IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for Leave to Appeal to the Supreme Court from an order of the Provincial High Court under and in terms of Section 31DD the Industrial Disputes Act (as amended)

SC. CHC. Appeal No. 26/09

SC.HC. LA. No. 22/09

HCALT No. 52/2008

LT. Case No. 01/283/98

J.H. Jacotine, No. 20, Melder Place,

Nugegoda.

Applicant

Vs.

Air Lanka Limited,

10-12, Sir Baron Jayatilleke Mawatha,

Colombo 01.

And

Administration and Training Building,

Bandaranaike International Airport,

Katunayake.

Respondent

And Between

J.H. Jacotine, No. 20, Melder Place,

Nugegoda.

Applicant-Appellant

Vs.

Air Lanka Limited,

10-12, Sir Baron Jayatilleke Mawatha,

Colombo 01.

And

Administration and Training Building,

Bandaranaike International Airport,

Katunayake.

Respondent-Respondent

And Now Between

Sri Lankan Airlines Limited,

Airline Centre,

Bandaranaike International Airport,

Katunayake.

(Formerly known as Air Lanka Limited)

Rpondent-Respondent-Petitioner

Vs.

J.H. Jacotine, No. 20, Melder Place,

Nugegoda.

Applicant-Appellant-Respondent

Before: **Tilakawardane, J**

Marsoof, PC, J &

Suresh Chandra, J.

Counsel: Ms. Manoli Jinadasa for the Respondent-Respondent-Petitioner.

Lucky Wickramanayke for the Applicant- Appellant-Respondent.

Argued on: 11.05.2011

Decided on: 03.02.2012

Ms. Shiranee Tilakawardane, J.

The Petitioner was granted special leave to proceed on 1st October 2009 on the questions of Law set out in paragraph P15 (a), (b) and (c) of the Amended Petition dated 14th September 2009.

The Applicant-Appellant-Respondent (hereinafter, the "Respondent") filed an application in the Labour Tribunal seeking relief on the premise that his services were constructively terminated by the Respondent-Respondent-Petitioner Company (hereinafter, the "Petitioner") and praying, *inter alia*, for the reinstatement of his services. The Petitioner emphatically denied and actively terminating the Respondent, asserting instead that the Petitioner had no choice but to deem the Respondent terminated from its employ as a result of the Respondent having vacated his post.

The dispute over the appropriate characterization of the severance of the relationship between the Petitioner and Respondent which is the issue this

court has to determine necessitates a careful review of the larger context in which this severance occurred, and as such, this Court takes the opportunity to both peruse the events directly leading up to this Petition as well as the Respondent's overall employment history with the Petitioner.

At the time of the severance, the Respondent had been on suspension from his post of leading steward and was required to show cause in respect of acts of misconduct and disciplinary breaches relating to the loss of US $63 to the Petitioner as a result of either (i) the Respondent's misappropriation of the funds or (ii) the neglect of his duties resulting in such loss. Though an internal inquiry into the matter resulted in the termination of the Respondent's services on 31st October 1996, the Respondent successfully appealed to Chairman of the Petitioner for a reduction in severity of the inquiry's finding. By letter dated 08th November 1996, the Chairman of the Petitioner allowed for a reinstatement of the Respondent, subject, however, to:

i. a demotion of the Respondent to the post of Flight Steward (Grade IV) without a change in salary;
ii. a restriction of the Respondent's duties, including a prohibition on his involvement in conducting duty free sales; and
iii. a mandatory, unpaid leave by the Respondent for the period from 31st October 1996 to 26th January 1997.

In terms of this reinstatement, the Respondent was ordered to report for duty on 27th January 1997. The Respondent, however, refused to accept the above mentioned conditions and failed to report for work on the specified date.

The Petitioner alleges that, after giving the Respondent further opportunities to report for work, the Petitioner deemed him as having vacated his post. By letter dated 10th February 1997, the Respondent answered the vacation of post notice, informing the Petitioner that he would be willing to report to work only if reinstated to his original position of Leading Steward. Furthermore, the

Respondent asserted that he would consider the Petitioner's failure or refusal to reinstate him to such post within seven days to be a constructive termination and reserved the right to seek redress before an appropriate forum. On 27th February 1997 the Petitioner responded to the aforementioned letter, referencing the findings of the disciplinary inquiry as reason for not being able to acquiesce to the Respondent's request for reinstatement to his original post and stating further that failure to report to work as required would compel the Petitioner to consider the Respondent as having vacated employment. After the above-mentioned exchange between the Respondent and the Petitioner, the Respondent filed action before the Labour Tribunal.

The learned President of the Labour Tribunal made his order dated 09th May 2008, dismissing the application of the Respondent. The learned President held that:

a) As per the case of *Nelson de Silva v. Sri Lanka State Engineering Corporation (1996) 2 SLR 342*, two elements have to be satisfied to determine the issue of vacation of post, namely the physical and the mental element;
b) If an employee commits misconduct, the employer is entitled to take disciplinary action against the workman and impose a proportionate punishment. A perusal of the documents reveals that the applicant had committed similar "misconduct" on 34 previous occasions. Therefore the employer was justified in imposing a punishment on the Respondent;
c) The evidence reveals that the Petitioner had given the Respondent more than enough opportunities to correct himself by imposing lesser punishments;
d) Even during the incident which related to the cessation of his employment, the Petitioner had acted justly and reinstated the Respondent in service, subject to justifiably imposed conditions;

e) The refusal to report for work by the Respondent therefore is not just and equitable;
f) The Respondent should have complied and complained;
g) However the Respondent had refused the new position and not reported for work. Thus he had not physically reported for work nor did he have the mental intention to report for duty.
h) As the Respondent has refused the new position and not reported for work he has fulfilled the physical and mental requirement needed to prove vacation of employment as the presence of an intention on the part of the employee not to return is needed to prove vacation of post.

Being dissatisfied with the finding of the Labour Tribunal, the Respondent then appealed to the Provincial High Court of the Western Province to set aside the Labour Tribunal Order. The learned High Court Judge by order dated 17th June 2009 had reinstated the Respondent with full back wages and other dues, awarded costs against the Petitioner on the premise that by reinstating the Respondent in service the Chairman of the Petitioner company had accepted the grounds pleaded by the Respondent in his appeal marked A49. The Learned High Court Judge had thereupon held that in such circumstances the imposition of the lesser punishment constitutes a constructive termination of his services. Thereafter subsequent to a motion filed by the Respondent the High Court judge made a further order dated 29th July 2009 “clarifying the” earlier order dated 17th June 2009. For the reasons below, we have determined that the findings of the Learned High Court Judge to be an improper reversal of the Labour Tribunal Order.

In simple terms, constructive termination occurs when the conduct of either the employer or employee will lead to termination of the contract of employment by the attitude or the conduct adopted towards the other party, though there is a relative dearth of case law establishing a clear guiding principle to determine when such repudiation exists. In *Hare v. Murphy Bros.*

1973 I.C.R 331 an employee was sentenced to one year's imprisonment for unlawfully wounding another, and on his release was informed by his employer that his job had been filled and that there was no alternative employment for him. It was held that the sentence of imprisonment amounted to a breach by the employee in such a rigorous manner that it constituted a repudiation of his contract of employment which, therefore, was terminated on his imprisonment. Hence there was no termination by the employer. In *Superintendent Abottsleigh Group and Others v. Estate Services Union on behalf of a workman (1991) 1 SLR 380*, the applicant had previously filed an action in the Labour Tribunal, Hatton, alleging that the appellant respondents had wrongfully terminated his services. The appellants, however, successfully averred that they had not terminated the applicant's services as the applicant had vacated his post by refusing to accept a transfer to another division of the same estate. The Court in *Pfizer Ltd v. Rasanayagam(1991) 1 SLR 290* suggests the need for sufficient clarity, as it found an employee's demotion to be deemed constructive termination as the employer had not sufficiently set out the reasons as to why the demotion order was lawful and just.

Indeed, according to S. R. de Silva in *The Employers' Federation of Ceylon (The Contract of Employment)*, it is difficult to state with any degree of certainty the legal rules which would apply in Sri Lanka on the question of repudiation of a contract of employment by an employee. However the following principles should be followed in making such a determination:

(a) Repudiation of a contract of employment gives the employer the right to terminate the contract or waive the breach, or to treat the contract as at an end in consequence of the repudiation by the employee. Where the employer himself terminates the contract instead of treating the contract as having been terminated by the employee, then the employer must justify the non-employment on the basis of a termination by him. If he waives the breach and totally condones the conduct, then the contract continues.

(b) The type of conduct that would amount to repudiation should go to the root of the contract.

(c) Where the employer wishes to treat the contract as at an end in consequence of the employee's repudiation then, in view of the conflicting decision in regard to the question of acceptance by the employer of the repudiation, it would be safer for the employer to accept the repudiation as being a necessary pre-requisite to the contract terminating in consequence of the repudiation.

(d) In exceptional situations, repudiation may not determine the contract and a court may keep the contract alive.

(e) It is not the immorality of the conduct which gives the employer the right to punish but the fact that such conduct is a fundamental breach of the employment relationship and is inconsistent with the continuance of that relationship. The conduct sought to be punished must have a material bearing on the employment relationship. Punishment would vary depending on the circumstances such as the gravity of the offence, length of service of the employee, his or her past conduct and the position occupied by the employee. The gravity of the offence may sometimes depend on the position the accused employee holds in the undertaking, such as a position of confidence.

(f) The principles relating to the past record of a workman is that it can be taken into account to justify a particular disciplinary action in respect of a subsequent act of misconduct, though the disciplinary action in question may not have been justified if the workman's past record had not been unsatisfactory. The basic problem relating to suspension without pay is that the general principle applicable to a contract of employment is that it cannot be suspended unilaterally and that the right of suspension exists only where it is expressly permitted by the contract of employment or by a collective agreement or where it is a custom or usage in the trade or establishment, thus making it an implied term of employment. Otherwise a suspension without pay could be

viewed as such a fundamental breach of the contract by the employer so as to entitle the employee to elect to treat the breach as a constructive termination of his services.

Given the fact-sensitive nature inherent in the analysis of a severance between employer and employee, it is to be noted that a determination of constructive termination can admittedly be quite a complex and delicate affair and is best left to the Labour Tribunal – the original trier of fact – for precisely this reason. As such, unless an exigency exists that warrants otherwise, upsetting the determination of the Labour Tribunal in such matters is to be resisted.

It is the view of this Court that the sheer extent and frequency of the Respondent's repeated misconduct throughout his employment with the Petitioner lays to rest any question surrounding the reasonableness of the Labour Tribunal Order. Apart from the non-settlement of the cash shortage at issue, there were several other acts of misconduct committed by the applicant that reveals him to have been a generally undisciplined employee with little regard for the practices and procedures of the Petitioner. For example, Documents R1, R2, R10 and R11 establish that the Respondent had been found guilty of delaying a UL Flight and endangering the passengers on board by insisting that his fiancée be permitted to travel on the aircraft despite her being stricken with Chicken Pox. According to these above-mentioned documents, the Respondent had been insubordinate to his superiors and, in fact, threatened the station officer with a complaint to the Chairman and pressured the Captain to permit her to travel. The Respondent was demoted to the position of flight steward and all travel privileges were forfeited for a period of one year for this misconduct.

The Respondent was also warned several times for his irresponsible conduct, inter alia, (i) poor service on board the flights (*vide* letters marked as R9 and R15), (ii) failure to perform his duties on the grounds of having to get his hair

cut (*vide* letter marked as R13), and (iii) irregular attendance and non-compliance with procedures relating to resuming duties after illness (*vide* letters marked as R14 and R32). The Respondent's annual increments for the years 1988, 1996 and 1994 were forfeited due to several acts of misconduct committed by him (*vide* document R21 and R27 and paragraph 20 of his affidavit at page 30B).

However, the most frequent and serious of the litany of offences committed by the Respondent during his employment with the Petitioner – and for which he had been repeatedly punished – was of precisely the kind at issue in this case. The evidence demonstrates that the Respondent failed/refused to settle the cash shortages in the duty free sales (also referred to as the "bar sales returns") until warning and punishment no less than 40 times. (vide page 408 of the brief)

This Court finds that the Learned President, having considered the extent of the Respondent's misconduct as well as the correspondence, acted well within reason to conclude that the Petitioner had not constructively terminated the Respondent. The Learned President's determination that the Respondent's refusal to report to duty was a vacation of employment is, to this Court, a just and fair determination arrived at with reasoning that closely tracks the thrust of the above-mentioned Guiding Principles. As such, we find no basis for the Learned High Court Judge's variance of the Labour Tribunal Order. Given the relative but nonetheless extraordinary leniency of the Petitioner in allowing the Respondent to continue employment after so many instances of subordination, it is simply not believable that the Respondent felt forced to use his absence from duty as the sole means of seeking justice. If the Respondent indeed had wished to appeal/complain regarding the said decision – a tactic he was no doubt quite comfortable with given the extent of his recalcitrance – he should have reported to work and then done so.

We find that the Respondent has failed to establish that he was constructively terminated as alleged. Therefore on the basis of the aforesaid findings, it is evident that the Petitioner's declaration that the Respondent had vacated employment as upheld by the Labour Tribunal is accurate and is reasonable under the circumstances. Accordingly, the Judgment of the High Court is set aside and this Court affirms the Labour Tribunal Order. The Petitioner's appeal is allowed. We also make Order that the Respondent pays a sum of Rs 25,000/- as Costs to the Petitioner.

JUDGE OF THE SUPREME COURT

Marsoof, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Suresh Chandra, J

I agree.

JUDGE OF THE SUPREME COURT