

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

*In the matter of an Application for
mandates in the nature of Writ of
Certiorari and Mandamus under and
in terms of Article 140 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.*

Court of Appeal Case No.
CA/WRT/31/21

Arbitration No. A 3216

1. Mrs D.B. Siriwardana
"Siri Sevene", Kimbulapitiya,
Negombo.

2. Mr D.A.N. Dissanayaka
No. 132, Bogamuwa,
Kalagedihena.

NOW BOTH ARE AT
No. 51/22, 2nd Lane,
Dammodaya Mawatha,
Battaramulla.

Petitioners

Vs

1. Jayantha De Silva, Arbitrator,
No. 160/14,
Averiyawatta Road

2. B.K. Prabath Chandarakeerti
Commissioner General of Labour,
Labour Secretariat,
Narahenpita, Colombo 05.

3. K.D. Manoj Priyantha

Commissioner of Labour
Labour Secretariat,
Narahenpita, Colombo 05.

4. Nimal Siripala De Silva
Minister of Labour,
Labour Secretariat,
Narahenpita, Colombo 05.

5. Sri Lanka Insurance Corporation
Ltd.,
No. 21, Vauxhall Street,
Colombo 02.

Respondents

Before: **M. T. MOHAMMED LAFFAR, J.**
S. U. B. KARALIYADDE, J.

Counsel: Isuru Lakpura for the Petitioners
Maithri Amarasinghe, S. C. for the 2nd, 3rd, 4th
Respondents
Malik Hannan, instructed by Manjula Jayasena for the
5th Respondent

Argued on: 25.07.2023

Written Submissions on: 05.10.2023 (by Petitioners)
06.10.2023 (by 5th Respondent)

Decided on: 04.12.2023

MOHAMMED LAFFAR, J.

The Petitioners have instituted this action challenging the Award dated 07.07.2020 delivered by the 1st Respondent-Arbitrator (X17) published in Gazette No.2191/42 dated 04.09.2020 (X18), seeking *inter alia* orders in the nature of Writs of Certiorari quashing the said Award and other incidental relief arising thereto. The Respondents are of the view that in agreement with the reasoning of the Arbitrator and the Award and contend that the said Award has been issued based on just and equitable principles.

The crux of the matter involves an industrial dispute between the Petitioners as employees of the 5th Respondent Organization. The Petitioners were deemed to have vacated their employment by the 5th Respondent due to their absence and/or failure to report to work.

It is submitted that on 16.06.2004, the Petitioners had faced a Visa interview at the British High Commission. While returning from the High Commission, the CID had taken the Petitioners into custody over a complaint made regarding certain documents submitted for consideration of their Visa application. Thereafter, it is submitted that they were produced before the Learned Magistrate of Colombo on the same day and remanded. On 30.08.2004, the Hon. Attorney General had then informed the Magistrate's Court, in writing, that they did not wish to pursue the charges against the Petitioners. Consequently, the Petitioners have been discharged on 30.08.2004. In the said circumstances, the Petitioners have been in prison from 16.06.2002 to 30.08.2004, for almost two months and two weeks. The Petitioners have not reported to work at the 5th Respondent Organization during the said period. The Petitioners' position is that they were not able to rightfully inform the 5th Respondent as they were detained in prison.

The 1st Petitioner was required to report for work by the 5th Respondent on 08.07.2004. Then the Petitioner, through their Attorney-At-Law, by letter dated 08-07-2004 informed the 5th Respondent of their inability to report for work as they were detained in prison and declared their willingness to report for work as soon as they were released. However, the 5th Respondent by letter dated 12-07-2004, informed the Petitioners that they have

vacated their posts. The Petitioners had then requested the 5th Respondent to reconsider the said decision. However, notwithstanding the representations made, the 5th Respondent has then continuously maintained the position that the Petitioners had vacated their employment. The matter was then referred to arbitration where it was decided in favour of the 5th Respondent that the Petitioners had in fact vacated their employment.

Therefore, the primary question to be answered by this Court is whether, while the Petitioners were in prison from 16.06.2002 to 30.08.2004, their physical absence from work would constitute a vacation of post as claimed by the 5th Respondent. It is pertinent to note that the Petitioners were thereafter discharged and have indicated their willingness to continue with their employment.

In examining whether the mere physical absence constitutes a vacation of post or whether the mental element or the *mens rea* should also co-exist with such physical absence. The attention of this Court is drawn towards **Nelson De Silva Vs Sri Lanka State Engineering Corporation (1996 (2) SLR 342** where F. N. D. Jayasooriya, J held that;

*"In this context, I wish to cite a passage from the author Alfred Avins - Employee's Misconduct at page 26. "I wish to appeal Justice Jayalath's judgment in Sri Lanka Jathika Pravahana Sevaka Sangamaya vs. Central Region Transport Board and Sri Lanka Central Transport Board, where the learned judge applied the identical principles. Justice Kulatunga in a fundamental rights application before the Supreme Court - Wijenaike vs. Air Lanka Ltd. - referred to the same principle and emphasised that **physical absence alone is insufficient and that the party seeking to establish a vacation of the Post must prove that the physical absence coexisted with the mental intent -animus non revertendi.**"*

In **Paradigm Clothing (Private) Limited Vs Mahagamage Chandramadu and Others (2020 Bar Association Law Journal 230)**, it was held as follows:

*"I find that in the present case, **there is no presence of the mental element**, i.e. the intention of the Employee to desert and abandon the employment. Therefore, in the given*

circumstances, the failure to comply with the letters of transfer does not amount to a vacation of Post.”

In **Coats Thread Lanka (Pvt.) Limited V. Samarasundara 2010 (2) SLR 1**, it was observed as follows:

“The above discussion refers to the question of automatic repudiation by the operation of the contract due to the conduct of the employee.

However, it yet remains to be seen whether the employee deliberately repudiated his contract by seeking employment elsewhere. As noted earlier, the right to seek secondary employment is subject to the important condition that such employment takes place outside the usual working hours of his primary place of employment. It is pertinent to note that in the instant case the Respondent's alternate employment by his own employment clashes with the working hours of the Appellants.

"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 whereby his own act a party disables himself from performance or makes it impossible for the other party to render performance"

It was urged before us that the employee in the instant case had by seeking employment elsewhere, impliedly repudiated his contract of employment, in other words, he had vacated his post.

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.

In **A.K. Mohammed Illyas v. Agricultural Insurance Board (SC APPEAL No. 165/2013 decided on 28.03.2016)** it was observed that:

“Kulatunga J in Wijenaike v Air Lanka Ltd. (1990) 1 Sri L.R. 293, referred to the principle of Vacation of Post and emphasised that physical absence alone is insufficient and that the party seeking to establish a vacation of post must prove that the physical absence co-existed with the mental intent. Thus, the concept of vacation of post involves two aspects; Physical element and mental element. These elements must co-exist with each other for the employer to establish that there is vacation of post by the employee (Kalamazoo Industries v Minister of Labour & Vocational Training (1998) 1 SLR 235)”

In the said context, further to the evidence that had been led - it is apparent that the Petitioners had no intention (mental element) of abandonment or vacation from their post, but were compelled to such a position physically, due to detainment in prison until they were discharged. In such a background, the Petitioners contend that the determination of the 5th Respondent to deem that they vacated their post is not just and equitable. In deciding the said issue, the 1st Respondent Arbitrator had identified 8 pertinent issues to be answered in that regard. However, it is the view of this Court that the Arbitrator has not thoroughly considered the circumstances of the case and the position of the Petitioners in a just and equitable manner and in particular, the fact that the Petitioners had no intention to vacate their post.

For the above reasons, this Court is inclined to issue a mandate in the nature of a Writ of Certiorari quashing the aforesaid award/decision of the 1st Respondent marked as 'X17' appearing in the Gazette notification bearing No. 2191/42 and dated 04.09.2020 marked 'X18'.

However, this Court is cognizant of the fact that despite the need for compensation being presented during submissions on behalf of the Petitioners, the pleadings fail to rightfully establish and/or pray for an accurate claim against the 5th Respondent.

For the foregoing reasons, A Writs of Certiorari quashing the Arbitral Award made by the 1st Respondent marked as P17 and the Gazette Notification bearing No. 2191/42 dated 04-09-2020 marked as X18 is issued.

A Writ of Mandamus directing the 5th Respondent to reinstate the 2nd Petitioner with due promotions, salary increments and back wages is issued.

A Writ of Mandamus directing the 5th Respondent to pay the back wages to the 1st Petitioner in accordance with the present salary scale from the date of purported vacation of post till the date of retirement with all retirement benefits is issued.

The parties should bear their costs as to this Application.

Application Allowed, No Costs.

JUDGE OF THE COURT OF APPEAL

S. U. B. Karalliyadde, J.

I agree.

JUDGE OF THE COURT OF APPEAL