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

In the matter of an Appeal from the Judgement of the Provincial High Court of the Western Province holden in Negombo dated 7th November 2016 in HCALT 38/2013, in terms of the Industrial Disputes Act and the High Court of Provinces (Special Provisions) Act, No. 10 of 1990 read with the Rules of the Supreme Court

Kachchakaduge Frank Romeo Fernando,
No. 17/28, Raja Mawatha,
3rd Kurana, Negombo.

Applicant

S.C. Appeal No. 60/2018
SC/HC/LA 89/2016
HCALT 38/2013
L.T. Application No. 21A/998/2010

Vs.

Brandix Apparel Solutions Limited
(Formerly Brandix Casualwear Ltd),
No. 409, Galle Road, Colombo 03.
(having a factory at 21, Temple Road,
Ekala, Ja-ela).

Respondent

AND BETWEEN

Kachchakaduge Frank Romeo Fernando,

No. 17/28, Raja Mawatha,

3rd Kurana, Negombo.

Applicant-Appellant

Vs.

Brandix Apparel Solutions Limited

(Formerly Brandix Casualwear Ltd),

No. 409, Galle Road, Colombo 03.

(having a factory at 21, Temple Road, Ekala,

Ja-ela).

Respondent-Respondent

AND NOW BETWEEN

Brandix Apparel Solutions Limited

(Formerly Brandix Casualwear Ltd)

No. 409, Galle Road, Colombo 03.

(having a factory at 21, Temple Road, Ekala,

Ja-ela).

Respondent-Respondent-Petitioner

Vs.

Kachchakaduge Frank Romeo Fernando,

No. 17/28, Raja Mawatha,

3rd Kurana, Negombo.

Applicant-Appellant-Respondent

Before: Jayantha Jayasuriya, P.C., C.J.

Vijith K. Malalgoda, P.C., J.

Janak De Silva, J.

Counsel:

Suren Fernando with Khyati Wickramanayake and Sanjit Dias for the Respondent-Respondent-Appellant

P.K. Prince Perera for the Applicant-Appellant-Respondent

Written Submissions filed on:

03.07.2019 and 11.08.2021 by the Respondent-Respondent-Appellant

19.06.2019 and 02.08.2021 by the Applicant-Appellant-Respondent

Argued on: 30.07.2021

Decided on: 05.05.2022

Janak De Silva, J.

The Applicant-Appellant-Respondent (hereinafter referred to as "Respondent") has joined the Respondent-Respondent-Appellant (hereinafter referred to as "Appellant") as a Quality Executive. While serving as Assistant Manager (Finishing) at the Appellant's plant in Seeduwa, the Respondent was suspended from service on 07.10.2009. The Respondent was told verbally that the reasons for the suspension will be communicated later. Subsequently, on 09.10.2009, a notice of suspension of service (A2) without pay effective 07.10.2009 was served on the Respondent, which contained two charges.

Thereafter, the Respondent was informed of a disciplinary inquiry (A4) against him on 27.10.2009. In response, the Respondent pointed out that he had not yet been served with a charge sheet nor afforded an opportunity to show cause (A5). Subsequently, the disciplinary inquiry was postponed and the Respondent was given a formal charge sheet containing three charges and asked to show cause (A8). After the Respondent responded to the show cause letter, a disciplinary inquiry was carried out and he was convicted on two charges.

The findings of the disciplinary inquiry were communicated to the Respondent by letter dated 11.01.2010 (A13). He was advised that as a result of the findings, he is subject to a punitive transfer to a factory in Polonnaruwa, owned by the Appellant, effective 18.01.2010. He was also informed that if he does not report to work at the Polonnaruwa factory, he will be deemed to have vacated post. The letter then indicated that his work would be monitored for a period of six months. The services of the Respondent were to be terminated if he failed to comply with the Appellant's rules and regulations during this period.

In response, by letter dated 28.01.2010 (A16), the Respondent rejected the contents of the letter dated 11.01.2010 (A13). He claimed that the disciplinary inquiry was conducted in violation of the principles of natural justice in an unjust and unreasonable way. The Respondent stated that imposing a punitive transfer based on the findings of such an inquiry is unfair and unreasonable. The Respondent requested the Appellant to invalidate the letter dated 11.01.2010 (A13). He indicated his willingness to comply with the transfer order and report to work at the factory located at Polonnaruwa if the Appellant removed the punitive conditions contained in the transfer order.

Subsequently by letter incorrectly dated 05.01.2010 (A18), which should read as 05.02.2010, the Respondent informed the Appellant that due to the Appellant's failure to reply to his letter dated 28.01.2010 (A16) and as the Appellant is bent on punishing him for acts he did not commit, he has been compelled to come to the conclusion that the Appellant has constructively terminated his services with effect from 01.02.2010. The Respondent concluded by stating that he will accordingly seek suitable judicial remedies.

The Appellant, by letter dated 10.02.2010 (A21) rejected the contents of the letter dated 28.01.2010 (A16). The Respondent was informed that he is required to report to work by 22.02.2010 and that the failure to do so will compel the Appellant to deem that the Respondent has vacated post.

The Respondent however did not report to work and the Appellant informed him by letter dated 25.02.2010 (A20) that he is considered to have vacated post. However, prior to this communication, on 24.02.2010, the Respondent filed an application with the Negombo Labour Tribunal stating that his services had been terminated in a constructive manner. The Appellant filed answer denying termination and maintained that the Respondent had vacated post by failing to comply with the transfer order.

At the conclusion of the inquiry before the Labour Tribunal, the learned President dismissed the application on the ground that constructive termination had not been proved. He went on to observe that the Respondent was in transferable service and liable to be transferred by his employer in the normal course of business.

The learned President referred extensively to the judgment of Amaratunga J. in ***Sri Lanka Insurance Corporation Ltd. v. Jathika Sewaka Sangamaya*** **[(2011) 2 Sri.L.R. 114]**, where it was held that if an employee who was issued a transfer order at the conclusion of a disciplinary inquiry, fails to comply with the said order and keeps away from work without obtaining leave, he, by his own conduct, secures his own discharge from the contract of employment with his employer. Accordingly, the learned President concluded that the Respondent had vacated his post by refusing to comply with the transfer order unless the punitive terms contained in it is removed and that there has been no termination of by the Appellant. The learned President concluded that as such, the Labour Tribunal lacked jurisdiction to inquire into the application made by the Respondent.

Aggrieved by the order of the Labour Tribunal, the Respondent appealed to the High Court of the Western Province holden in Negombo which held that the Appellant had unjustly and unreasonably terminated the services of the Respondent and ordered reinstatement with back wages.

This Court on 03.04.2018, granted leave to appeal on the following questions of law contained in paragraph 10 of the Petition of Appeal dated 15.12.2016:

(a) Did His Lordship of the High Court err in law in failing to recognize that the jurisdiction of the High Court was restricted to questions of law?

(d) Did His Lordship of the High Court err in law in failing to apply principle of law relating to burden of proof, especially in the context where termination was denied?

(e) Did His Lordship of the High Court err in law in failing to properly consider and apply the principles of law applicable to transfer of employees and the principle of 'Comply and Complain'?

(f) Did His Lordship of the High Court err in law in failing to recognize there was no termination of Respondent's services as alleged?

(g) Did His Lordship of the High Court err in law in failing to recognize that the Respondent has vacated post?

I shall first address the question of law set out in (d).

Jurisdiction of the Labour Tribunal

The Respondent invoked the jurisdiction of the Labour Tribunal alleging that constructive termination had taken place. In terms of section 31B(1)(a) of the Industrial Disputes Act as amended, the jurisdiction of the Labour Tribunal is engaged only where there has been a termination of the services of the workman by the employer. In the absence of such termination in law, the Labour Tribunal is without jurisdiction.

Judicial precedent establishes that the jurisdiction of the Labour Tribunal is also engaged in cases of constructive termination. Here the workman alleges that the employer has constructively terminated his services although the employer, as in this case, denies any termination.

The learned Judge of the High Court proceeded on the basis that the transfer order was invalid due to the domestic inquiry not been conducted in a just and fair manner. The learned High Court Judge held that by failing to present the proceedings of the domestic inquiry to the Labour Tribunal, the Appellant had failed to establish that it did not act in an unjust and unfair manner towards the Respondent. He further held that while he is in agreement with the reasoning in ***Sri Lanka Insurance Corporation Ltd*. v. Jathika Sewaka Sangamaya (Supra.)**, the principle of *comply and complain* did not apply to the instant case as the disciplinary inquiry was not conducted in a fair manner. The learned High Court Judge held that the *comply and complain* principle did not apply where the transfer order was illegal.

The learned High Court Judge expressed his views as follows:

> *"වැඩිදුරටත් විනය චෝදනාවට අදාළව විනය පරීක්ෂනයක් පවත්වන ලද බවට වගඋත්තරකාර පර්ශ්වය සාක්ෂි දුන්න ද, කම්කරු විනිශ්චයාධිකරණයේ දී ඉල්ලුම්කරුට විරුද්ධව ඇති චෝදනා සම්බන්ධයෙන් කිසිදු සාක්ෂියක් මෙහෙයවා නැත. අවම වශයෙන් විනය පරීක්ෂනයේ සටහන් හෝ වාර්තාවක් ඉදිරිපත් කර නැත. මේ අනුව, සේවායෝජකයා ඉල්ලුම්කරු කෙරෙහි අසාධාරණ හෝ අයුක්ති සහගත චේතනාවකින් කටයුතු නොකලේ යැයි කීමට කිසිදු කරුණක් අධිකරණයට ඉදිරිපත් වී නොමැති බවට මා තීරණය කරමි. මෙම කරුණු අනුව, කම්කරු විනිශ්චයාධිකරණයේ තීන්දුව පාදක වූ අවනත වී පැමිණිල්ල කළ යුතුය යන (Comply and Complain) රීතිය මෙම වගඋත්තරකරු කෙරෙහි යොදා ගත නොහැකි බව මා තීරණය කරමි."*

Burden of Proof

In this context, the question arises as to who bears the burden of proving constructive termination so as to engage the jurisdiction of the Labour Tribunal.

In ***The Ceylon University Clerical and Technical Association, Peradeniya v. The University of Ceylon, Peradeniya*** **(72 N.L.R. 84 at 90)** and ***Anderson v. Husny*** **[(2001) 1 Sri.L.R. 168 at 175]** it was held that although Labour Tribunals are not bound by the provisions in the Evidence Ordinance, the principles contained therein are a useful guide in determining the matters before it. In ***Indrajith Rodrigo v. Central Engineering Consultancy Bureau*** **[(2009) 1 Sri.L.R. 248 at 260]** it was explained that although the equitable nature of the jurisdiction of Labour Tribunals has consistently been recognized in the decisions of our courts, in the process of redressing grievances of workmen in a just and equitable manner, one cannot lose sight of procedural propriety and evidentiary legitimacy.

Section 102 of the Evidence Ordinance reads:

> "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Accordingly, the burden is on the workman to establish that there has been a constructive termination of services so as to vest jurisdiction in the Labour Tribunal as the workman will fail if no evidence is given on either side. Therefore, the onus was on the Respondent to prove that his services were constructively terminated as the Appellant had denied termination.

In this respect the decision in ***Indrajith Rodrigo v. Central Engineering Consultancy Bureau*** **(Supra.)** is illustrative as it was held that in Labour Tribunal proceedings where the termination of services of a workman is admitted by the respondent, the onus is on the latter to justify termination by showing that there were just grounds for doing so and that the punishment imposed was not disproportionate to the misconduct of the workman. It was further held that the burden of proof lies on him who affirms, and not upon him who denies as expressed in the maxim *ei incimbit probatio, qui dicit, non qui negat*.

Conversely, where the employer denies termination as in this case, the burden is on the workman to prove that there was termination as well as that the termination was unjust and unlawful. The onus is not on the employer to prove that the termination was just and lawful when the termination is denied.

Accordingly, I hold that the learned High Court Judge erred in law in placing the burden of proof on the Appellant to establish that it did not act in an unfair and unjust manner towards the Respondent. Consequently, question of law (d) is answered in the affirmative.

Next, I will examine question of law (e).

Comply and Complain

The learned counsel for the Respondent submitted that the punishment transfer given to the Respondent by letter dated 11.01.2010 (A13) is perse mala fide, bad and misconceived in law as the disciplinary inquiry was held in breach of the principles of natural justice in an unfair and unjust manner. Furthermore, it was argued that an employer's general right to transfer an employee within the organization is not an absolute right.

Relying on the decision in ***Janatha Estates Development Board and Others v. Kurukuladitta*** **[(1990) 2 Sri.L.R. 169]**, the learned counsel for the Respondent contended that the employee is entitled to disobey the transfer, where the transfer order is tainted with mala fide intentions and that in these circumstances, the learned Judge of the High Court did not err in law in holding that the principle of *comply and complain* is not applicable to the instant case.

As correctly submitted by the learned counsel for the Respondent, in ***Janatha Estates Development Board and Others v. Kurukuladitta*** **(Supra.)** it was held that an employee is justified in refusing to comply with a transfer order if the transfer order is mala fide. Moreover Weeramantry J., in ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(73 N.L.R. 278 at 287)**, observed that there is no general principle that an employee is in all cases bound to accept a transfer order under protest for there may be cases where the mala fides prompting such order is self-evident or the circumstances of the transfer so humiliating that the employee may well refuse to act upon it even under protest. This was cited with approval by Fernando J. in his dissenting judgement in ***Nandasena v. The Uva Regional Transport Board*** **[(1993) 1 Sri.L.R. 318 at 327]** where he observed that an employee has a limited right, bona fide to challenge an improper transfer order.

Nonetheless, Goonewardene J. delivering the majority judgment in ***Nandasena v. The Uva Regional Transport Board*** **(Supra.)** held that even where the transfer order was invalid, the employee must obey it. He could appeal against the order but he cannot refuse to carry it out. He must *comply and complain*. I must add that Amaratunga J. in ***Sri Lanka Insurance Corporation Ltd. v. Jathika Sewaka***

Sangamaya **(Supra.)** was dealing with what he considered to be a legal transfer order, since he held (at page 125), that the High Court had failed to consider the legal result of the workman's total refusal to comply with a disciplinary order made after a disciplinary inquiry regarding which he had no cause to complain.

Accordingly, the question whether an employee is bound to *comply and complain* against an invalid transfer appears to be open for definitive determination. However, this is not a matter which Court needs to examine in the present case as I am of the view that the impugned transfer order has not been established by the Respondent to be invalid. Let me now set out the reasons for this conclusion.

The main thrust of the Respondent's argument is that the impugned transfer order is invalid as the disciplinary inquiry that led to it was conducted in breach of the rules of natural justice. He attempted to justify this position on a number of grounds.

At the outset, the Respondent complained that he was not given the right of representation at the disciplinary inquiry. He stated that, by letter dated 31.10.2009 (A9), he had requested permission to have a defence officer. The Respondent claims that his application was refused by letter dated 19.12.2009 (A11). The issue to be addressed is whether an employee is entitled to representation at a disciplinary inquiry.

In ***Chulasubadra De Silva v. The University of Colombo and Others*** **[(1986) 2 Sri.L.R. 288]** it was held that a university student appearing before an Examination Committee on a charge of having committed an examination offence is not entitled as of right to have legal representation.

A similar approach was adopted in ***Frazer v. Mudge and Others*** **[(1975) 3 All E. R. 78]** where it was held that a prisoner is not entitled, as of right, to be legally represented before a Board of Visitors. Lord Denning in ***Enderby Town Football Club Ltd. v. The Football Association Ltd.*** **[(1971) 1 All E. R. 215 at 218]** observed:

> *"… is a party who is charged before a domestic tribunal entitled as of right to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. It is master of its own procedure; and if it in the proper exercise of its discretion, decline to allow legal representation, the courts will not interfere."*

S.R. De Silva in ***Disciplinary Action and Disciplinary Procedures in the Private Sector*** **[Monograph No. 2, 3rd Edition, page 22]** states that under no circumstances should the accused employee be represented by an outsider, e.g. a lawyer or an official of his parent union.

It is thus clear that an employee is not entitled as of right to legal representation at a disciplinary inquiry . Nonetheless, the question remains whether the Respondent had a right to be represented through a defending officer and if so, whether that right is subject to any limitations.

In ***R v. Secretary of State for the Home Department and Others*** **[(1984) 1 All E. R. 799]** it was held that although a prisoner appearing before a board of visitors in a disciplinary charge was not entitled as of right to have legal representation or the assistance of a friend or advisor, as a matter of natural justice, a board of visitors had a discretion to allow such representation or assistance before it.

S.R. De Silva in ***Disciplinary Action and Disciplinary Procedures in the Private Sector*** **[Supra.]** goes on to state that if existing practice allows representation, the representative of the accused employee should be either a co-employee or an official of his Branch Union. In my view, such a practice is justified as the facts leading to a disciplinary inquiry is essentially an internal matter between the employee and the management and such matters should not reach the public domain at that stage.

In this context, I observe that although the Respondent testified that he was not permitted to have a defending officer, it transpired during his evidence that he was permitted to get a defending officer from within the Appellant's establishment [Appeal Brief page 87].

Moreover, it is observed that the prosecuting officer was not a lawyer. No evidence was adduced to establish that the Appellant's disciplinary rules conferred a right to outside representation on an employee at a disciplinary inquiry. In these circumstances, I hold that the rules of natural justice have not been breached on the alleged ground of non-representation.

The learned counsel for the Respondent then drew our attention to letter dated 12.11.2009 (A19) in which the Respondent complained about the conduct of the prosecuting officer. However, the alleged unlawful conduct of the prosecuting officer cannot result in the breach of the rules of natural justice unless it is proved that the inquiring officer is guilty of such breach. The burden to do so was on the Respondent which he failed to do.

Further, the learned counsel for the Respondent submitted that the Respondent had not received a copy of the inquiry proceedings. I am not persuaded that, even though this allegation is true, it invalidates the disciplinary inquiry. Moreover, S.R. De Silva in ***Disciplinary Action and Disciplinary Procedures in the Private Sector*** **[Monograph No. 2, 3rd Edition, page 27]** states that unless it is obligatory to do so in terms of a Collective Agreement, a transcript of the proceedings of the inquiry should not be given to the accused employee.

Next the learned counsel for the Respondent submitted that the punishment transfer given to the Respondent by letter dated 11.01.2010 (A13) is perse mala fide.

Judicial precedent unequivocally establish that a transfer order made mala fide is unjustifiable and amounts to constructive termination. **[**See ***The Superintendent, Baranagalle Estate v. Supaiya*** **(S.C 108/69, S.C.M. 11.11.1972),** ***Gurusinghe v. Ceylon Theatres Ltd.*** **(S.C. 122/69, S.C.M. 19.01.72),** ***Ceylon Estate Staffs' Union v. Ratwatte, Superintendent, Frotoft Group, Ramboda*** **(S.C. 186/70, S.C.M. 16.7.74)].**

However, I note that the application made by the Respondent to the Labour Tribunal does not contain any allegation of bad faith against the Appellant.

The burden of proving bad faith on the part of the Appellant, as alleged, was on the Respondent and the burden is heavy. It is an evidentiary principle recognized in administrative law.

In ***Principles of Administrative Law*** **(Jain & Jain, 7th Edition 2011-page 1202)** it is stated as follows:

> "*While the plea of mala fides is raised quite often before the courts to challenge discretionary decisions, it succeeds rarely; it is extremely difficult to prove mala fides. The courts insist that the plaintiff who seeks to invalidate an order should prove the allegation of bad faith to the court's satisfaction. This is quite a difficult task to do and it is only in an exceptional fact-situation that such plea can be substantiated to the court's satisfaction.*"

This principle has also been used in industrial conflicts. In ***Ceylon Mercantile Union v. Ceylon Cold Stores Ltd. and Another*** **[(1995) 1 Sri.L.R. 261 at 269]** Wijetunge J. quoted with endorsement the following statement in Malhotra in the Law of Industrial Disputes (1968 edition) at 479-481:

> *"It is, however, for the party alleging mala fides to lead reliable evidence in support of the said plea. A finding the management has not acted bona fide will ordinarily not be reached if the materials are such that a reasonable- man could have come to conclusion which the management has reached."*

Weeramantry J. had in fact earlier in ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(Supra. at 282)** quoted with approval the approach taken by the Indian Supreme Court that Industrial Tribunals should interfere if a transfer order is made mala fide or for the ulterior purpose of punishing an employee for his trade union activities, and that a finding of mala fides should be reached by Industrial Tribunals only if there is sufficient and proper evidence in support of the finding.

To support a plea of mala fides the Court must positively conclude that the employer could have been acting only with a dishonest motive, and it is not sufficient to conclude that it was probably so **[**See ***Ramankutty v. State of Kerale*** **((1972) IILJ 509 Ker. at paragraph 26),** ***Royappa v. State of Tamil Nadu*** **(1974 A.I.R. (SC) 555 at 586)]**

Notwithstanding the failure on the part of the Respondent to specifically plead mala fides against the Appellant, a careful examination of the evidence shows that that no cogent evidence has been led by the Respondent to establish mala fides on the part of the Appellant.

One of the primary grounds for claiming that the transfer was made in bad faith was that it was a demotion of the Respondent. The learned counsel for the Respondent submitted that the transfer of the Respondent from the position of an "Assistant Manager-Finishing" at Seeduwa plant to the post of "Washing Coordinator" at the Polonnaruwa plant amounted to a demotion.

However, the Appellant maintained throughout the case that the transfer did not involve a demotion or a break in service. This position was specifically asserted in letters dated 11.01.2010 (A13) and 10.02.2010 (A21) sent by the Appellant. Weeramantry J. in ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(Supra. 284)** placed much reliance on a similar assertion by the employer in that case in concluding that the transfer was not a demotion. Furthermore, this allegation was expressly rejected during the cross-examination of the witness for the Appellant [Appeal Brief page 308]. Moreover, the Appellant had by the Letter of Appointment (A1), specifically reserved the right to transfer the Respondent to any other post of equivalent status. In these

circumstances, the evidence does not establish any demotion or break in service of the Respondent as a result of the punitive transfer. Thus, the Respondent has failed to establish mala fides.

On the contrary, the evidence demonstrates the good faith of the Appellant. For example, by letter dated 10.02.2010 (A21) the Respondent was informed that he will be paid back wages for the period of suspension and that a mutual transfer to a place of choice of the Respondent can be considered at the end of the six-month period specified in letter dated 11.01.2010 (A13). Moreover, the Appellant rescheduled the disciplinary inquiry and gave the Respondent time to show cause when it was pointed out that he had not yet been served with a charge sheet nor afforded an opportunity to show cause.

It is also pertinent to observe that the Respondent complained that the transfer to Polonnaruwa is unfair, unreasonable and financially detrimental to him. Nonetheless by letter dated 28.01.2010 (A16) the Respondent informed the Appellant that he is willing to comply with the transfer order and report to work at the factory located at Polonnaruwa if the punitive conditions contained in the transfer order are removed. It is difficult to reconcile the contradictory positions taken by the Respondent. Such inconsistent positions negate the allegations of mala fides against the Appellant and fortifies the view that the Respondent was looking for excuses not to comply with the transfer order.

Another ground relied on by the Respondent to substantiate that the impugned transfer order was invalid is that it will adversely affect him financially to go and work at Polonnaruwa.

In ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(Supra. at 282)** Weeramantry J. took the view that one limitation on the right of transfer is that the employee cannot be made to suffer financially. However, S.R. De Silva in ***Transfer*** **(Monograph No. 7, Revised 1995, page 11)** states that any monetary loss does not render a transfer unjustified. I am in agreement with this proposition particularly as the Letter of Appointment (A1) issued to the Respondent by the Appellant states as follows:

> "*Your appointment will be to the position of Quality Executive on the Executive grade, with effect from 11.02.2002 in the regular establishment of the company but the company reserves to itself the right to transfer you to any other post of equivalent status and responsibility permanently, temporarily or on secondment within L.M. Apparels (Pvt) Ltd or any of its Associate companies, subsidiaries or holding company as may be required*"

Consequently, the Respondent knew that he was in a transferable position that could have financial implications. I hold that in these circumstances for a punitive transfer to be unjustified on the ground that the employee has been made to suffer financially, the employee must establish that he has been made to suffer unreasonable financial loss as a result of the punitive transfer. In fact, Weeramantry J. took this view in ***Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda*** **(Supra. 283)** by holding that no material had been placed before the Labour Tribunal by the applicant to support his submission that his emoluments would be affected to an extent rendering justifiable his refusal to accept a transfer. The Respondent has failed to adduce any such evidence in this matter.

Finally, the question arises whether the Respondent could have been given a punishment transfer. The general right of an employer to transfer an employee within his service is well recognized in our legal system **[*Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate, Watagoda* (Supra. 281-282)]**. Moreover, the position of the Appellant is that the Respondent is in transferable service, which has not been challenged by the Respondent probably in view of the contents of the Letter of Appointment (A1).

I have to add that the Respondent was found guilty of verbal sexual harassment against an employee of the Seeduwa plant. It should be noted that it is the duty of an employer to provide a safe and supportive work environment for its employees. The productivity of the employee and the company will not increase unless such an environment exists. Sexual harassment in any form should be dealt with severely because it will otherwise pollute the working environment and affect employee morale. In these circumstances, it was virtually difficult for the Appellant to retain the Respondent at the same plant because it would have had a negative impact on the workplace. Therefore, there was nothing unfair or illegal about the punitive transfer given to the Respondent.

I hold that where the contract of employment expressly or impliedly provides for a transfer, and the employee is given a punishment transfer consequent to the conduct of a valid disciplinary inquiry, the employee cannot reject outright the transfer order and must comply and complain.

For all the foregoing reasons, I hold that the impugned transfer order is valid and that the *comply and complain* principle applies to the Respondent. Accordingly, I answer question of law (e) in the affirmative.

I will next examine questions of law (f) and (g) together as they are connected.

Constructive Termination

As the position of the Respondent before the Labour Tribunal was that his services were constructively terminated, it is apposite to scrutinize this concept in some detail given the dearth of authority on the matter.

The contract of employment attracts certain fundamental principles of the law of contracts and therefore any examination of this concept must begin with an examination of a few fundamental principles in the law of contracts relevant to the matter before us.

A contract may be breached by one party failing to perform an obligation in full or in part undertaken by him or by one party repudiating the contract.

However, not every breach will entitle the innocent party to terminate the contract. Where the breach is of a term which goes to the root of the contract, the innocent party has the right to terminate the contract. Here the breach occurs where the guilty party fails to render performance at the time of performance of the term, which goes to the root of the contract. The innocent party has a choice of deciding whether or not to terminate the contract. The choice must be communicated to the guilty party.

A contract may also be breached by one party repudiating the contract. Weeramantry in ***The Law of Contracts*** **(Volume II, page 879)** observes:

> *"Repudiation may occur either expressly, as where a party states in so many words that he will not discharge the obligations he has undertaken, or impliedly, as where by his own act a party disables himself from performance or makes it impossible for the other party to render performance."*

Here the repudiation occurs prior to the due time of performance. The repudiation must be of a term which goes to the root of the contract. Where one party has repudiated the contract, the other party has two options. Firstly, he can accept the repudiation and treat the contract as having been terminated and seek legal remedies. Alternatively, the innocent party can waive the repudiation and consider the contract as still subsisting.

Therefore, repudiation will result in the termination of the contract only where the innocent party accepts the repudiation for as Asquith L.J., stated in ***Howard v. Pickford Tool Co. LD.*** **[(1951) 1 K.B. 417 at 421]**, *"an unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal rights of any sort of kind."* This position has been accepted in ***Noorbhai et al. v. Karuppen Chetty*** **(27 N.L.R. 325)**, ***Senanayake v. Anthonisz and Another*** **(69 N.L.R. 225 at 229)** and by Weeramantry in ***The Law of Contracts*** **(Supra. 880).**

It has been questioned whether this principle in the law of contracts applies to contracts of employment. In ***Vine v. National Dock Labour Board*** **[(1956) 1 Q.B. 658,674]** and ***Sanders v. Ernest A. Neale Ltd.*** **[(1974) L.C.R. 565(N.I.R.C.)]** the view has been taken that as contracts of employment are *sui generis*, repudiatory conduct automatically brings an end to the contract of employment and that there is no right of election on the innocent party. However, in ***Thomas Marshall (Exports) Ltd. v. Guinle*** **[(1978) I.C.R. 905]** and ***Gunton v. Richmond-upon-Thames London Borough Council*** **[(1980) 3 W.L.R. 714]** it was held that even where contracts of employment are concerned the innocent party must accept the repudiation before the contract is terminated.

It must be borne in mind that the contract of employment provides an employee with livelihood and as such he must be given the choice of electing to consider whether the contract of employment should be considered to have been constructively terminated due to the repudiation by the employer. Similarly, the employer relies on the services rendered by the employee to his business and should also be given the choice of electing to consider whether the contract of employment should be considered to have been constructively terminated due to the repudiation by the employee. Accordingly, in my view, even in employment contracts, the innocent party must accept the repudiation for the contract to be terminated.

Accordingly, where an employee claims that there has been constructive termination by the employer due to the employer repudiating the contract of employment, the employee must communicate to the employer that he is accepting the repudiation. It is only then may he seek to invoke the jurisdiction of the Labour Tribunal on the ground of constructive termination in terms of section 31A(1)(a) of the Industrial Disputes Act.

The difficult question is what type of conduct may amount to constructive termination of a contract of employment. It has been held that whether there has been constructive termination or not depends on the facts and circumstances of each case [See ***Pfizer Limited v. Rasanayagam*** **(1991) 1 Sri.L.R. 290**; ***Thaksala Weavers Ltd. v. Dhanawathie Perera and Others*** **(1994) 3 Sri.L.R. 116**; ***J.H. Jacotine and Another v. Air Lanka Limited & Others*** **(S.C.(CHC)Appeal 26/2009, S.C.M. 03.02.2012)**; ***Christopher W.J. Silva v. Sri Lankan Airlines Limited*** **(S.C. Appeal 212/2016, S.C.M. 22.03.2019]**. Although this is correct in principle and is a good

starting point, a more helpful formulation is that the conduct of the guilty party relied on by the innocent party to establish that there has been repudiation of the contract must be examined.

In ***Western Excavating (ECC) Ltd. v. Sharp*** **[(1978) 2 WLR 344 at 349]** Lord Denning enunciated the following formula:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

Accordingly, for there to be constructive termination due to the conduct of the employer, the breach by the employer must go to the root of the contract of employment or must be an indication that he is no longer bound by an essential term of the contract of employment. A breach will be considered as going to the root of the contract of employment if the breach would render the performance of the rest of the contract by the party in default a thing differing in substance from what the other party has stipulated for.

Courts have held the following instances to be constructive termination: requiring the employee to report to a junior officer is tantamount to a demotion **[*Pfizer Limited v. Rasanayagam* (Supra.)]**; reversion of a workman's post to his former post amounts to a demotion **[*Superintendent, Liddesdele Group, Halgranoya v. Ponniah* [C.A. No. 453/83, C.A.M. 14.05.1993]**; Where an employer failed to take disciplinary proceedings and at the same time did not allow the workman to work

[*Thaksala Weavers Ltd. v. Dhanawathie Perera and Others* (Supra.)]; Sudden, unforeseen and unnotified long distance transfers **[*Mahagamage Chandramadu and Others v. Paradigm Clothing (Private) Limited & Others* (S.C. Appeal No. 106/2014, S.C.M. 19.12.2019]**.

At this point it must be stressed that constructive termination cannot occur where there has only been a breach of reasonable conduct without there being a breach of an express or implied term of the contract of employment which goes to its root or foundation **[**See ***Wetherall v. Lynn* (1977) IRLR 336** ***; Western Excavating (ECC) Ltd. v. Sharp* (Supra.); *Christopher W.J. Silva v. Sri Lankan Airlines Limited* (Supra.)]**.

Accordingly, in order to establish constructive termination, the Respondent should have proved that:

(a) The Appellant is guilty of conduct which is a significant breach going to the root of the contract of employment; or

(b) The Appellant has repudiated the contract of employment by showing that the Appellant no longer intends to be bound by one or more of the essential terms of the contract going to the root of the contract of employment.

(c) The Respondent notified the Appellant that he is terminating the contract of employment due to the breach by the employer or that he is accepting the repudiation by the employer.

The Respondent has given the required notification in terms of (c). However, for the reasons discussed more fully above, the Respondent has failed to establish that the Appellant is guilty of conduct which is a significant breach going to the root of the contract of employment or that there has been a repudiation of the contract of employment by the Appellant showing that it no longer intends to be bound by one or more of the essential terms of the contract going to the root of the contract of employment. The impugned transfer was not made mala fide or in contravention of the rules of natural justice or a demotion . Accordingly, the Respondent has failed to establish that there has been a constructive termination of his services.

On the other hand, the Respondent has failed to comply and then complain against the valid punitive transfer. In ***Sri Lanka Insurance Corporation Ltd. v. Jathika Sewaka Sangamava*** **[Supra.]**, it was held that if an employee who was issued a transfer order at the conclusion of a disciplinary inquiry, fails to comply with the said order and keeps away from work without obtaining leave, he, by his own conduct, secures his own discharge from the contract of employment with his employer. Therefore, the learned High Court Judge erred in concluding that there has been constructive termination.

Accordingly, the questions of law (f) and (g) are answered in the affirmative.

The only remaining question to be answered is (a). In my view, the learned High Court Judge did appreciate that the jurisdiction of the High Court was limited to questions of law. However, for the reasons set out above, he answered them erroneously. Accordingly, question of law (a) must be answered in the negative.

For all the foregoing reasons, I set aside the judgment of the High Court of Western Province holden in Negombo dated 07.11.2016 and affirm the order of the learned President of the Labour Tribunal of Negombo dated 14.12.2012.

I make no order as to costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Jayantha Jayasuriya, P.C., C.J.

I agree.

CHIEF JUSTICE

Vijith K. Malalgoda, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT