

WALKER AND SONS & COMPANY LTD.
v
GURUSINGHE

SUPREME COURT
SHIRANI BANDARANAYAKE, J.
MARSOOF, J.
BALAPATABENDI, J.
SC(APPL) 61 OF 2005
HCA 305/2003
LT 4/G/23590/99
FEBRUARY 27, 2008
APRIL 2, 3, 29, 2008

Resignation – Services constructively terminated? Use of term ‘resignation’ by an employee – Does it by itself preclude him from claiming relief on the footing of a constructive termination? – What is constructive termination?

Held:

- (1) The employee informed the appellant employer that due to the non availability of the resources at the new place of work he would not be in a position to accede to the additional duties that were assigned to him and therefore he is tendering his resignation. The appellant had taken immediate steps to demote him to his previous position, and had also taken steps to call for explanation for his non attendance at meetings. In conceptual terms it can be said that when an employer breaches a fundamental obligation of the contract of employment, the employee is entitled to treat such a breach as a ‘constructive termination’ by the employer, which puts an end to the contract.
- (2) The mere use of the term resignation by an employee does not by itself preclude him from claiming relief on the footing of a ‘constructive termination’ by the employer.
- (3) After receiving the ‘resignation’ letter the employer appellant had taken steps to demote the respondent to his previous position. The employer appellant also took steps to call for explanation for his non attendance at meetings – thus confirming the fact that the employer had not accepted the resignation tendered by the employee respondent – it is abundantly clear that the appellant’s action against the respondent amounts to ‘constructive termination’.

APPEAL from the judgment of the High Court of Matara

Wasantha Gunasekara for respondent-appellant-appellant.

Rohan Shabandu with *Athula Perera* for applicant- respondent-appellant.

Cur.adv.vult.

October 19, 2008

SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of the Southern Province dated 30.03.2005. By that judgment, the learned judge of the High Court affirmed the order of the Labour Tribunal dated 04.08.2003, by which the Labour Tribunal had held that the services of the workman-applicant-respondent-respondent (hereinafter referred to as the respondent) had been constructively terminated by the respondent-employer-appellant (hereinafter referred to as the appellant) and awarded him a sum of Rs. 264,000/- as compensation for the loss of employment. The appellant appealed to the High Court of the Southern Province, where special leave to appeal was granted to the Supreme Court. Since, no questions of law had been specified by the High Court, both learned Counsel had agreed on 20.02.2006 that the appeal could be argued on the following question:

“Whether the Labour Tribunal and the High Court erred in law in considering that there was a wrongful termination of service by the employer, considering the documents and the evidence that is adduced in the case”

The fact of this appeal, *albeit* brief are as follows:

The respondent had joined the appellant Company as a supervisor on 26.06.1985 (A1). In terms of the terms and conditions of his employment, his age of retirement was 55 years. Thereafter the respondent was promoted to the post of Training Assistant Engineer (Mechanical) with effect from 01.06.1993 (A2). Later on 30.08.1995 the respondent was promoted to the position of Assistant Engineer (A3) and by document marked A4, he was promoted to the position of engineer of the appellant Company with effect from 01.03.1999. Since July 1985, the respondent had been

serving in the appellant Company, for a continuous period of over 13 years.

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The promotion granted to the respondent in March 1999, was conditional as he had to serve a period of six (6) months on probation, and it was also common ground that, the appellant Company by its letter dated 23.03.1999 (A4A), had assigned additional duties to the respondent, which were as follows:

- a. Continue to improve the level of activity at the branch ensuring that the turn over does not fall below the figures over the past six (6) months;
- b. Endeavour to re-commence revenue work for repairs to plantation machinery at a value, not less than Rs. 250,000/- per month; and
- c. Co-ordinate with the Branch Accountant in the collection of dues to the Company in respect of invoices raised in pursuance of work carried out in (a) and (b) above.

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During this period the respondent had to work in the office at Galle Fort, which was admittedly a large well equipped Garage. After his new appointment, the said Garage was sold and the machinery and the equipment were taken to a place at Mihiripenna. The respondent after the receipt of the notice, assigning additional duties (A4A), had tendered his resignation by his letter dated 07.07.1999, to be with effect from 31.08.1999 stating that he is unable to accede to the terms and conditions of his new appointment (A6). By their letter of 09.07.1999, the appellant, whilst reverting the respondent to his former position as Assistant Engineer Galle Branch on the salary allocated to Assistant Engineer's post, informed the respondent that they are awaiting his confirmation of his resignation.

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The respondent by his letter dated 02.08.1999 had informed the appellant that they have terminated his services, constructively, and that he would be instituting proceedings in the Labour Tribunal.

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The Labour Tribunal had decided that the appellant had terminated his services constructively and had ordered to pay him Rs. 264,000/- being two years salary taking into account Rs. 11,000/- as his monthly salary, for the loss of his employment.

The learned Judge of the High Court had affirmed the order of the Labour Tribunal. Accordingly, both the Labour Tribunal and the High Court had come to the conclusion that the respondent's employment had been constructively terminated by the appellant.

It is not disputed that the respondent, as stated earlier, was promoted to the post of Engineer of the Galle Branch by letter dated 23.03.1999 with effect from 01.03.1999. It is also not disputed that by a further communication, the respondent was informed of the additional duties assigned to the respondent.

In his evidence, the respondent had stated that after he was promoted to the post of Engineer, the Garage, which was the biggest of that kind in the Southern Province, was sold and the establishment was re-located at Mihiripenna. The respondent's position was that the new location at Mihiripenna was a small house that was taken on lease and that the machinery and equipment were not re-located and installed. The new place was not fitted with three phase electricity, which was essential to run the heavy equipment machinery and sufficient number of workmen were not assigned to him. In the circumstances, although the appellant Company had been manufacturing Roll Breakers, Tea Rollers and all equipment necessary for the Tea trade when the garage was located in Galle, it was not possible to manufacture any of the above, after moving to Mihiripenna. The resulting position was that it was not possible to achieve the targets set out in the document, which listed out the additional duties (A4A) as none of the Estate Superintendents had given work to the appellant Company since they lacked the necessary infrastructure.

In fact the respondent has expressed his difficulties in achieving the expected goals due to the insufficient infrastructure facilities. In his letter dated 07.07.1999, (A6) he had stated thus:

"....

Notice of Resignation

"I wish to bring to your notice that I cannot accede to your terms and conditions and the expectations of my new appointment as a Covenanted Staff Engineer at Galle Branch with the available Company infrastructure.

The available resources for Galle Branch Engineering Division is not sufficient to implement any mode of operation and also we do not get any concession from any other divisions which could deteriorate the present level of operation. (sic)

Hence, I am compelled to notify my resignation in advance complying with A.G.M (P & L)'s Circular No. 1/99 : WMSWF : SS : MK dated 22.01.1999 to utilize my entitle leave with the appropriate condition prior to the resignation. (sic)

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I intend to resign from the services from 31.08.1999. However the confirmation would be as per letter of appointment.

I would like to make this opportunity to appreciate superiors who are devoted to develop our establishment."

In response to the respondent's said letter of resignation (A6), the Assistant General Manager/Personnel and Legal, had informed the respondent that since the respondent is unable to accept the terms and conditions stipulated in the letter of appointment placing him in the new post, that the appellant has no alternative other than reverting the respondent to his former position. Accordingly the respondent was reverted to his former position as Assistant Engineer, Galle Branch on the salary drawn by an Assistant Engineer. The said letter had further stated that the respondent's 'intention to resign from the services of Walker Sons and Co. Ltd.' was noted and that they were awaiting his confirmation of his resignation (A5 and A5A). The said letter (P5) was dated 09.07.1999. On the same date the Assistant General Manager/Personnel and Legal had written to the respondent calling for explanation to be sent within seven days from 09.07.1999 (R3). The said letter was in the following terms :

"It is noted that you have failed to participate at the Monthly Management Meeting held on 06.07.99 although you were informed to attend.

You were thereafter, requested to appear before the management at a Special Meeting held on 08.07.99 at

10.30 a.m. along with Mrs. Anwar – Accountant and AGM/Galle Branch.

Your failure to participate in the above Meetings appears to be a gross violation of the disciplinary rules and regulations of the Company and misconduct on your part. 150

Therefore please send me your explanation on or before the lapse of seven (07) days from today as to why you failed to participate in the above mentioned 02 meetings.*

It is in this context, that we will have to examine as to whether the respondent had resigned from his employment or whether his services were constructively terminated by the appellant.

Considering the factual position, which was referred to earlier, it is to be borne in mind that after the receipt of the letter specifying the additional duties, the respondent had tendered his resignation since it was difficult for him to fulfill those with the available infrastructure facilities. Thereafter the appellant had informed the respondent that he would have to confirm his resignation. Notwithstanding the above, the appellant took steps to demote the respondent and to call for explanation for his non-participation at a monthly Management Meeting held on 06.07.1999 and a Special Management Meeting held on 08.07.1999. Both these action were taken, it is to be noted well after the respondent had sent his letter or resignation, on 07.07.1999. 160 170

The Labour Tribunal had considered all the circumstances referred to above in coming to the conclusion that the appellant had constructively terminated the service of the respondent, which decision was affirmed by the learned judge of the High Court.

Describing the instances and as to what amounts to constructive termination, would not be a simple question to give a brief answer. However, the doctrine of constructive termination, in its conceptual form has been identified in the following terms (The Contract of Employment. S. R. de Silva, The Employers' Federation of Ceylon, monograph No. 4, pg.158): 180

The difficult question arises in connection with what amounts to a constructive termination of employment In conceptual terms it can be said that when an employer breaches a fundamental obligation of the contract of employment, the employee is entitled to treat such a breach as a constructive termination by the employer, which puts an to the contract.

In his examination of the doctrine of constructive termination, S.R. de Silva (*supra*) had set out examples that clearly illustrates its 190 meaning. According to his examination:

If an employer refuses to pay an employee his salary in circumstances which make such refusal illegal, the employee can treat the employer's refusal as a constructive termination of the contract or again, *the employer may seek to unilaterally vary the contract on a fundamental matter, e.g. demote him. In such cases the employee often purports to resign from the service of the employer for the reason that the latter has compelled him to do so. Such a resignation is in law a constructive termination by the employer and does not preclude the employee from claiming relief before a Labour Tribunal on the basis that there has been a termination by the employer. The mere use of the term 'resignation' by an employee does not by itself preclude him from claiming relief on the footing of a constructive termination by the employer"* (emphasis added).

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When the respondent informed the appellant that due to the non availability of the resources for the Engineering Division of the 210 Galle Branch that he would not be in a position to accede to the additional duties that were assigned to him and therefore he is tendering his resignation, the appellant had taken steps immediately to demote the respondent to his previous position. Notwithstanding the above, as stated earlier, the appellant also took steps to call for explanation from the respondent for his non-attendance at meetings, thereby confirming the fact the they had not accepted the resignation tendered by the respondent by his letter dated 07.07.1999 (A6).

In such circumstances, on a consideration of all the material adduced in this case, it is abundantly clear that the appellant's action against the respondent amounts to constructive termination of the respondent's service. Accordingly, I answer the question on which this appeal was heard, in the negative. 220

For the reasons aforesaid, this appeal is dismissed and the judgment of the High Court dated 30.03.2005 is affirmed. The appellant will pay the respondent a sum of Rs. 25,000/- as costs.

MARSOOF, J. - I agree.

BALAPATABENDI, J. - I agree.

Appeal dismissed.