinstate an employee in their designation once they have returned from their training. As per document marked "A 31", Mr. U. L. R. Seneviratne who had returned to Sri Lanka after the training has resumed his work in the previous position. The Respondent has not sufficiently explained as to why they singled out the Petitioner and asked his subordinate to continue to oversee the work, which was legitimately the job of the Petitioner.

It is pertinent to briefly refer to the grading system at this point. The Petitioner's post as "Flight Control Executive" belonged to "E III" cadre prior to the restructure. With the restructuring, class "E III" was regraded to "8A" provisionally in April 2000 and equated to Grade 9 in June 2000. (Vide pages 385, 386 and "A 49" and "A 47"). The Manager - Human Resources in her evidence has stated that the new post 'Duty Manager' was a notch higher than the earlier 'Flight Control Executive' since it was a conjugation of two designations with increased responsibilities. She has further stated that owing to this, the new post was elevated to 'Grade 9' and that the Petitioner in any event could not have qualified for the same as his equivalent grading under the new system was "8B." (vide her evidence at page 607-611, 622, 920, 927). However, the documentary proof clearly indicates that Grade 8A and later Grade 9 were Grade E III's counterparts in the new scheme. It is also true that the Petitioner's subordinate who was in a lower grade than he was, subsequently became eligible for this position (vide evidence in pages 834-844). In contrast, the Petitioner who belonged to "Grade 8A" or "Grade 9" was given

"Fuel Monitoring Executive" a post which belonged to "Grade 8B". This mismatch in treatment and the demotion to "Grade 8B" seems surreptitious and unsupported by any rationale.

The Petitioner complains that requiring him to serve a probationary period of 6 months in the new designation was humiliating and malicious. I am not fully inclined to agree with this view as the Respondent company has categorically stated that it is customary to place officers in probation when they assume work in a new post. Several others who were given different appointments have been asked to comply with the same requirement. (Vide "R 28", "R 27").

At the same time however, the company purports to take up the position that he was offered that employment both because he could not go through the interview and because he has 'failed' the cadet pilot test. I think it is beyond any controversy that this last finding is an absolute mendacity. The evidence clearly speaks that the Petitioner could not complete the training. As I mentioned earlier, irrespective of the strained relationship between the instructor and the Petitioner, it is palpably wrong to state that he failed the test. He could only be deemed to have failed only if he went through the simulator test, which he did not.

Therefore, the purported failure cannot justify offering a lower position. However, if the company offered that position as a way of ensuring the continuance of a 15-years-long employee's career, that would be a different matter altogether. However, the history of discrimination and victimization seems to speak against this inference.

The company's failure in providing him a work station, arbitrarily stopping his wages midway into the training, failure to respond to his request asking for an alternative day for the interview, and placing him in a lower grade without sufficient explanation cumulatively does lend credence to the Petitioner's version that he has been mistreated by the company. As an employee who had served the company for 15 years, and who remained in his service till March 2000, the

company ought to have considered his grievances. I fully agree with the Petitioner that when he disclosed that there was an 'urgent situation' which prevents him from attending the interview, at the very least considering his long-standing service, his request ought to have been considered. The Respondent later seemed to agree that attending to his ailing mother is a reasonable excuse for foregoing the interview. However, their position that the Petitioner ought to have disclosed the same in the letter is unwarranted. If they had prompted to inquire, I believe the Petitioner would not have withheld the information.

From the record and the evidence placed before the Labor Tribunal, it appears to me that the management, despite admitting having 'stringent procedures' (vide pages 655-658), have mostly conducted their work based on verbal trust and assurances. The whole affair is an unpleasant result of giving and relying on verbal assurances. While it is undisputed that the informal structures help foster trust and confidence among work colleagues, for the sake of propriety they must also diligence in following due process. If there had been plans to restructure the posts, there was a duty on the Respondent to relay that message to its existing employees to keep them abreast of the developments. If a trainee has poorly performed at a training for which the company has paid, they ought to warn him of his performance. If the company decides not to grant an exception to the interview date, they ought to inform their stance to the applicant. It is precisely the failure to uphold their end of the bargain at each of these steps that paved the way for the present cause of action.

Yet, I stop short at believing the Petitioner's claim that he was 'literally kicked out of the company because he wanted to become a pilot'. While the Company may have looked unfavorably at the unyielding nature of the Petitioner, I do not believe that the management concocted a devious plan to sack the Petitioner because he was too ambitious. But it cannot escape the obvious conclusion the management has been persistently negligent and extremely careless in their treatment towards

the Petitioner to the point where they made it impossible for the Petitioner to continue his services.

Irwin Jayasuriya points out in ***The Concept of Misconduct in the Termination of Employment*** at page 91 that constructive termination takes place, *inter alia*, when the employer refuses to pay the legitimately due salary to the employee or where the salary is reduced or withheld without any reason being given, when the employer unilaterally varies the terms of the contract and when the employer unilaterally demotes the employee in grade or service. The Petitioner has drawn our attention to case law that finds demoting and reporting to a junior officer as amounting to constructive termination. **(Pfizer Limited v Rasanayagam (1991) 1 SLR 290)**.

These developments in law are on par with the developments in English Jurisprudence. At the same time, it must be noted that the doctrine of constructive termination is beset with a certain degree of uncertainty and Courts must take great care not to lightly find that every conduct amounts to a constructive termination. Jurisprudence in this regard has evolved from breaches of direct obligations in the contract of employment to encompass breaches of implied terms as grounds for constructive termination. These are violations which reach the very root of the contract and render further co-operation impossible.

While acknowledging these developments, there can be no harm in reiterating the observations made by the UK Court of Appeal in **Western Excavatina (ECC) Ltd v Sharp (1978) 1 All E.R. 713** that constructive termination must be a breach of contract and not a breach of reasonable conduct. In my opinion, whether a particular conduct amounts to a breach of a direct or implied contractual obligation must be assessed within each factual matrix. A finding in one case that a long-serving employee ought to be given consideration should not be taken as giving rise to a '*right to have their way*' in every situation. If Courts were to blindly follow precedence without heeding to the factual situations unique to each case, it

would loosely assimilate every conduct which may not involve a breach as constructive termination. (See pages 213-217 in ***The Contract of Employment*** by S. R. de Silva)

Bearing that caveat in mind, I am of the opinion that, in the present case the facts warrant a finding of constructive termination. The Petitioner has not at any point acted in a malicious way to disrepute or financially affect the Respondent company. He is not the typical malleable employee that most Companies prefer to have and he has been resolute in his determination to become a pilot. But that is clearly not a ground for a penalty. The learned President of the Labor Tribunal has observed that acts of victimization and discrimination that the Petitioner had to experience warrant a finding of constructive termination of the employment. (Vide page 1613)

In these circumstances, I do not believe that the decision of the learned President of the Labor Tribunal should have been interfered with. Although, my opinion in certain respects diverge from the opinion of the learned President, I do not believe that the decision has caused any miscarriage of justice or is erroneous. The decision is compatible with the evidence led before the Tribunal, and bereft of any glaring failures or unsupported conclusions. Where this is the case, the law is clear that the appellate platforms must not substitute the decisions of the primary court.

In **Caledonian (Ceylon) Tea & Rubber Estate v Hillman (79 NLR 421)** it was held that in order to set aside a determination of facts by the Tribunal "*the appellant must satisfy this Court that there was no legal evidence to support the conclusion of facts reached by the Tribunal, or that the finding is not rationally possible and is perverse having regard to the evidence on record.*"

In **Pfizer Limited v Rasanayagam (1991) 1 SLR 290**, the Court endorsed the observation in the Caledonian Case as follows; "*Where an appeal under section 31(d)2 of the Industrial Disputes Act lies only on a question of law that parties are*

bound by the Tribunal's findings of fact, unless it could be said that the said findings are perverse and not supported by any evidence."

In **D.L.K. Peiris v Celltel Lanka Limited (2012) 1 SLR 170**, the Court has affirmed this line of thought; "*At the very outset it must be noted that whilst this Court undoubtedly has jurisdiction to evaluate the evidence put before the learned President of the Labour Tribunal aforesaid, this Court is equally conscious of the unequivocal recognition of the trial court as the most able, to determine questions of original facts and, therefore, of the need to accord its finding due deference*."

In the instant case too, there is evidence on record to support the findings of the learned President. In those circumstances, I do not think the learned High Court judge had any grounds to alter the findings of the Labor Tribunal. I further reiterate that the learned High Court Judge has erred by trying to forge a link between the termination of the training and the termination of the employment.

Accordingly, I answer the 1st, 2nd 3rd, & 4th questions in the affirmative, and answer in the negative the question of law raised by the Respondent.

That leaves only the question with regard to compensation. On 02. 11. 2016 the learned Counsel for the Petitioner had intimated to the court that "*He is willing to accept the amount awarded by the Labour Tribunal President. The Amount is Two Million One Hundred Ninety-Five Thousand, Five Hundred & Eighty-Eight rupees with interest accrued as a settlement without prejudice to his rights*". As such, I do not consider it necessary to examine the said question of law.

Accordingly, I allow the appeal and set aside the orders given by the High Court in HCALT 761/2012 delivered on 29. 06. 2015 and in HCALT 736/2012 delivered on 02. 09. 2015.

Appeal allowed.

JUDGE OF THE SUPREME COURT

JUSTICE H. N. J PERERA

I agree

CHIEF JUSTICE

JUSTICE VIJITH K. MALALGODA PC.

I agree

JUDGE OF THE SUPREME COURT