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

In the matter of an application for Special Leave to Appeal in terms of Article 154(P) of the Constitution read with Section 31DD of the Industrial Disputes Act (as amended) and Section 9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

SC.Appeal No.61/2015

SC.SPL.LA NO.251/2014

HCALT/33/2012

LT 32/RM/71/2008

Padmika Mahanama Tilakarathne

No.198, High Level Road,

Homagama.

Applicant-Appellant-Petitioner

Vs.

Maga Neguma Road Construction Equipment Company (Pvt) Ltd.,

No.50, Station Road,

Angulana,

Ratmalana.

Respondent-Respondent-Respondent

BEFORE : **SISIRA J.DE ABREW, J.**

VIJITH K. MALALGODA, PC, J. &

A.L.S. GOONERATNE, J.

COUNSEL : Uditha Egalahewa PC with Ranga Dayananda, N.K. Ashokbharan and Miyuru Egalahewa instructed by Ms. Lilanthi de Silva for the Applicant-Appellant-Appellant.

J.B. Shantha Perera PC with Epa Premachandra and L.Walasmulla for the Respondent-Respondent.

ARGUED &

DECIDED ON : 27.01.2021.

SISIRA J.DE ABREW, J.

Heard both Counsel in support of their respective cases. The Applicant-Appellant-Appellant (hereinafter referred to as the Applicant-Appellant) filed an application dated 08.09.2008 in the Labour Tribunal alleging that his termination of services was wrong. In the same application he sought re-employment and back wages. Learned President of the Labour Tribunal by his order dated 16.03.2012 dismissed the application of the Applicant-Appellant on the basis that he had vacated his employment. Being aggrieved by the said order of the learned President of the Labour Tribunal the Applicant-Appellant filed an appeal in the High Court of Colombo. The learned High Court Judge by his judgment dated 17.11.2014 dismissed the Appeal and affirm the order of the learned President of the Labour Tribunal. Being aggrieved by the said judgment of the learned High Court Judge the Applicant-Appellant has filed an appeal in this Court. This Court by its order dated 23.07.2015 granted Leave to Appeal on questions of law set out in paragraph 10(a), (b), (c) and (e) of the Petition of Appeal dated 15.12.2014 which are set out below;

1. Did the Hon. Judge of the High Court err in law by affirming the award made by the learned President of the Labour Tribunal without properly evaluating the evidence led in the Labour Tribunal?.

2. Was the said Order of the Hon. Judge of the High Court just and equitable?

3. Was the said Order of the Hon. Judge of the High Court against the weight of the evidence led and therefore contrary to the law?

4. Did the Hon. Judge of the High Court misdirect herself on whom the burden of proof lies to establish the two aspects involving the concept of vacation of post i.e. the physical absence from the work place and intention of desert and abandon the employment?

The facts of this case may be briefly summarized as follows;

The Applicant –Appellant was sent on vacation of post on two grounds;

1. Not reporting for duty

2. Not submitting the medical certificates.

According to the evidence led at the trial, the Applicant-Appellant could not report for duty due to various harassment that he had to encounter in the office. By letter dated 21.05.2008 marked "A25", the Employer-Respondent-Respondent (hereinafter referred to as the Employer-Respondent) gave time to the Applicant-Appellant to submit the relevant medical certificate till 30.05.2008. This letter dated 21.05.2008 has been signed by the General Manager of the Employer-Respondent. Although, the Employer-Respondent by letter dated 21.05.2008 marked "A25" (in the Labour Tribunal) gave permission to the Applicant-Appellant to submit his Medical Certificate till 30.05.2008, the Board of Directors of the Employer-Respondent on 21.05.2008 took a decision to send the Applicant-Appellant on vacation of post. This evidence is revealed at page 368 of the brief. The decision of the Board of Directors had been

submitted to the Labour Tribunal as "X1". It is noted that by letter dated 21.05.2008 the Employer-Respondent gave permission to the Applicant-Appellant to submit their medical certificate till 30.05.2008. But strangely on 21.05.2008 the Board of Directors has taken a decision to send him on vacation of post. Therefore, the decision of the Employer-Respondent to send him on vacation of post on 21.05.2008 itself is questionable.

The Applicant-Appellant has stated in his evidence that he could not report for duty due to various harassments caused to him by the Chairman of the Employer-Respondent. He has stated, in his evidence, that after the new Chairman assumed duties in the Employer-Respondent company, the new Chairman has taken a decision to demolish the office of the Applicant-Appellant. It is interesting to note the incident that had taken place on 17.03.2008. The Chairman of the Employer-Respondent, on 17.03.2008, had walked into the office of the Applicant-Appellant and threatened to kill him like a dog by putting a pistol into his mouth. The Applicant-Appellant complained this incident to the Police. The Applicant-Appellant was examined by a Doctor and the Medico Legal Report has been produced as "A36a" in the Labour Tribunal. The history given by the patient is as follows;

> Alleged to have been assaulted by …… on 17.03.2008 at 12.30 p.m;
> Slapped either side of the face;
> Threatened by putting a pistol into mouth;
> Attempted manual strangulation;

The Doctor, in the Medico Legal Report, has made the following observation;

> " History given by the victim is consistent with Medico Legal Examination findings"

On the complaint made by the Applicant-Appellant on the above incident, the Police filed a case against the Chairman of the Employer-Respondent. We note that he was charged under Section 314 and Section 486 of the Penal Code. In the Magistrate's Court a settlement was reached and in the settlement, the Chairman of the Employer-Respondent in Open Court apologized to the Applicant-Appellant. Therefore, it is clear that the Chairman of the Employer-Respondent has apologized to the Applicant-Appellant about what happened on 17.03.2008. When we consider the above evidence, the most important matter that must be considered is whether the Applicant could have continued to report for duty. When we consider the above material, we hold that there was no opportunity for the Applicant-Appellant to report for duty at the office of the Employer-Respondent.

After considering all the above matters, we hold the view that the Applicant-Appellant did not have an intention not to report for duty and he was prevented from reporting for duty by the Employer-Respondent. If the Applicant-Appellant did not have an intention not to report for duty and was prevented from reporting for duty due to the harassment caused to him by the Employer, his employment cannot be terminated on the basis that he had vacated the employment. This view is supported by the judicial decision in the case of Nelson de Silva *Vs. Sri Lanka State Engineering Corporation(1996) 2 SLR 342* wherein His Lordship Justice Jayasuriya made the following observation.

> "A temporary absence from a place does not mean that the place is abandoned; there must be shown also an intention not to return"

We have earlier pointed out that the Appellant did not have an intention not to report for duty. According to the evidence led at the trial he could not report for duty due to the harassment caused to him by the Employer-Respondent at the work place. If he did not have an intention not to report for duty, we hold that his services cannot be terminated on the basis that he had vacated the employment. We have earlier said, that the decision

of the Employer-Respondent to send him on vacation of post is questionable. For the purpose of clarity, we would like to state that Applicant-Appellant was given time to submit medical certificates till 30.05.2008, but the Board of Directors of the Employer-Respondent took a decision on 21.05.2008 to send him on vacation of post.

Considering all these matters, we hold that the decision of the Employer-Respondent to send the Applicant-Appellant on vacation of post cannot be permitted to stand in law.

Considering all the above material, we held that the learned President of the Labour Tribunal was wrong when he came to the above decision. In view of the conclusion reached above, we answer the 1st question of law in the affirmative. With regard to the 2nd question of law, we answer as follows;

> " The order of the Hon. Judge of the High Court is not just and equitable".
>
> We answer the 3rd question of law in the affirmative.
>
> With regard to the 4th question of law, we answer as follows;
>
> The Applicant-Appellant did not have any intention of abandoning the employment.

Considering all these matters we set aside the judgment of the learned High Court Judge dated 07.11.2014 and the order of the Labour Tribunal dated 16.03.2012. We direct the Employer-Respondent to re-employ the Applicant-Appellant in the same post that he held at the time of the time of termination of services at the Employer-Respondent company and to grant him all back wages and emoluments.

We direct the Respondent to implement this judgment within three months from the date of this judgment.

The Registrar of this Court is directed to send a certified copy of this judgment to the Respondent.

JUDGE OF THE SUPREME COURT

VIJITH K. MALALGODA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

A.L.S. GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT

Mks