

**IN THE COURT OF THE APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Application for the Mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. WRIT 209/2015

Fascination Exports (Pvt) Ltd
105 & 107 Hunupitiya Lake Road
Colombo 2.

PETITIONER

- Vs -

1. Commissioner General of Labour
Department of Labour
Labour Secretariat
Kirula Road
Colombo 5.
2. Assistant Commissioner of Labour
Termination Unit
Department of Labour
Labour Secretariat
Kirula Road
Colombo 5.
3. Deputy Labour Commissioner
Maharagama District Labour Office
121/3A, High Level Road
Maharagama.
4. Premawathie Kumarage
27/7, Mabulgoda
Pannipitiya.

RESPONDENTS

Before:

Janak De Silva J.

&

N. Bandula Karunarathna J.

Counsel: Kavindri Wijayaratne instructed by D.L. & F. De Sarams for the Petitioner
Thushani Machado instructed by Piyumi Kumari for the 4th Respondent.

Written Submissions: By the Petitioner on 05.07.2019.
By the 4th Respondent on 26.07.2019.
By the 1st, 2nd and 3rd Respondents on 07.08.2019.
Reply Submissions of the Petitioner to the Written Submissions Filed on Behalf of the 1st, 2nd and 3rd Respondents and the 4th Respondent on 12.12.2019.

Argued on: 10.05.2019

Judgment on: 16/11/2020

N. Bandula Karunarathna J.

The Petitioner, Fascination Exports (Private) Limited, was incorporated on 13.08.1992 and the 4th Respondent was employed by the Petitioner on 04.11.1995 as a 'Pattern Maker'. On 01.01.2014 by way of a letter dated 31.12.2013 the Petitioner transferred the 4th Respondent to a company named Udawatte Garments (Pvt) Ltd, with just a day's notice. The 4th Respondent thereafter wrote to 1st Respondent on 03.01.2014 on the basis that she was treated unfairly by transferring her to a separate company.

On 05.02.2014 an inquiry was conducted by the 3rd Respondent based on the aforementioned letter to the 1st Respondent by the 4th Respondent and it was agreed by the parties thereafter that the Petitioner has to pay

- (a) The 4th Respondent's salary for the month of February 2014;
- (b) 2 months' salary amounting to Rs.97,000/-;
- (c) Gratuity and Holiday Pay entitlements, upon calculation and informing to the Petitioner of the same.

The sum of Rs.97,000/- along with the February salary was to be deposited by 19.03.2014 in the Maharagama District Labour Office and Gratuity and Holiday Pay were to be paid by the Petitioner upon notice of the due amount by the 3rd Respondent.

Upon calculation of the Gratuity and Holiday Pay due by the Petitioner to the 4th Respondent, the 3rd Respondent notified the Petitioner on 21.03.2014 the sum of payment in default as Rs.212,500/-, to be paid within 14 days of the notice.

The Petitioner defaulted in payment of any of the aforementioned payments and therefore the 4th Respondent wrote to the 3rd Respondent on 05.05.2014 stating that she wished to withdraw from the settlement with the Petitioner and to forward her application to the Termination Unit of the Commissioner of Labour.

The 4th Respondent's application to Termination Unit was accepted on 17.06.2014 and inquiries were held on 10.07.2014, 24.07.2014 and 14.08.2014 by the 2nd Respondent where both parties filed Written Submissions and stated their arguments on the matter, whether the 4th Respondent's services were unlawfully terminated. 1st Respondent thereafter identified that the Petitioner neither received prior approval of the Labour Commissioner General nor did it obtain the written consent of the employee as required by the Termination Act and that the Petitioner had transferred the 4th Respondent to Udawatte Garments (Pvt) Ltd., which is a separate corporate body from the Petitioner without the 4th Respondent's written consent and issued an order on 13.01.2015 holding that the 4th Respondent's services were illegally terminated.

Thereafter, the Petitioner sought the intervention of this Court towards quashing the aforementioned Order of the 1st Respondent and preventing the 1st and/or 2nd Respondents from acting in the furtherance of the same on the basis that they did not consider the following grounds when making the order;

- (a) The misconceived and unfolded finding that the Petitioner had terminated the 4th Respondent's services when she was transferred to Udawatte Garments (Pvt) Ltd;
- (b) The Petitioner continued to pay the 4th Respondent's salary and EPF even after she started working at the Udawatte Garments (Pvt) Ltd as she continued to be an employee of the Petitioner;
- (c) The Petitioner repeatedly requested for the 4th Respondent to report to work;
- (d) The Petitioner continuing to employ the 4th Respondent or treating her as an employee by keeping her vacant for over a year;
- (e) The 1st Respondent's lack of jurisdiction to make an order in this regard as there was no termination prima facie or ex facie.

Following the withdrawal by the 4th Respondent and the Application by the Petitioner to this Court, a complaint was lodged against the Petitioner by the 4th Respondent on 5.12.2015 (vide X2) for wrongful termination of the 4th Respondent's employment and for not following the Labour Commissioner's determination numbered TEU/A/30/2014 and Order dated 13.01.2015, for breach of conditions laid down in the Memorandum of Settlement entered into between the Petitioner and the 4th Respondent on 19.02.2014 in terms of Section 12 (1) of the Industrial Disputes Act No.43 of 1950 by the Petitioner himself.

Thereafter, the Petitioner sought to move this Court by way of a Petition and Affidavit on 13.05.2015, to list the matter for support of interim relief directing the learned Magistrate of the

Kesbewa Magistrate's Court to stay all proceedings of the case No.68306/Labour, to enforce the order of the 1st Respondent, until the final hearing and determinations of the Applications.

The Petitioner is therefore inter alia, seeking the following reliefs: -

- a) a Writ of Certiorari quashing the Order dated 13th January 2015 of the 1st Respondent (P39).
- b) a Writ of Prohibition, prohibiting the 1st and / or 2nd and/or 3rd Respondent and/or agents or servants from taking any further legal action against the Petitioner in respect of the order dated 13th January 2015 (P39).

The Petitioner states that the 1st Respondent issued an Order on 13th of January 2015 purportedly in terms of Section 6 of the Termination of Employment of Workmen (Special Provision) Act ordering the reinstatement of the 4th Respondent from 20th January 2015 with back wages to be paid for the period between 1st January 2014 to 19th January 2015. This Application has been filed seeking to impugn the said Order "P39". The Petitioner is of the contention that the impugned Order "P39" is *ultra vires*, unlawful, arbitrary and also offend the principles of reasonableness and fairness and in such circumstances, be pleased to grant the reliefs prayed for in the Prayer to the Petition.

The Petitioner states that as per the Order "P39" the 1st Respondent has based the finding of purported unjust/wrongful termination of the 4th Respondent's services by the Petitioner on the following:

- (a) The Petitioner didn't receive the prior approval of the Commissioner General of Labour or the consent of the employee (4th Respondent) to terminate the 4th Respondent's services;
- (b) The Petitioner did not obtain the written consent of the 4th Respondent for her transfer to Udawatte Garments (Pvt) Limited, which is a separate corporate body from the Petitioner.

The Petitioner states that the Petitioner never expressly or by implication, terminated the services of the 4th Respondent. The transferring of the 4th Respondent to Udawatte Garments (Pvt) Ltd cannot be treated as termination of the 4th Respondent's services as per the misconceived findings of the 1st Respondent. In so holding the 1st Respondent has completely disregarded and/or willfully failed to consider the fact that upon being transferred to Udawatte Garments (Pvt) Ltd, the 4th Respondent expressly conceded her agreement to continue to work at Udawatte Garments (Pvt) Limited. As evidenced by the 4th Respondent's own letter "P10". Udawatte Garments (Pvt) Limited was an entity which maintained a production sharing agreement with the Petitioner. Despite stationing the 4th Respondent at such factory, the 4th Respondent at all times and for all purposes was an employee of the Petitioner which is evidenced by the fact that the Petitioner continued to pay the 4th Respondent her salary and EPF

contributions for January and February 2014 as borne out by the documents "P9" and "P10". As Irrefutably borne out by the documents "P31", "P34", "P36" and "P37", during this ordeal, the Petitioner repeatedly requested the 4th Respondent to report back to work and kept the 4th Respondent's position vacant for over a year. By "P37" the Petitioner has duly informed the 4th Respondent that the smooth functioning of the Petitioner's operations were being hindered by the 4th Respondent's position being vacant for such an extensive period of time. Accordingly, the 4th Respondent had been expressly instructed to report to work by 15th January 2015. The Petitioner further adds that it was the 4th Respondent herself that refused to report to work making unreasonable demands from the Petitioner.

The Petitioner further states that the terms of Settlement "P15" entered under Section 12 (1) of the Industrial Disputes Act No.43 of 1950 were unilaterally revoked by the 4th Respondent. As set out above, the 3rd Respondent was required to convey to the Petitioner the quantum of the Gratuity and holiday pay payable to the 4th Respondent in terms of the said terms of Settlement "P15" entered on 19th February 2014. It is the contention of the 3rd Respondent as per its Statement of Objections that the 3rd Respondent continued in service with the Petitioner immediately after cessation of employment on 31st January 2009. By that contention the 4th Respondent would have been in the services of the Petitioner from 1st February 2009.

The Petitioner states however that, even as at 19th March 2014 the 3rd Respondent was to inform the Petitioner the calculation for payment of Gratuity due to the 4th Respondent in Terms of Settlement marked "P15". Thereafter, on 21st March 2014 the 3rd Respondent by Notice marked "P16" directed the Petitioner to pay gratuity which was incorrectly calculated for a period of 18 years [2nd November 1995 to 19th February 2014], including the 4th Respondent's previous tenure of service with the Petitioner [2nd November 1995 to 31st January 2009] for which gratuity had already been paid as duly admitted and acknowledged by the 4th Respondent before the 3rd Respondent.

The Petitioner states that the 4th Respondent's break in service and re-engagement with the Petitioner is further demonstrably evident by the allocation of a separate EPF number after her resignation on 31st January 2009.

In response to the aforesaid submissions of the Petitioner, the 4th Respondent states that the 4th Respondent had resigned on the 31st of January 2009 for the reason that her father had fallen ill and she required a large sum of money to expend her father's illness and requested the management of the Petitioner's Company to grant her a loan for the said purpose. However, the management had refused to grant the said loan and, in the alternative, advised her to resign and collect her gratuity. However, there was no break in her service for the reason even though she resigned on the 31st January 2009 she reported for duty on the 1st of February 2009. This is confirmed by the fact that she received her salary for the month of February 2009, the salary slip for the month of February 2009 (though the EPF number is not indicated) and the salary slip for January 2009 (the old EPF number is indicated) (vide 4R-1A and 4R-1B respectively). The salary

slip for March 2009 indicating the new EPF number (vide 4R-1C) and the salary slip for Bonus & Leave indicating the old EPF number for March 2009 (vide 4R-1D).

The 4th Respondent states that the 4th Respondent functioned as the Manager of the Sample Room and signed her attendance in the book which was exclusively used by Managers. The 4th Respondent categorically denied the position taken up by the Petitioner that she held the position of sample Supervisor for the reason that even the bar code pass issued to her by the Petitioner, the 4th Respondent's designation is indicated as "Sample Room - in Charge". (Vide 4R-2). The 4th Respondent was appointed as "Head of Production – Technical Unit" with effect from 13.9.2013 (vide P7). However, after the issuance of the said letter P-7 she was asked to perform the duties of a machine operator even though she had purportedly been appointed as a "Production Technical Officer ". The fact that she was not assigned the duties of a Production technical Officer is evidenced by her pay slip for November 2013 and December 2013 indicating her designation as "sample supervisor" and the deductions contained therein which are applicable only to machine operators. Furthermore, when she was performing her duties as the Manager of the Sample Room no such deductions were made which is indicative of the fact that it was a demotion (vide copies of her salary slips for the months of October 2013, November 2013 and December 2013 have been produced marked as 4R-3).

The 4th Respondent's position is that her appointment to the post of Production Technical Officer by P-7 was not a promotion but in fact a demotion. The DGM, Mr. Mahesh Sandarasekara had informed her that the necessary training would be given to her as she had no knowledge in respect of the said subject as her area of expertise was in pattern making and sample making.

The Petitioner has taken up the position that they were dissatisfied with performance of 4th Respondent's duties in her capacity as a Production Technical Officer. However, the 4th Respondent states that she was never informed either orally or in writing that the Petitioner Company was dissatisfied with the performance of her duties in the post. In fact, she had received the bonus for 2013 as well and this is confirmed by the deposit of a sum of Rs.24,225/- on 10.04.2013 made to her savings account maintained at the Piliyandala Branch of Commercial Bank. (vide 4R-4).

The Petitioner has consistently held out that there was a break in the 4th Respondent's service as they had purported to give her a new EPF number. However, this is denied for the reason that she resigned on the 31st of January 2009 and assumed duties again the following day namely, on the 1st of February 2009. The holiday pay of Rs.25,866.66 calculated by the 3rd Respondent was never paid to her by the Petitioner. In fact, even though Petitioner had undertaken to settle all the dues to her within 14 days of receiving the amount due from the 3rd Respondent, the Petitioner had paid only the salary for the month of February 2014.

The 4th Respondent states that as the Petitioner had failed to fulfil the conditions in the Memorandum of Settlement (produced marked P-15) in as much as the Petitioner failed to

deposit said sum of Rs.97,000/- by 19th March 2014, the 4th Respondent had no option other than to inform the 3rd Respondent that she was withdrawing from the settlement and requested him to forward her application to the Termination Unit. On the 19th of February 2014 on conclusion of the inquiry and reaching the settlement, the Human Resources Manager Mr. Indika Seneviratne had informed the 4th Respondent orally to refrain from reporting to duty forthwith, in the presence of the 3rd Respondent. (vide an audio recording has been produced marked as 4R-5 and a transcript of the aforementioned conversation has been produced marked as 4R-6)

The 4th Respondent further states that although the Petitioner has taken up the position in the Petition, that the 4th Respondent had refrained from reporting to work on her own accord, which is categorically denied by her. In compliance with the order of the 1st Respondent dated 13th January 2013, (P-39) the 4th Respondent had reported for duty on the 20th of January 2015 at the Petitioner's Factory but she was detained at the security division and the Manager (HR Division) had informed her that the DGM (HR) was not present at the factory and they would inform as to when she should report for duty. The 4th Respondent addressed a letter dated 21.1.2015 to the 2nd Respondent (with a copy to the Manager (HR) and informed him of the events that transpired on the 20th of January 2015. (vide 4R-7).

The 4th Respondent submits that the Petitioner had failed and neglected to comply with the said order of the 2nd Respondent in as much as the 4th Respondent had not been reinstated in her post prior to termination. It is irreconcilable for the Petitioner to state that it never terminated the services of the 4th Respondent considering the evidence to the contrary.

The 1st, 2nd and 3rd Respondents Submission is also mainly based on two issues,

- (a) Whether there was a break in the 4th Respondent's service between 31.01.2009 and 01.02.2009 and thereby whether the 4th Respondent is entitled to gratuity as calculated and explained.
- (b) Whether the transfer of the 4th Respondent from Fascination Exports (Private) Limited to Udawatte Garments (Pvt) Ltd amounted to constructive termination of the services of employment of the 4th Respondent and thereby whether there was a breach of express provisions in the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 (as amended) before terminating services of the 4th Respondent.

Subsequent to a thorough analysis of the facts of the case, it is pertinent to consider whether there was in fact a break in the 4th respondent's employment between 31.01.2009 and 01.02.2009. Even if the 4th respondent resigned on 31.01.2009, she reported to work on 01.02.2009, meaning that there was no break in her service. Moreover, the 4th Respondent received salary for the month of February and this verifies the fact that she reported to work immediately after her resignation (But, the EPF No. in the salary slip for the month of February was not indicated) (vide 4R-1A).

I further note that the Petitioner has stated that the service of the 4th Respondent was never terminated and relies on the letter produced and marked as P10, that the 4th Respondent had agreed to continue at Udawatte Garments (Pvt) Ltd. This position is refuted for the reason that on perusal of the said letter reveals that it is captioned "unfair transfer/change in post, "the 4th Respondent had brought to the attention of the Petitioner that even though she had been appointed as the Head of Productions – Technical Unit" with effect from 13.09.2013 she was required to perform the duties of a machine operator, even though she had purportedly been appointed as a "Production Technical Officer". The 4th Respondent had further protested against her transfer to the said Udawatte Garments and had accepted the said transfer under protest.

The Petitioner has taken up the position that the transfer does not amount to constructive termination.

In the case of Pfizer V Rasanayagam (1991) (1) SLR 290 a case similar to the facts of the instant application, Justice Gunasekera at page 296 held as follows:

"S.R. de Silva in the Employers Federation of Ceylon Monograph 4 on the Contract of Employment in paragraph 267 states that "Where the conduct of one party amounts to a constructive termination, then the law deems the contract in question to have been terminated as a result of the action of the party who has so misconducted himself. Therefore, if the employer has conducted himself in relation to the employee in such a way as to amount to a constructive termination of the contract then the termination of the contract will be deemed to be by the employer and as such a termination attracts the consequences of an express termination by the employer". In the instant case the learned President after analyzing the evidence has taken the view that the action on the part of the Company to require to report to John is tantamount to a demotion and hence that there has been a constructive termination". (emphasis added)

In the present application, the 4th Respondent has set out in the objections and in the relevant facts above, that the transfer to another factory as a machine operator was in fact a demotion though the Petitioner Company purportedly assigned the post of Head of Production – Technical Unit.

Similarly, in Hassan V Fairline Garments (Pvt) Ltd 1989 (2) SLR 137, the Supreme Court held as follows:

1.A workman has an inalienable right to choose for himself the employer he will serve. Once the contractual relationship between himself and his employer is established, the employer cannot transfer his services to another without his (the employee's) consent or against his will. It is reasonable to infer that the Appellant's appointment was to a specific post, namely that of purchasing officer, which doubtless would have required skill and experience of some sort. The clause that the Appellant should carry out all the duties entrusted to him by the Respondent company in context must be construed to mean duties within the ambit of a purchasing officer.

It cannot possibly be taken to embrace every kind of duty which the company may decide to assign to him.

The proposition that the employer enjoys an implied right, in the absence of contractual provisions or other rules to the contract to transfer a workman from one establishment to another at a different place within the service of the employer has no application to the present case as here the Appellant was transferred to another place of work not within, but outside the Respondent's service and in the service of another and altogether different company, in which he was employed namely, 'Jetro'. The whole purpose of the Termination of Employment {Special Provision} Act is to ensure that the workman continues in employment in the same capacity in which he was employed by his employer.

The same sentiments were also expressed in the case of P.K. Garments V Commissioner of Labour (CA Writ 2/2012 CA Minutes 23.5.2016)

In consideration of the aforesaid, it is my standpoint that the Petitioner has no right to transfer the 5th Respondent to Udawatte Garments (Pvt) Ltd., as it is a totally different company as the Petitioner has admitted in paragraph 5 of the Written Submissions that "if a Company with whom the Petitioner Company had a Production Agreement with". Therefore, the Petitioner cannot transfer the 4th Respondent without her consent for the reason that it has to be specifically included in the contract and the Petitioner has failed to establish that it is permitted to do so, in terms of her contract.

Moreover, specifically Section 5 of the TERMINATION OF EMPLOYMENT OF WORKMEN (SPECIAL PROVISIONS) ACT No.45 of 1971 states that any substantial change of the employee's duties/work station without his consent can also be deemed a *constructive termination of services* which entitles him to challenge it at a Labour Tribunal or make a complaint to the Commissioner of Labour. However, in case of a transfer to another location, the employee must always first comply and then complain. It is clear that the Petitioner has always made substantial changes to the duties and workstation of the 4th Respondent without her consent. As mentioned above, the 4th Respondent was asked to perform duties of a "machine operator" even if she had purportedly been appointed as a "Production Technical Officer". Moreover, it was a sudden change in her position from Manager of the Sample Room to a machine operator. The 4th Respondent was also transferred to a completely separate legal entity. Thus, it can be construed as constructive termination of services.

It is clear that the 4th Respondent has neither committed any serious offence nor has any complaints of her unethical or non-disciplinary conducts. The Petitioner has also failed to inform the 4th Respondent about any dissatisfaction with her work, despite the Petitioner's statement in its Petition that the 4th Respondent's work was not up to the required standards.

It is further pertinent to note that she was given the position of a Production Technical Officer without prior notice and the Assistant General Manager of the Petitioner Company removed all

the facilities she had earlier and offered the 4th Respondent only a chair and a desk to work. She was not given the opportunity to sign in the book anymore where all the executive officers signed and was given to put finger prints after that.

The 1st – 3rd Respondents have rightfully conducted inquiries, taken account of all material considerations and thereafter made determinations. The 4th Respondent has thereafter lodged a complaint in the Kesbewa Magistrate 's Court following the failure of the Petitioner to abide by the Order and determinations of the Respondents.

In the foregoing analysis of facts and upon application of the relevant provisions of the law, I note that the Respondents have not erred in law and establish principles of Administrative law, and have followed the relevant laws and regulations.

Therefore, I hereby dismiss the Petitioner's application with costs.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal