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

SC Appeal 101/2014
SC Appeal 100/2014

In the matter of an application for Leave to Appeal under section 31DD of the Industrial Disputes Act, as amended by Act No 11 of 2003

D.M.B. Warnakulasooriya,
No.113, Maligakanda Road,
Colombo 10.

Applicant

Vs,

Hotel Developers (Lanka) Ltd.
Hilton Colombo,
No.02, Chittampalam A. Gardiner Mw,
P.O Box. 1000,
Colombo.

Respondent

And between

D.M.B. Warnakulasooriya,
No.113, Maligakanda Road,
Colombo 10.

Applicant-Appellant

Vs,

Hotel Developers (Lanka) Ltd.
Hilton Colombo,
No.02, Chittampalam A. Gardiner Mw,
P.O Box. 1000,
Colombo.

Respondent- Respondent

And Now between

D.M.B. Warnakulasooriya,
No.113, Maligakanda Road,
Colombo 10.

Applicant-Appellant-Appellant

Vs,

Hotel Developers (Lanka) Ltd.
Hilton Colombo,
No.02, Chittampalam A. Gardiner Mw,
P.O Box. 1000,
Colombo.

Respondent-Respondent-Respondent

Before: **S.Eva Wanasundera PC J**
Priyantha Jayawardena PC J
Vijith K. Malalgoda PC J

Counsel: Chula Bandara with Gayathri Kodagoda for the **Applicant-Appellant-Appellant in the SC Appeal No. 101/14** and **Applicant-Appellant- Respondent in SC Appeal No. 100/14**

Raneesha de. Alwis for the **Respondent-Respondent-Respondent in the SC Appeal No. 101/14** and **Respondent-Respondent-Appellant in SC Appeal No. 100/14**

Argued on: 17.11.2017

Judgment on: 26.07.2018

Vijith K. Malalgoda PC J

Appellants in the appeals i.e. SC Appeal 100/2014 and SC Appeal 101/2014 agreed to take up both appeals together and to abide by one judgment of this court. In the said circumstances this judgment deals with both appeals preferred by the Applicant-Appellant-Appellant and the Respondent-Respondent-Appellant against the Judgment of the High Court of Western Province holden in Colombo dated 09.01.2014.

The Applicant-Appellant-Appellant in SC Appeal 101/2014 (hereinafter referred to as the Applicant) had filed an application dated 18.11.2009 in the Labour Tribunal Colombo under section 31B of the Industrial Disputes Act against the Respondent-Respondent-Respondent in SC Appeal 101/2014 (herein after referred to as the Respondent) for unlawful termination of her services as a secretary.

As revealed before us the Applicant was initially employed as a Secretary on probation by the Respondent on 3rd May 1994 and on 28th November her appointment was confirmed with effect from 3rd November 1994. Her services were terminated by her employer with effect from 28.10.2009, and by application dated 18th November 2009 she went before the Labour Tribunal, Colombo against the said termination.

At the conclusion of the inquiry before the Labour Tribunal, by order dated 17th August 2011, the Labour Tribunal had accepted the position taken up by the Respondent, that the Respondent had not terminated the employment of the Applicant but the Applicant had vacated her post and dismissed the application of the Applicant subject to any statutory entitlements due to the Applicant.

Being aggrieved by the said decision of the Labour Tribunal, the Applicant preferred an appeal to the High Court of Western Province holden in Colombo. By Judgment dated 9th January 2013, the High Court of the Western Province had dismissed the said appeal subject to the payment of compensation to the Applicant computed on the last drawn basic salary, for 15 years of service based on 3 months per year.

Both, the Applicant and the Respondent who were aggrieved by the said decision of the High Court of Western Province had preferred the present applications seeking special leave from the Supreme Court. When the said Applications were supported before this court for special leave, this court granted special leave in both cases on the following questions of law as raised by the Applicant-Appellant-Appellant and Respondent-Respondent-Appellant in their respective applications filed before this court.

In SC Appeal 101/2014

a) Are the determinations of the Labour Tribunal dated 17.08.2011 and the High Court dated 09.01.2014 supported by the evidence led in that case including documentary evidence?

b) Did the Labour Tribunal and High Court err in Law by coming to the conclusion that the misconduct committed by the Petitioner was sufficiently serious to justify termination of service?

In SC appeal 100/2014

c) Did the learned High Court Judge err in awarding compensation to the Respondent despite finding that determination of the order of Labour Tribunal is equitable and there is no reason to interfere with the said order?
d) Did the learned High Court Judge err in awarding compensation to the Respondent despite holding that the Respondent had acted with intent to vacate employment?

The Applicant who was confirmed in her capacity as Secretary was functioning as the Secretary to the Executive Chef at the Respondent Hotel.

As submitted by the Applicant she had been a dedicated employee and was never accused of any misconduct during her service. However as revealed before us the Applicant had developed an abdominal pain from time to time and as a result she underwent a surgery on 22.08.2009 at the National Hospital Colombo. After the said surgery she was advised to be on medical leave for 28 days by the doctor who performed the surgery and accordingly she was placed on medical leave for the period 20.08.2009 to 17.09.2009.

As submitted by the Applicant, she reported back to work after the medical leave on 21.09.2009 and continued to work for nearly one week but due to complications, she was compelled to take bed rest as it was difficult to attend to work. On 28th September 2009 she informed her Head of the Department that she was unable to attend to work. But as revealed from the evidence placed before the tribunal, she kept away from work until she received a telegram on 9th October 2009 asking her to report to work immediately.

Even though she was asked to report for work immediately by the said telegram, since 10th and 11th October 2009 being a weekend and her off days she reported to Human Resources Manager on 12th October.

However as submitted by the Respondent, even on the 12th the Petitioner had come to the office of the Human Resources Manager around 5.00 p.m. When she met the Human Resources

Manager, she was served with the vacation of post notice, which was challenged by the Applicant before the Labour Tribunal.

In the light of the above evidence placed before the Labour Tribunal, the main question to be resolved before this court as raised in the Appeal 101/2014 is, whether it is just and equitable for the Labour Tribunal President, and the learned High Court Judge to hold that the Applicant had vacated her post with effect from 28.10.2009.

As already discussed in this judgment, the Applicant had kept away from work since 28.09.2009 after sending a SMS (short message service) to her immediate supervisor to the effect that she is unable to come to work, until she received a telegram from her employer on 08.10.2009 requesting her to report to work "as soon as possible" (A-1). With regard to the receipt of A-1, the Applicant takes up the position that she received the same on 09.10 which is a Friday and she reported for work on the following Monday, the first working day after the receipt of A-1.

When going through A-1 it appears that, no final date had been given by A-1 to report for work but it's a request to report for work as soon as possible.

As admitted by both parties before this court, when the Applicant met the Human Resources Manager around 5.00 pm, the Applicant was served with the vacation of post notice. At the time the said vacation of post notice was served, the Applicant was in possession with a medical certificate issued by her family doctor which was approved by the hotel doctor as well.

The concept of vacation of post was discussed by *F.N.D. Jayasuriya (J)* in the Court of Appeal decision in ***Nelson de. Silva Vs. Sri Lanka State Engineering Corporation (1996) 2 Sri LR 342 at 343*** as follows;

> "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 is not reporting at the work place, was actuated by an intention to voluntarily vacate his employment."

When discussing the above, *Jayasuriya (J)* was guided by the decision of the Supreme Court in ***The Superintendent of Hewagama Estate Vs. Lanka Eksath Workers Union SC 7-9/69 Supreme Court minutes 02.02.1970*** and referred to the said decision in his Judgment at page 343 as follows;

> "The learned President of the Labour Tribunal hold on the facts that there was no abandonment of employment by the workman as the workman in question had no intention of abandoning his employment.
>
> The learned President correctly applying the legal principles observed that the physical absence and the mental element should co- exist for there to be a vacation of post in law. Besides, he held on this issue the Tribunal ought to be guided by the common law of the land which is the Roman Dutch Law and consequently the English doctrine of frustration, relied upon by the learned Counsel, has no application whatsoever to the situation under consideration. An appeal preferred by the employer against this order of the learned President of the Labour Tribunal was considered by the Supreme Court in *The Superintendent* of *Hewagama Estate Vs. Lanka Estate Workers Union* and the order of the learned President was affirmed in Appeal."

As already discussed in this judgment, A-1 only requested the Applicant to Report to work as soon as possible. No final date had been given in A-1 for the employer to consider whether the Applicant had vacated the post. The applicant had reported to work the earliest possible day; i.e. the following Monday since she received the telegram on Friday. The Applicant in explaining the delay in reporting on Monday, had stated that she had to wait for the Company Doctor to get her medical approval until 3.30 pm.

The Applicant had been previously (between 2007 to 2009) warned on several occasions for getting absent without previous approval and, on the present occasion, obtained leave for a single day by sending a short massage (SMS) to her immediate supervisor. However she had kept away from work for nearly 15 days until the 12th. The learned President of the Labour Tribunal after considering the above material had come to the conclusion that the applicant had no intention of reporting to work and therefore the mantel element required to establish the concept of vacation of post is fulfilled in this occasion. However he has failed to consider the subsequent conduct of the Applicant when she received A-1. The Applicant had reported to work

"as soon as possible" on the earliest possible day with a medical certificate approved by the company doctor. Whether the medical certificate is dated and the illness referred to in the medical certificate is immaterial to the Human Resources division or to the learned President of the Labour Tribunal, since it refers to the period leave required and had been approved by the company doctor.

If the Applicant's intention is not to report to work, she wouldn't have reported to work on the earliest possible day with a medical certificate. In the said circumstances I cannot agree with the finding of the learned President of the Labour Tribunal when he concluded that the Applicant had vacated her job since her conduct had fulfilled mental as well as physical elements required by Law.

In the case of ***Ceylon Cinema and Film Studio Employees Union Vs. Liberty Cinema (1996) 3 Sri LR 121*** the limitations of the Appellate jurisdiction when considering the decision of the Labour Tribunal was considered and it was decided that,

> "The question of assessment of evidence is within the province of the Labour Tribunal and if there is evidence on record to support its finding the Appellate Court cannot review those finding, even though on its own perception to the evidence it may be inclined to come to a different conclusion."

I am further mindful of the decision in ***The Colombo Apothecaries Co. Ltd Vs. Ceylon Press Workers Union 75 NLR 182*** where *Justice Weeramanthri* observed that,

> "The principle that, although there is no right of appeal on questions of fact, the Supreme Court will interfere where the Labour Tribunal has misconstrued the questions at issue and directed its attention to the wrong matters or has arrived at findings which bear no relation to the evidence led before it."

When considering the material already discussed it appear that the finding of the learned President of the Labour Tribunal with regard to the legal requirement to establish the concept of vacation of post does not support the material placed before the Labour Tribunal.

In the said circumstances I answer question of law (a) in SC Appeal 101/2014 in favour of the Applicant and conclude that both the Labour Tribunal and the High Court had erred when it was

concluded both by the Labour Tribunal and High Court that the Applicant had vacated her post from 28.09.2009.

During the trial before the Labour Tribunal, four documents were produced on behalf of the employer marked R1 to R 4. The said documents are warning letters issued by the employer when the Applicant got absent without informing the employer. In addition to the said warning letters, certain E-mails were also produced in evidence to establish that the conduct of the applicant had created lot of hardships to her immediate supervisor, the Executive Chef of the Employer Hotel.

When going through the contents of the four warning letters issued to the Applicant, it appears that the Applicant was severely warned for her conduct of frequently absenting without informing at least her immediate supervisor for several dates. As observed by me, all these instances, the applicant got herself absent for several days sometime nearly two weeks. The above conduct of the Applicant had created lot of hardships to the employer and as revealed, it had effected the smooth functioning of the kitchen Department of the Employer Hotel.

The Applicant being the secretary to the Executive Chef to the Employer Hotel had played a key role in the functions of the Kitchen Department. As observed in document produced marked A-23 an E-mail sent to the Human Resource Department, in December 2008 the Executive Chef had referred to the regular absenteeism of the Applicant in the following terms;

> "After advising Mano about her regular absenteeism and punctuality to work last week thru Human Resource Office, again she did not report to work since 3rd December 2008 saying she has a stomach problem. If you check her roster, you will find the pattern of keeping off from work and this has caused severe draw back in the operation of work at the chef's office.
>
> This is the busiest period of the year and her absence from work has effected a downward trend to maintain the required quality."

In the case of ***Brook Band (Ceylon) Ltd V. Tea Rubber Coconut and General Produce workers' Union 77 NLR 6*** a five judges Bench comprising of *Fernando J, Sirimanne J, Samarawickrama J, Siva Supramaniam J,* and *Tennakoon J,* whilst discussing the question of reinstatement had concluded that;

> "On the question of reinstatement of a workman, the past record of service of the workman is of the greatest importance and relevancy."

In the case of ***Sri Lanka State Plantation Corporation V. Lanka Podu Seva Sangamaya (1990) 1 Sri LR 84*** the Supreme Court concluded that;

> "Where the termination is found to be unjustified, the workman is, as a rule, entitled to reinstatement. An order for payment of compensation is competent in situations referred to in sections (33) (3) (workman in personal service) and (33) (5) (workman requesting compensation instead of reinstatement) or where such order would be otherwise just and equitable in the circumstances as contemplated by section 33 (6) of the Act.

When considering the matters already discussed by me in this judgment, I observe that this is not a fit case to make order to reinstate the Applicant- Appellant-Appellant is SC Appeal 101/2014 but considering the past record and the position held by her in the capacity of a Personal Secretary to the Executive Chef, to order compensation in lieu of reinstatement.

When considering the amount of compensation that should be awarded to the Applicant I am further mindful of the decisions in the ***Associated News Papers of Ceylon Ltd V. Jayasinghe (1982) Sri LR 595*** where a bench comprising of *Samarakoon CJ, Wanasundera J,* and *Saza J,* held that;

> "When a tribunal is called upon to determine compensation, it should take into account back wages lost but it is not entitled to make a separate award of back pay in addition to compensation."

and the decision in ***Associated Cables Ltd V. Kalutarage (1999) 2 Sri LR 314*** where a bench comprising of *Amerasinghe J, Gunasekara J,* and *Weerasekara J* held that;

> "The award of compensation to the workman in a sum of Rs. 150,000 was bad for the want of an adequate basis for computing that amount. Instead, the payment of 3 years' salary would be a just and equitable award of compensation."

In the said circumstances I observe that, the amount of compensations which has already been ordered by the learned High Court Judge is just and equitable.

In the said circumstance I answer the question of law raised in both appeals as follows;

SC Appeal 101/2014

a) No

b) Not arise

SC Appeal 100/2014

c) Not arise

d) Not arise

Whilst considering the questions of law raised in the two appeals as referred to above, I declare that both the President of the Labour Tribunal and the learned High Court Judge had erred when they concluded that the Applicant had vacated her post with effect from 28.09.2009. I further make order for the Respondent to pay as compensation a sum of money computed on the last drawn basic salary for 15 years based on 3 months per year as ordered by the High Court.

SC Appeal 101/2014 is allowed and SC Appeal 100/2014 is dismissed.

However I order no costs.

The Applicant-Appellant-Appellant is entitled further for statutory entitlements as well.

Judge of the Supreme Court

S. Eva Wanasundera PC J

I agree,

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree,

Judge of the Supreme Court