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

In the matter of an appeal in terms of Article 128(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Paragraph 3(b) of Article 154(P) of the Constitution and Section 3 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990

SC Appeal No: 110/2023
HC Galle No. HC/LT/AP No. 1372/2019
LT Case No: 04/G/94/2016

Soorya Balashakthi Lankapura,
No. 13/36, Malwatte Temple Road,
Dangedara,
Galle.

APPLICANT

Vs.

Sarvodaya Economic Development Services (Guarantee) Limited,
No. 98, Rawatawatte Road,
Moratuwa.

RESPONDENT

And between

Soorya Balashakthi Lankapura,
No. 13/36, Malwatte Temple Road,
Dangedara,
Galle.

APPLICANT – APPELLANT

Vs.

Sarvodaya Economic Development Services (Guarantee) Limited,
No. 98, Rawatawatte Road,
Moratuwa.

RESPONDENT – RESPONDENT

And now between

Soorya Balashakthi Lankapura,
No. 13/36, Malwatte Temple Road,
Dangedara, Galle.

APPLICANT – APPELLANT – APPELLANT

Vs.

Sarvodaya Economic Development Services (Guarantee) Limited,
No. 98, Rawatawatte Road, Moratuwa.

RESPONDENT – RESPONDENT – RESPONDENT

Before: **A.H.M.D Nawaz, J**
Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Ruvendra Weerasinghe with Kaushalya Hapuarachchi for the Applicant – Appellant – Appellant

Malik H. Hannan for the Respondent – Respondent – Respondent

Argued on: 27th May 2025

Written Submissions: Tendered by the Applicant – Appellant – Appellant on 14th February 2024

Tendered by the Respondent – Respondent – Respondent on 28th March 2024

Decided on: 28th January 2026

Obeyesekere, J

(1) The Applicant – Appellant – Appellant [the Applicant] filed an application in the Labour Tribunal, Galle [Labour Tribunal] complaining that her employer, the Respondent – Respondent – Respondent [the Respondent] has served her with a vacation of post notice dated 12th February 2016 without any reason and unfairly terminated her services.

(2) Having heard the evidence presented by both parties, the Labour Tribunal held by its Order dated 27th November 2018 that the Respondent was justified in treating the Applicant as having vacated her post. Aggrieved, the Applicant filed an appeal with the High Court of the Southern Province holden in Galle [the High Court], which upheld the Order of the Labour Tribunal by its judgment delivered on 4th May 2023.

(3) The Applicant thereafter sought and obtained leave to appeal from this Court on 19th July 2023 on the following question of law:

> "*Did the learned High Court Judge err by upholding the finding of the Labour Tribunal that the Applicant had vacated her post*."

The concept of vacation of post

(4) There are many reasons why an employee will stay away from reporting to his or her workplace. Common among these reasons is the transfer of an employee from one work place of the employer to another work place of the employer. While the general principle is that even if the employee is aggrieved by such transfer, he or she must first comply and then complain, there can be instances where the transfer is actuated by malice on the part of the employer or give rise to situations of constructive termination of the contract of employment. Be that as it may, where the employee does not report to the new work place without a valid explanation for his or her absence, the employer is entitled to arrive at a determination that the employee is not interested in continuing with his or her employment and has vacated his or her post. Where such a determination is challenged in a labour tribunal, the burden of proving the vacation of employment is with the employer.

(5) In **Nandasena v Uva Regional Transport Board** [(1993) 1 Sri LR 318; at page 324], Mark Fernando, J in his dissenting opinion referred to the judgment of the Administrative Tribunal of the International Labour Organisation in Re Duran (No. 2) cited in C.F. Amerasinghe's Law of the International Civil Service [1988, pp. 903-904] where it had been stated as follows:

" If one party to a contract fails or refuses to perform his duties under the contract in circumstances which show that he does not intend ever again to resume them, i.e. show in effect that he is abandoning his post, the other party is entitled to treat the contract as at an end; ***he is not obliged to wait indefinitely in case the first party might change his mind.*** *This is what abandonment means.* ***It contains both a physical and a mental element.*** *A temporary absence from a place does not mean that the place is abandoned; there must be shown also an intention not to return. So to the physical failure to perform a contractual duty there must be added the intention to abandon future performance. Proof of intention is not always easy, and the object of Rule 980 is to allow the intention to be assumed from the fact of absence without reasonable explanation for fifteen days. The explanation has not got to be one that exonerates the staff member from breach of contract or from other disciplinary measures, but it has to be one which negatives the intention to abandon*....." [emphasis added]

(6) That the concept of vacation of post comprises of two elements has long been recognised by our Courts. In **Nelson De Silva v Sri Lanka State Engineering Corporation** [(1996) 2 Sri LR 342; at page 343] F.N.D. Jayasuriya, J stated that:

"*The concept of vacation of post involves two aspects; one is the mental element, that is intention to desert and abandon the employment and the more familiar element of the concept of vacation of post, which is the failure to report at the work place of the employee. To constitute the first element, it must be established that the Applicant in not reporting at the work place, was actuated by an intention to voluntarily vacate his employment*."

(7) This position was reiterated in **Coats Thread Lanka (Pvt) Limited v Samarasundera** [(2010) 2 Sri LR 1; at pages 9 and 10] where Chief Justice Asoka De Silva stated that, "*It has been held in several instances by this court, which now can be considered as trite law that for abandonment of the contract to be proved,* ***proof of physical absence as well as the mental element of intent needs to be established****…. I am of the opinion that "absence" here is a reference to the lack of presence when such presence is deemed necessary in the ordinary course of employment. In other words, where the Respondent is required to be present at the work place at a reasonable hour of the day and he absents himself and* ***such absence continues*** *it can be safely assumed that the first ingredient had been met. The mental element or what is referred to as 'animus non revertendi' is the intention to abandon the contract permanently*." [emphasis added]

(8) While mere physical absence alone is insufficient and cannot be singled out and taken in isolation to signify the abandonment of the contract of employment, the party seeking to establish a vacation of post must prove that the physical absence co-existed with the mental intent *of animus non revertendi.* The two must co-exist for there to be a vacation of post in law.

(9) While proving intention to abandon is difficult, especially where the absence is temporary, in **Building Materials Corporation v Jathika Sevaka Sangamaya** [(1993) 2 Sri LR 316], Perera, J while taking the view that long absence without obtaining leave or authority is evidence of desertion or abandonment of service, held as follows:

> "*Where an employee endeavours to keep away from work or refuses or fails to report to work or duty without an acceptable excuse for a reasonably long period of time such conduct would necessarily be a ground which justifies the employer to consider the employee as having vacated service. In this case it is clear that the document R11 was served on the Applicant-Respondent after he had been given several opportunities to regularise his position and to report for duty at Anuradhapura which he persistently failed to do*." [page 322]

"*An intention to remain away permanently must necessarily be inferred from the Employee's conduct and I hold that long absence without obtaining leave or authority is evidence of desertion or abandonment of service*." [page 323]

(10) This being the legal position, I shall now turn to the attendant circumstances of this appeal on which I am required to determine whether the Labour Tribunal and the High Court erred when it held that the Applicant had vacated her employment with the Respondent.

Attendant circumstances

(11) By letter dated 8th October 2004 [A1], the Applicant had been appointed to the post of Enterprise Promotion Officer [Trainee] of the Respondent with effect from 15th October 2004. It is admitted that the said post was transferable as specifically set out in A1. The Applicant, whose home town is Galle, had initially been assigned to the Hambantota Office of the Respondent, and by letter dated 8th June 2005 [A2], the Applicant had been transferred to the Galle Office of the Respondent. The position held by the Applicant had subsequently been re-designated as Project Officer in 2006 and the Applicant had been promoted as an Executive [Grade 2] with effect from 1st December 2012.

(12) It is admitted that the core activity of the Respondent comprised of its micro finance division with the bulk of its employees being involved with the micro finance business of the Respondent. In addition, the Respondent had two other divisions, namely the management division and the projects division, with the Applicant attached to the latter division. In 2013, the micro finance business had been transferred to Sarvodaya Development Finance and the employees who had been in that division had either been absorbed into the new company or else, had been offered compensation under a voluntary retirement scheme. The Respondent states that the division that the Applicant was attached continued to function and that the services of the Applicant were required for its operations.

(13) However, with the micro finance business not being part of the Respondent any further, the affairs of the Respondent had been scaled down, and the premises where the office of the Respondent was situated in Galle is said to have been sold to

Sarvodaya in 2014. Consequently, by letter dated 27th May 2014 [R2], the Applicant had been informed that she had been assigned to the head office of the Respondent at Rawathawatte, Moratuwa and to report for duty at the head office from 2nd June 2014. A similar letter had been sent to the other three employees who were attached to the projects division of the Respondent.

(14) By letter dated 30th May 2014 [R3], the Applicant had informed the Respondent that she is pregnant and that she will find it difficult to report for duty at the head office and had therefore sought the indulgence of the Respondent to continue to work in Galle. The Respondent had acceded to this request of the Applicant and had informed her by letter dated 18th July 2014 [R4] that she had been assigned on a temporary basis to the Sarvodaya District Office, Galle which was part of the Sarvodaya group, with effect from 21st July 2014 and that the Respondent may require her services at the head office on a future date.

(15) The Respondent had granted the Applicant maternity leave in terms of the law, which had been extended with a period of paid leave followed by a further period of leave on no-pay basis until 30th June 2015. While approving the no-pay leave, the Respondent had informed the Applicant by its letter dated 8th June 2015 [R6] that she must report for duty at the head office of the Respondent at Moratuwa on 2nd July 2015.

(16) The Applicant did not report for duty as required by R6, which resulted in the Respondent informing the Applicant by letter dated 5th August 2015 [R7] that her work place is the head office of the Respondent at Moratuwa and that she must report for duty on a daily basis. The Applicant not having complied with the above directive, by its letter dated 13th August 2015 [R8] the Respondent had informed the Applicant as follows:

> "2015/07/28 වැනි දින පැවති ව්‍යපෘති අංශයේ මාසික ප්‍රගති සමාලෝචන රැස්වීමේදි නියෝජ්‍ය සාමාන්‍යාධිකාරිවරයා විසින් වාචිකව සහ 2015/08/05 වන දිනෙන් පහත අත්සන් කරන අය විසින් ඔබ වෙත ලිඛිතව (ලියාපදිංචි තැපෑලෙන්) අංක 98, රාවතාවත්ත පාර මොරටුව පිහිටි සිඩ්ස් (ගැරන්ට්) ලිමිටඩ් සමාගමේ ප්‍රධාන කාර්යාලය වෙත දෙනිකව සේවය සඳහා වාර්තා කරන ලෙස දැනුවත් කර ඇත. **නමුත් අද දින තෙක්/උක්ත උපදෙස් පරිදි සේවාවන් සඳහා වාර්තා කර නැත.** එසේම මේ සම්බන්ධව **අප වෙත කිසිදු දැනුම් දීමක් කර හෝ විධිමත් පරිදි නිවාඩු**

ලබාගැනිමක් ද සිදුකර නොමැත. ඒ නිසා වහාම සේවය සඳහා වාර්තා කරන ලෙස මේ මගින් ඔබ වෙත නැවත දැනුවත් කරමු."

(17) It appears that the Applicant had disregarded R8 and failed to report for duty, since the Respondent had sent the following letter dated 9th September 2015 [R9]:

"**2015 අගෝස්තු මස 03 වන දින සිට අද දින තෙක් ඔබ සේවයට වාර්තා කර ඇත්තේ දින 01 කි.** මෙය ඉතාම අසතුටුදායක තත්ත්වයකි. 2015 වර්ෂය වෙනුවෙන් සකස් කරන ලද සංවර්ධන කාර්ය සැලැස්මට අනුව ආයතනයට ඔබගෙන් ඉටුවිය යුතු සේවාව ලබාදිමට නම් සේවය සඳහා ක්‍රියාකාරිව වාර්තා කල යුතුය. එසේ නොකිරීමෙන් ආයතනයේ ක්‍රියාකාරිත්වය දුර්වල වීමට එය බලපානු ඇත. ඒ නිසා ක්‍රමානුකූලව සේවයට පැමිණෙන ලෙස අවසන් වරට ඔබ වෙත අවධාරණය කරවමු.

2015 වර්ෂයට අදාල ඔබට හිමි සියළු නිවාඩු දින ගණනට වඩා දැනටමත් ඔබ සේවයට වාර්තා කොට නොමැති දින ගණන් වැඩිය. ඒ නිසා දිමනා ගෙවීමේදි සේවයට නොපැමිණි දින සඳහා පඩි රහිත දිනයන් ලෙස සලකා 2015 සැප්තැම්බර් මාසයේ සිට කටයුතු කිරීමට සිදුවන බව දන්වමු.

එසේම දිගින් දිගටම සේවය සඳහා පැමිණෙන ලෙස අප විසින් දැනුවත් කළත්, තමා වෙත පැවරී ඇති සේවා වගකීම් ඉටුනොකර, කළමනාකරණය වෙත කිසිදු දැනුම් දීමක් නොකර, සේවයට වාර්තා නොකර සිටීමෙන් ඔබ කරන්නේ ආයතනික නිතිරීති වලට පටහැනිව ක්‍රියා කිරීමකි. ඒ අනුව ඔබ සේවයෙන් පහ කරනවා හැරෙන්නට ආයතනයට වෙනත් විකල්පයක් නොමැති බව මේ මගින් දැනුම් දෙමු.

කෙසේ නමුත් ඉහත කරුණු කෙරේ ඔබගේ දැඩි අවධානය යොමු කර මෙම අඩුපාඩුකම් නිවැරදි කරගනිමින් වහාම නිසියාකාරව සේවයට වාර්තා කරන ලෙස දැනුවත් කරමු."

(18) In spite of R9, the Applicant had continued to disregard the request of the Respondent to report for duty which resulted in the Respondent sending a final notice by letter dated 22nd September 2015 [R12] informing the Applicant as follows:

"2015.09.09 දිනෙන් ඔබ වෙත පහත අත්සන් කරන ලද අය විසින් එවන ලද ලිපිය හා බැඳේ. මෙම ලිපියට කිසිදු පිළිතුරක් හෝ ප්‍රතිචාරයක් ඔබ විසින් දක්වා නැත.

නිසියාකාරව සේවයට වාර්තා කළයුතු බව මීට පෙර අවස්ථා කිහිපයකදි ඔබව දැනුවත් කර තිබුනත් 2015.08.03 දින සිට අද වනතුරුත් ඔබ අනවසරයෙන් හා කිසිදු දැනුම්දිමකින් තොරව සිඩිස් (ගැරන්ට්) ලිමිටඩ් හි සේවයට වාර්තා කොට නොමැත.

ඔබ 98, රාවතාවත්ත පාර මොරටුව ලිපිනයේ පිහිටි සිඩිස් (ගැරන්ට්) ලිමිටඩ් හි ප්‍රධාන කාර්යාලය වෙත නිසියාකාරව සේවය සඳහා වාර්තා නොකලහොත් ඔබගේ සේවය අවසන් කිරීමට සිදුවන බව අවසාන වශයෙන් මෙයින් අවවාද කරමු."

(19) While the Applicant did not respond to R12, the Respondent admits that the Applicant visited the Head Office on 5th January 2016 at 11.09 in the morning but failed to report for duty either on that date or any day thereafter. This failure resulted in the following letter dated 18th January 2016 [R10] being sent to the Applicant:

> "සිඩ්ස් (ගැරන්ට්) ලිමිටඩ් හි විධායක (2) තනතුර දරන ඔබ සේවය සඳහා නිසියාකාරව වාර්තා නොකරන නිසා ඒ බව දැනුවත් කර වහාම සේවය සඳහා වාර්තා කරන ලෙස ලිඛිතව අවස්ථා කිහිපයකදි (ලියාපදිංචි තැපෑලෙන් 2015.08.05, 2015.08.13, 2015.09.09 2015.09.22) දැනුම් දි ඇත. නමුත් ඔබ සේවය සඳහා වාර්තා කර නැත. එබැවින් 2016.01.29 දිනට පෙර අංක 98, රාවතාවත්ත පාර මොරටුව ලිපිනයේ ඇති සිඩ්ස් (ගැරන්ට්) ලිමිටඩ් හි ප්‍රධාන කාර්යාලය වෙත නිසියාකාරව සේවය සඳහා වාර්තා කරන ලෙස ඔබ වෙත දැනුම් දෙමු. ඔබ වෙත පැවරෙන සේවා වගකීම් පහත අත්සන් කරන අය විසින් සේවයට වාර්තා කිරීමෙන් අනතුරුව ලිඛිතව ලබාදෙනු ඇත."

(20) The Applicant thereafter visited the head office of the Respondent on 29th January 2016. The Applicant claimed that she reported for duty on that date but that no work was assigned. She stated further that she met the Managing Director of the Respondent in order to discuss "her plight", presented him with three options and had thereafter left the workplace without signing off.

(21) It is admitted that the Applicant did not report for duty on the next working date of 1st February 2016 or thereafter. It is in this background that the Respondent informed the Applicant by letter dated 12th February 2016 [A13] that she has vacated her employment with effect from 1st February 2016.

<u>The position of the Applicant</u>

(22) The Applicant, whilst admitting that she reported for duty only on 8-10 days during the period 2nd July 2015 – 1st February 2016, claimed for the first time before the Labour Tribunal that her salary was not sufficient to meet her transport costs from Galle to Moratuwa on a daily basis and that the transfer was actuated by malice in order to force the Applicant to resign from her employment without the payment of any compensation. However, it is clear that the Respondent did not have an office in Galle and hence, the services of the Applicant had to be performed from its head office where the work of the projects division was being carried out. Thus, the claim

of the Applicant that her transfer was actuated by malice is not supported by the evidence.

(23) This is further borne out by two other factors. The first is the Respondent paid compensation to a sizeable number of employees who opted to move on after the sale of the micro finance business and therefore the payment of compensation to the four employees of the projects division could not have been an issue for the Respondent. The second factor is that the Respondent acceded to the request of the Applicant to keep her in Galle until she delivers her baby and thereafter granted her paid maternity leave as well as further no-pay leave to look after the baby. Such conduct cannot be expected if the motive behind the transfer was malicious.

(24) The Applicant has conceded further that even though she visited the Head Office on about 8-10 occasions after her maternity leave was over and during the period of 2nd July 2015 – 1st February 2016, the purpose of such visits was to discuss whether the Respondent was willing to pay her compensation similar to what it did with employees in the micro finance business or offer her a higher salary. Thus, the intention of the Applicant to refrain from reporting for duty unless her conditions were met is borne out by her own evidence.

(25) The Applicant states that she reported for duty at the Head Office on 29th January 2016 but was not assigned any work nor allocated a table and chair. She states that she met the Managing Director of the Respondent who offered her 9 months' salary as compensation but that she declined the offer, and instead presented three options to the Managing Director, that being to transfer her to Galle, offer her enhanced compensation, or if she was to report to the head office to pay a monthly salary of Rs. 45,000, whereas her salary at that time was Rs. 16,800. The Applicant took up the position that she had no intention to give up her employment and that she did not report for duty after 29th January 2016 since she expected the Managing Director to inform her the position of the Respondent on the three options that she had placed on the table.

(26) This being the factual circumstances of this case, I shall now consider the Order of the Labour Tribunal and the judgment of the High Court.

Impugned Order and Judgment

(27) The Labour Tribunal has at the outset considered the claim of the Applicant that her transfer was actuated by malice and had rejected such claim on the basis that the Applicant held a transferable post, the reason for her transfer was the divestiture of the finance business and that her services were required by the Respondent at the head office. The Tribunal has held further that the Respondent acceded to the request of the Applicant and deferred the transfer that was initially effected in 2014 since the Applicant was expecting a baby and thereafter granted her paid and unpaid maternity leave, thus demonstrating that the Respondent had acted in good faith.

(28) The Labour Tribunal has thereafter held that even though the Applicant visited the head office, the Applicant did not have an intention of reporting for duty or to comply with the transfer order or the many letters sent to her, when it stated as follows – "මේ සම්බන්ධව ඉල්ලුම්කාරිය අදාළ කරුණු මග හරිමින් සාක්ෂි දී ඇති අතර ඉල්ලුම්කාරියගේම සමස්ථ සාක්ෂිය අනුව ඇය සේවය කිරීමේ අදහසින් මොරටුව කාර්යාලයට ගොස් නොමැති බව අධිකරණය නිරීක්ෂණය කරම්". The basis for this conclusion founded upon the evidence before the Tribunal is threefold.

(29) The first is that even out of the days that the Applicant reported at the head office, she did not report at 8.30 in the morning – "එනම් සේවයට වාර්තා කිරීමට අවශ්‍ය නම් වාර්තා කළ යුත්තේ නියමිතව සේවයට වාර්තා කළයුතු වේලාවට වන නමුත් ඇය වාර්තා කර ඇත්තේ 11.00 ට වන අතර එනයින්ම ඇය ගොස් ඇත්තේ සේවය කිරීමට නොවන බවද නිරීක්ෂණය වේ."

(30) The second is that she visited the head office on 29th January 2016 not with an intention of reporting for duty but to present three options to the Respondent, or in other words, to propose to the Respondent the conditions on which she was willing to report for duty – "එනම් ඉතාමත් පැහැදිලි ලෙස ඉල්ලුම්කාරියගේම ඉහත මා උපුටා දක්වා ඇති සාක්ෂි අනුව ඇය විසින් ආයතන ප්‍රධානියාට දැනුම් දී ඇත්තේ ඉල්ලිම් 3 කි. එහි ගාල්ලේ රුකියාව, වන්දියක් හෝ වැටුප් වැඩිකර ප්‍රධාන කාර්යාලයේ රුකියාව ලබාදෙන ලෙසයි. එනම් ඉල්ලුම්කාරියගේ අවශ්‍යතාවය වී ඇත්තේ කෙසේ හෝ ගාල්ලේ අළුතින් ආරම්භ කරන ලද ආයතනයේ රුකියාව ලබාගැනීම හෝ සේවය අවසන් කර වන්දි මුදල් ලබාගැනීම හෝ මොරටුවේ සේවයට වාර්තා කරන්නේ නම් වැටුප් වැඩි කරන ලෙසට කර ඇති ඉල්ලිමයි. එනයින්ම ඇය ස්ථාන මාරුව පරිදි මොරටුව ආයතනයට සේවය සඳහා වාර්තා කිරීමක් කර නොමැති බවත්, අදාළ ඉල්ලිම සම්බන්ධව සාකච්ඡා කිරීමේ අවශ්‍යතාවය මත පමණක් වාර්තා කර ඇති බවටත් මා නිරීක්ෂණය කරම්."

(31) The third was that the Applicant failed to report for duty in response to A13 dated 12th February 2016 – "එසේම ඉල්ලුම්කාරියට අවසාන වශයෙන් එවා ඇති R.12 ලේඛනයට අනුවද ඇය විධිමත්ව සේවයට වාර්තා නොකළ බවද ඇය සාක්ෂි දෙමින් සඳහන් කර තිබේ."

(32) The Labour Tribunal has accordingly concluded as follows:

> "ඉහත සියළුම කරුණු නැවත පුන පුනා සඳහන් කරමින් ඉල්ලුම්කාරිය ස්ථාන මාරුවට අවනත නොවී සිටීම සේවය හැර යාමක් බවට නිරීක්ෂණය කරන අතර, එහිදි ඉල්ලුම්කාරියගේම සාක්ෂි අනුව ඇයට සේවය හැරයාමේ මානසික අවශ්‍යතාවයක්ද තිබී ඇති බව සනාථ වන අතර සේවය අවසන් කිරීම සකෂ්‍යතා වැඩිබර මත සනාථ වී නොමැති බවට තීරණය කරමින් ඉල්ලුම්පත්‍රය නිෂ්ප්‍රභා කරමි,"

(33) Dissatisfied with the said Order, the Applicant preferred an appeal to the High Court. It must be noted that an appeal to the High Court is circumscribed by the provisions of Section 31D(3) of the Industrial Disputes Act which provides that an appeal from an order of a labour tribunal shall be on a question of law. While a misdirection on the facts can amount to a question of law, due deference must be shown to the conclusions reached by the labour tribunal which are supported by evidence.

(34) I have examined the judgment of the High Court and observe that the High Court has carefully considered the five grounds urged on behalf of the Applicant. Whilst rejecting the argument that the Labour Tribunal has not considered the evidence, the High Court has arrived at two important conclusions. The first is that even if the Applicant was dissatisfied with the transfer, she ought to have complied first and then complained. The High Court has correctly concluded that the Applicant did neither and that the Applicant did not even respond to the several letters sent to her requesting that she report for duty. The second conclusion reached by the High Court is with regard to what transpired on 29th January 2016, with the High Court agreeing with the Labour Tribunal that the Applicant visited the head office on that day only to present her three options and not with an intention to report for duty or in compliance with the transfer order, thus demonstrating that the Applicant did not have the intention to resume her employment.

Vacation of post by the Applicant

(35) The issue that needs to be determined by me is whether the High Court erred by upholding the finding of the Labour Tribunal that the Applicant had vacated her post. It is admitted that even though the Applicant was required to report for duty on 2nd July 2015 after her no-pay maternity leave came to an end in June 2015, she failed to report to the head office except may be on 8 – 10 days. It is clear that the Applicant was served with A13 on 12th February 2016 not only due to her prolonged absence without taking leave and without any explanation, but also due to her failure to report for duty either on 29th January 2016 or thereafter. Thus, of the two elements required to prove that an employee has vacated his or her post, the first element of physical absence from the work place has been established.

(36) This brings me to the critical question of whether the Respondent has established the mental element or in other words, that the Applicant had the intention to vacate her employment when she failed to report for duty on 2nd July 2015 or thereafter.

(37) Here is an employee (a) who keeps away from her work place for seven long months except a few days in-between where she steps in to the office not with an intention of reporting for duty or to do any work or with an intention to continue her contract of employment, and (b) who does not make any attempt to inform the Respondent of any difficulty that prevents her from reporting for work on a continuous basis. In other words, she couldn't care less for the interests of her employer or her employment.

(38) The absence of the Applicant from employment was not temporary but for a prolonged period, and that too, without leave and without any intimation to the Respondent. During this seven month period, the Respondent had sent the Applicant several letters asking her to report for duty but she chose to ignore each of the said letters as if she was no longer in the employment of the Respondent and therefore not bound to respond. All these taken together are to my mind, a clear indication that the Applicant had no intention to return to employment on the terms and conditions that were applicable to her at the time she was asked to report to the head office in 2014. This intention of the Applicant is confirmed by the fact that when

she reported to the head office for the last time on 29th January 2016, it was for the purpose of presenting the Respondent with three options and not with the intention of reporting for work on the aforementioned terms and conditions.

(39) In **Contract of Employment** by **S. R. De Silva** [page 412; paragraph 329], the author points out that long absence without leave or authority is evidence of desertion. He thereafter cites the following passage from **Jeewanal Ltd v Their Workmen** [1961 (1) L.L.J 517 (SC)] where it was held that, "*if an employee continues to be absent from duty without obtaining leave and in an unauthorised manner for such a long period of time … an inference may reasonably be drawn from such absence that by his absence he has abandoned service…*"

(40) The author has thereafter cited the following passage from **Employees' Misconduct** by Alfred Avins [Law Book Company, Allahabad, 1968] which perhaps summarises what happened to the Applicant in this case:

> "*The basis of this rule [of prolonged absence] is that the longer the employee stays away, the more opportunities he has to think about coming back, and to actually return if he so chooses. The fact that he constantly rejects these opportunities at the moment of choice gives rise to a logical probability that during one of these points where the employee had to choose in his own mind between returning, staying away temporarily, or staying away permanently, he chooses not only to reject returning in favour of a temporary absence but rather in favour of a permanent absence. Thus the more opportunities for choice which presented themselves by the lapse of time, the greater is the mathematical probability that at one of these choice-points the employee chose a permanent absence over a temporary one. One such choice is enough to complete the offence of desertion*."

(41) I am of the view that the continued absence of the Applicant from duty without obtaining leave, without any intimation and in an unauthorised manner for a prolonged period of time, and her conduct on 29th January 2016 to which the Labour Tribunal has adverted to, clearly establishes that the Applicant had no intention to resume her employment at the head office of the Respondent and that the Applicant has abandoned her contract of employment. I am therefore in agreement with the

aforementioned conclusions reached by the Labour Tribunal which have been affirmed by the High Court.

Conclusion

(42) In the above circumstances, the question of law is answered in the negative. The judgment of the High Court is affirmed and this appeal is dismissed, without costs.

JUDGE OF THE SUPREME COURT

A.H.M.D. Nawaz, J

I agree

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J

I agree.

JUDGE OF THE SUPREME COURT