THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 2 SRI L.R. - PART 5**

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**PUBLISHED BY THE MINISTRY OF JUSTICE**

**Printed at M. D. Gunasena & Co. Printers (Private) Ltd.**

**Price: Rs. 25.00**

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I also set aside the sentence of 1 year rigorous impris-

onment imposed on the 1st Respondent in respect of counts

1, 3, 5, 6, 8 and 10 which has been suspended for 5 years

in respect of each count. I note that the 1st Respondent is

the key person of the crime who had received major share

of the proft gained from the crime that is 3.5 million which

has been deposited in to his account. Thus I sentence the 1st

Respondent to a term of 3 years rigorous imprisonment in

respect of each count of 1, 3, 6, 8 and 10 and to pay a fne

of Rs. 1,00,000/- in default 01 year simple imprisonment in

respect of each count and 07 years rigorous imprisonment

in respect of count 5 and to pay a fne of Rs. 3 million in

default 05 years simple imprisonment. The terms of impris-

onment imposed on the 1st, 3rd, 5th, 6th, 8th and 10th counts

should run concurrently. Therefore the total term of im-

prisonment that the 1st Respondent should serve is 7 years

rigorous imprisonment. This is in addition to the default

sentence. The sentence imposed on the 1st and 2nd Respon-

dent shall be implemented from the date on which the

Respondents are brought before the High Court.

For the reasons stated above the appeal of the Appellant

is allowed, and the sentence is varied.

Learned High Court Judge is directed to issue a fresh

committal indicating the sentences against the 1st and 2nd

Respondents.

**SISIRA DE ABREW, J.**- I agree.

*Appeal allowed.*

*Sentence Varied.*

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**SRI LANKA INSURANCE CORPORATION LTD. V.**

**JATHIKA SEWAKA SANGAMAYA**

SUPREME COURT

GAMINI AMARATUNAGA, J.

RATNAYAKE, J. AND

IMAM, J.

S.C. APPEAL NO. 14/2009

S.C. (H.C.) LA APPLICATION NO. 49/2008

L.T./MH/33/154/2004

JULY 7TH , 2010

***Industrial Dispute – Transfer of employee as a punishment – Fail-***

***ure to report at the place to which he was transferred – Construc-***

***tive termination of services – Vacation of post.***

The workman (Appellant) was employed by the Sri Lanka Insurance

Corporation as a minor employee in 1978 and in 2003 he held the post

of Senior Document Assistant. From about 1987 he became a habitual

late comer for work. He was warned for his late attendance but there

was no improvement in his attendance. His explanation for coming late

for work was that due to a head injury sustained in an accident he

found it diffcult to rise early to come for work.

He was directed by the Management to go before a Medical Board, but

he neglected to comply with those directions. The workman was inter-

dicted and a domestic inquiry was held on fve charges. He was found

guilty of all charges. Consequently, the punishments meted out were

deferment of increments, immediate transfer to Batticaloa Branch and

reinstatement without back wages as an alternative to dismissal. The

workman was informed of the punishment imposed and that his new

station was the Batticaloa Branch.

On receipt of the letter, the workman wrote to the Senior Manager,

Personal Department that he did not agree with the punishment

imposed on him. In that letter he had stated that the deprivation of

back wages, deferment of increments and immediate transfer to the

Batticaloa Branch constituted a constructive termination of his services

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and he would be appealing against the order made against him. In that

letter he had further requested that he should be reinstated in the same

place where he worked. There was no reply from the employer to his

letter. The workman did not report to the Batticaloa Branch for duty. He

was informed by the Management that he was deemed to have vacated

his post by failing to report for work at the Batticaloa Depot.

Thereafter the Appellant made an application to the Labour Tribunal

in respect of the termination of his services. After inquiry the Labour

Tribunal allowed the application fled on behalf of the workman and

ordered to reinstate the workman with back wages limited only to three

months.

The employer appealed against the order of the Labour Tribunal to the

High Court. The High Court dismissed the appeal on the basis that

there was no question of law involved in the Appeal. The employer

appealed against the order of the High Court to the Supreme Court.

**Held:**

(1) An employee who is transferred as a punishment, consequent to

the fnding at a domestic inquiry, has to frst obey it and comply

with the transfer order and then complain against it by way of an

appeal. The failure to report at the place to which he is transferred

and keeping away from work, without obtaining leave to cover

his absence from work, is a calculated act of disobedience and by

his own conduct, secures his own discharge from the contract of

employment with his employer.

(2) The failure of the learned President of the Labour Tribunal to

approach the question of vacation of post in the proper legal

perspective applicable to the facts of this case and the fnding of

constructive termination based on an unsupported assumption

had raised questions of law which should have been considered

by the High Court.

(3) The President of the Labour Tribunal had failed to look at the

question of vacation of post in accordance with the legal posi-

tion applicable to a situation where there is a total refusal by a

workman to comply with a transfer order made by way of a

punishment after a disciplinary inquiry.

(4) The High Court had failed to consider the legal result of the work-

man’s total refusal to comply with a disciplinary order made after

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a disciplinary inquiry regarding which the workman had no cause

to complain.

(5) On the facts of this case, the workman, by his own conduct, had

got himself discharged from his contract of employment after a

period of service during which his continued attitude had been

to have his own way in defance of lawful orders, warnings and

directions given by the management.

**Cases referred to:**

*1. Ceylon Estate Staff’s Union Vs. The Superintendent, Meddecombra*

*Estate, Watagoda* – 73 NLR 278

*2. Nandasena V. The Uva Regional Transport Board –* (1993) 1 Sri L.R.

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*3. Ruban Wickramaratne V. The Ceylon Petroleum Corporation –* C.A.

Minutes of 15.10.1993 (unreported)

**AppEAl** from the judgment of the High Court

*Uditha Egalahewa* for the Appellant

*Wijedasa Rajapakse, P.C.,* with *Gamini Hettiarachchi* for the

Respondent

*Cur.adv.vult*

September 22nd 2011

**GAmInI AmARAtunGA J.**

This is an appeal, with leave to appeal granted by this

Court, against the judgment of the High Court dismissing the

employer appellant’s (hereinafter referred to as the employer)

appeal against the Order of the Labour Tribunal directing the

reinstatement of the workman (the workman) concerned in

this appeal, with back wages limited to three months.

The factual background to the application fled before the

Labour Tribunal on behalf of the workman concerned is briefy

as follows. The workman joined the Insurance Corporation

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(the employer) in 1978 as a minor employee. In 2003 he held

the post of Senior Documents Assistant. In 1986 he suf-

fered a head injury due to a road traffc accident. From about

1987 he became a habitual late comer for work. On several

occasions he was warned for his late attendance but there

was no improvement in his attendance for work. Then the

employer annually computed the total number of working

hours lost in each year due to his late attendance and placed

him on no pay leave for the total number of working days lost

in each year due to his late attendance. His explanation for

habitually coming late to work was that due to supervening

illness following the head injury he found it diffcult to rise

early to come to work on time.

In 2001 he was directed by the Management to go

before a Medical Board to check his health condition but he

failed to present himself before the Medical Board. In 2002

when he was directed again to go before a Medical Board, he

again neglected to comply with that direction. In 2003, the

Management called for his explanation for his habitual late

attendance and for his failure to go before a Medical Board.

As his explanation was not satisfactory, he was placed under

interdiction and a domestic inquiry was held on fve charges

set out in the charge sheet issued to him.

The frst charge was for habitual late attendance, the

second charge was for his failure to appear before a Medical

Board and the third charge was for giving a false excuse for

his failure to go before the Medical Board. The other two

charges were consequential charges arising from the frst

three charges. After the domestic inquiry, the Management

by letter dated 15.3.2004, signed by the Senior Manager of

the employer’s Personal Department, informed him that he

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has been found guilty of all fve charges framed against him.

The punishment imposed on him was reinstatement with-

out back wages as an alternative to dismissal, deferment of

increments and immediate transfer to Batticaloa Branch.

On receipt of that letter, the workman had addressed

a letter dated 19.3.2004 to the Senior Manager, Personal

Department. In that letter he had stated that he did not accept

that all fve charges against him had been proved and that he

did not agree with the punishments imposed him and that he

considered the punishments imposed on him as constructive

termination of his services. In that letter he had stated that

his transfer to Batticaloa would aggravate his illness and that

it would also adversely affect his children’s education and

his economic condition. The letter was concluded with the

request that he should be reinstated in the same place where

he worked (Nugegoda) without any punishment.

There was no response from the employer to this letter.

The workman did not report to Batticaloa for duty. He never

obtained or asked for leave to cover his absence from work. By

letter dated 29.3.2004 he was informed by the Management

that he had vacated his post with effect from 17.3.2004.

The workman went before the Labour Tribunal alleging

constructive termination of his services. The employer took

up the position of vacation of post. After inquiry the Labour

Tribunal allowed the application fled on behalf of the

workman on the basis that the physical fact and the mental

element necessary to constitute vacation of post has not

been established and that the employer had constructively

terminated the services of the workman by the punishments

imposed on him. Accordingly it was ordered to reinstate the

workman with back wages limited only to three months.

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The employer’s appeal to the High Court against the

order of the Labour Tribunal had been dismissed by the High

Court on the basis that the appeal did not raise any question

of law. This Court has granted leave to the employer on the

following questions of law.

 (a) Did the Honorable High Court Judge fail to consider

“just and equitable jurisdiction” vested in the Labour

Tribunal?

 (b) Did the Honorable High Court Judge fail to consider

the issues relating to mixed fact and law relating to

vacation of post?

 (c) Did the Honorable High Court Judge fail to consider

that long absence from work or refusal to report to

work is deemed that the workman had no intention of

assuming duties?

 (d) Did the Honorable High Court Judge fail to consider

the relevant decisions of the Supreme Court with

regard to vacation of post more particularly to

the fact that the respondent failed to “comply and

complain”?

At the hearing of this appeal both learned counsel made

their submissions on the above questions of law to supple-

ment the written submissions they have already fled. Since

questions B and D set out above are interconnected those

questions can be considered together. In considering the

question of vacation of post in the context of the facts of this

case, it is necessary to consider the legal consequences of

the refusal of a workman to comply with a transfer given as a

punishment on the fndings of a domestic inquiry held in the

exercise of the disciplinary powers available to an employer in

respect of a workman in a transferable service.

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The employer’s right to transfer a workman in his

service is not an unfettered absolute right. There are recognized

exceptions to it. A transfer which is mala fde or for an

ulterior purpose or which involves a demotion or a reduc-

tion of the salary or other emoluments (except as a punish-

ment imposed consequent to the appropriate disciplinary

process) are some of the instances in which an employee may

justifably contest the validity of a transfer given to him by

the employer.

In *Ceylon Estate Staff’s Union vs. The Superintendent,*

*Meddecombra Estate, Watagoda*(1), Weeramantry J. explicitly

referred to the employee’s right to contest the validity of a

transfer order and the limitations of that right in the follow-

ing terms.

 **“no doubt the employee is entitled to contest the right of**

**the management to make his transfer and the employee**

**is entitled to take the necessary steps towards bringing**

**this dispute to adjudication in the manner provided by**

**law. the employee is not entitled however to set the**

**employer at defance by fatly refusing to carry out**

**orders. (emphasis added)**

The rule comply and complain is implicit in the above

statement. In the same case Weeramantry J referred to

an exceptional situation where an employee may refuse to

comply with an order even under protest and pointed out at

the same time the adverse effects of such a course of conduct

as follows:

 “There is of course no general principle that an employee

in all cases bound to accept such a transfer order under

protest, for there may be cases where the mala fdes

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prompting such an Order is so self evident or the circum-

stances of the transfer so humiliating that the employee

may well refuse to act upon it even under protest ………

One can well visualize the enormous practical diffcul-

ties and the indiscipline that would result from the view

that pending any dispute as to transfer the employee can

refuse to act in the position to which he has been trans-

ferred.” *Ceylon Estate Staff's Union (supra).*

In *Nandasena vs The Uva Regional Transport Board*(2)

the workman concerned was transferred to a different work

place of the Board after he was found guilty of certain charg-

es at a domestic inquiry held against him. He preferred an

appeal against the disciplinary order and repeatedly re-

fused to comply with the transfer order pending the deci-

sion of his appeal. S.B. Goonewardene J in his judgment

cited with approval the views expressed by Weeramantry J.

cited above and held that the workman of his own volition

had secured his own discharge from employment under

the employer by vacating his post, which according to the

disciplinary rules binding on him and to be the result of his

being absent from work without having obtained leave and

failing to show justifcation for such absence.

In the course of his judgment Goonawardene J. has made

the observation that an employee could not be permitted to

have the liberty of considering himself to be the arbiter to

decide whether what was inficted upon him by way of

punishment was unjust and unlawful.

In *Ruban Wickramaratne Vs. The Ceylon Petroleum*

*Corporation*(3), after a domestic inquiry against an employee

who was placed on interdiction, the management decided

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to reinstate him without back wages and transfer him from

Kolonnawa to Batticaloa. The workman totally refused to

serve in Batticaloa. In view of his refusal he was not rein-

stated in service and was deemed to have vacated his post.

He was denied relief by the Labour Tribunal on the basis that

he had vacated his post and the Order of the Tribunal was

upheld by the Court of Appeal.

The present established legal position is that an employee

who is transferred as a punishment consequent to the fnd-

ings at a domestic inquiry has to frst comply with the trans-

fer order and then complain against it by way of an appeal or

other procedure through which he may contest the validity

of the order. If he fails to comply with the order by reporting

to that place to which he is transferred and keeps away from

work without obtaining leave to cover his absence from work,

he, by his own conduct, secures his own discharge from the

contract of employment with his employer.

In the present case the response of the workman to the

disciplinary order was a total refusal to accept the fndings of

the disciplinary inquiry and the punishments including the

transfer. In his letter dated 19.3.2004 he had stated that he

considered the punishments imposed on him as constructive

termination of his services. In that letter there was no re-

quest for the management to reconsider the punishments im-

posed on him or to give him a transfer to any place other than

Batticaloa. His sole request conveyed by the letter was re-

instatement without any punishment at the same place

(Nugegoda) where he worked at the time of his interdiction.

The tenor of his letter was not that of an appeal. It was an

uncompromising refusal to accept any punishment coupled

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with a demand for reinstatement on his own terms at the

place of his choice. His resolve not to return to work except

on his own terms was manifestly clear from his letter.

The learned President had stated that the letter of the

workman was his appeal against the disciplinary order. Even

if it was regarded as an appeal, still the workman had failed

to comply with the transfer order pending the determination

of his appeal. He had not obtained or at least applied for leave

to cover his absence from work after he received the disciplin-

ary order. The learned President had completely failed to look

at the question of vacation of post in accordance with the

legal position applicable to a situation where there is a total

refusal by a workman to comply with a transfer order made

by way of a punishment after a disciplinary inquiry.

Although the workman in his letter of 19.3.2004 had

stated that he did not accept that the charges against him

had been proved, in that letter or at the inquiry before

the Tribunal he had not made any allegation affecting the

propriety of the disciplinary inquiry. The main charges

against him at the disciplinary inquiry were his habitual late

attendance and his failure, without a reasonable excuse,

to go before a Medical Board on the two occasions he was

directed to do so by the management. On both those matters

there was suffcient evidence before the Tribunal and the

learned President on that evidence had held that the work-

man did not have a clean record with regard to attendance

during his entire period of service and that despite repeated

warnings, pay cuts and deferments of increments, the work-

man had continued his late attendance as a habit. With

regard to his failure to go before a Medical Board, the learned

President had found that the workman had neglected to go

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before a Medical Board on the two occasions he was directed

to do so. Despite those fndings the learned President had

held that the transfer to Batticaloa was unreasonable and as

such it amounted to constructive termination of his services.

The reasoning of the learned President was that the transfer

had the effect of making it more diffcult for the workman to

report to work on time when his repeated reason for his late

attendance was the illness resulting from his head injury.

Apart from the assertion of the workman that he suffered from

an illness arising from his head injury, there was no medical

evidence at least by way of a medical certifcate to show that

he suffered from an illness arising as a supervening condi-

tion of his head injury or from any other cause. When the

management in order to verify his claim of an illness directed

him on two occasions to appear before a Medical Board, he

had neglected, without any reasonable excuse, to go before

the Medical Board. At the inquiry before the Tribunal when

the workman was asked whether he submitted any medical

certifcates to cover his absence from work after the receipt of

the disciplinary order, his specifc reply was that he did not

have any illness to submit medical certifcates! Thus, despite

the absence of any evidence to show that the workman had

an illness which made it diffcult for him to report to work

on time and notwithstanding the workman’s own statement

that he had no illness, the learned President had come to the

conclusion that the transfer of this workman, who claimed

that his late attendance was due to an illness, to Batticaloa,

had the effect of making it more diffcult for him to report

to work on time and accordingly the transfer was unreason-

able. This conclusion not supported by any evidence (and

contradicted by the workman’s own assertion that he had no

illness) vitiates the fnding that the transfer was unreasonable

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and amounted to constructive termination of the workman’s

services. The failure of the learned President to approach

the question of vacation of post in the proper legal perspec-

tive applicable to the facts of this case and the fnding of

constructive termination based on an unsupported assump-

tion had raised questions of law which should have been

considered by the High Court. The High Court had failed to

consider the legal result of the workman’s total refusal to

comply with a disciplinary order made after a disciplinary

inquiry regarding which he had no cause to complain. On

the facts of this case, the workman, by his own conduct, had

got himself discharged from his contract of employment after

a period of service during which his continued attitude had

been to have his own way in defance of lawful orders, warn-

ings and directions given by the management. I accordingly

answer the questions of law B and D in the affrmative. In

view of the above fnding it is not necessary for me to consider

the question of law A and C. I accordingly allow the appeal,

set aside the judgment of the High Court dated 21.11.2008

and the Order of the Labour Tribunal dated 20.11.2008 and

dismiss the application made to the Labour Tribunal on

behalf of the workman P. Nelson Ranasinghe. I make no order

for costs.

**RAtnAyAkE J.-** I agree.

**ImAm J.**- I agree.

*Appeal allowed.*

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**KIRMALI FERNANDO V. STANDARD CHARTERED BANK**

SUPREME COURT

J.A.N. DE .SILVA , CJ

RATNAYAKE , J AND

IMAM , J.

S.C. APPEAL NO. 100/2009

SP/HCCA/COL/LA/50/09

D.C. COLOMBO NO. 2439/08/MR

NOVEMBER 23RD, 2010

***Industrial Disputes Act – Section 31 B(1)(a) – Application to a***

***Labour tribunal by a workman or a trade union on behalf of a***

***workman for relief or redress in respect of the termination of***

***service of the workman by the employer – Section 31 B(5) – Employee***

***who complains of unlawful termination, where an application***

***is entertained by a Labour Tribunal, the workman to whom the***

***application relates is he entitled to any other legal remedy in***

***respect of the matter to which that application relates? – Civil***

***Procedure Code Section 9, Section 46(2)***

The Plaintiff instituted action in the District Court seeking *interalia*

a declaration that her resignation from the Defendant – Bank was

procured wrongfully and unlawfully by undue infuence over her and a

declaration that the constructive termination of employment with the

Defendant bank was wrongful and unlawful and hence null and void

and for damages.

The learned District Judge by his order dated 5th June 2009 returned

the plaint for amendment in view of the fact that –

(1) there was non compliance with Section 45 of the Civil Procedure

Code.

(2) the claim was prolix and contained the particulars other than

those required to be therein.

The Plaintiff being aggrieved by the order of the District Judge fled an

application for leave to appeal to the High Court and the High Court

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refused to grant leave on the said application. The Plaintiff fled an

application for leave to the Supreme Court from the said order of the

High Court.

**Held:**

(1) In terms of Section 31B(5) of the Industrial Disputes Act No. 43

of 1950, an employee who complains of unlawful termination can

seek relief from a forum other than the Labour Tribunal as well

and if such person has sought relief from more than one forum

only one application can be pursued.

Per J.A.N. de Silva, CJ –

 “The reasoning of the District Judge that the jurisdiction to grant

relief in respect of termination of services was vested in the Labour

Tribunal by Section 31 B(1)(a) of the Industrial Disputes Act is

erroneous and is therefore a misdirection of Law. The High Court

too fell into the same error by affrming the reasoning of the

District Judge”.

(2) An objection can be raised by way of a motion under Section 46(2)

of the Civil Procedure Code. Hence there was no misdirection in

considering objections brought before Court by way of a motion.

(3) When a foreign organization engages in business and oper-

ates from a place of business in Sri Lanka, the principle place of

business would come within the meaning of residence in Section 9

of the Civil Procedure Code.

(4) Objection to Jurisdiction can be raised by way of a Motion Unite

Section 46(2)

**AppEAl** from judgment of the High Court of the Western Province.

**Cases referred to :**

(1) *Blue Diamonds Ltd.v. Amsterdam – Rotterdam – Bank M.V. and*

*Another –* (1993) 2 SLR 249

(2) *Actalina Fonseka V. Dharshanie Fonseka –* (1989) I SLR 95

*K. Kang-Isvaran PC* with *Shivaan Kanag – Iswaran* for Plaintiff –

Petitioner – Appellant

*S.L. Gunasekara* with *Avinda Rodrigo* and *M. de Silva f*or Defendant –

Respondent – Respondent

*Cur.adv.vult.*

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May 12th 2011

**J.A.n. DE SIlvA CJ.,**

This is an appeal from the judgment of the High Court of

the Western Province where the Plaintiff Appellants leave to

appeal application was refused.

The Plaintiff instituted action in the District Court of

Colombo on 16th May 2008 seeking,

(a) a declaration that her resignation from the Defendant

Bank was procured wrongfully and unlawfully by undue

infuence over her;

(b) a declaration that the letter of disclaimer dated 25th

February 2008 was null and void;

(c) a declaration that the constructive termination of

employment with the Defendant bank was wrongful and

unlawful and hence null and void and for damages in the

sum of Rs. 170,000,000.

The District Court after accepting the Plaint issued

summons on the Defendant and the Defendant fled the

answer on 17th October 2008. However prior to fling answer

the Defendant by a motion dated 6th October 2008 sought the

rejection of the Plaint *in limine* and or the return of the Plaint

and the Plaintiff countered several matters raised in the said

motion of the Defendant and prayed for the rejection of the

said motion. Both parties were directed to fle written submis-

sions on the said motion of the Defendant and submissions

were tendered by the parties. The Learned District Judge by his

order dated 5th June 2009 returned the Plaint for amendment

in view of the fact that,

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1. there was non compliance with Section 45 of the Civil

Procedure Code

2. the Claim was prolix and contained the particulars other

than those required to be therein

The Plaintiff claiming to be aggrieved by the said order

of the Learned District Judge fled an application for leave to

appeal for the Civil Appellate High Court and the High Court

refused to grant leave on the said application. The Plaintiff

fled an application for leave to appeal to this Court from the

said order of the High Court and when the said application

was supported on 1st September 2009 this Court granted

leave on the following questions of law as set out in para-

graph 17 :

 17(a) – The failure to give a reasoned order as to why leave

was refused has occasioned a grave miscarriage of justice

and vitiates the order refusing leave

 17(c) – the Forum to seek relief is the Labour Tribunal

and not the District Court is a grievous misdirection in

law

 17(d) – By reason thereof that the Plaint does not disclose

a prima facie cause of action is a grievous misdirection at

law

 17(e)- The defendant cannot be said to be resident within

the jurisdiction of the District Court within the meaning

of Section 9 of the Civil Procedure Code, notwithstanding,

admittedly that it does have a place of business at No. 37,

York Street Colombo 1 and carries on business from the

said address is a grievous misdirection at law

 17(f) – an objection to jurisdiction of court can be raised

by way of motion under Section 46(2) is a grievous misdi-

rection at law.

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 17(g) – The holding that the Plaint is within, teeming with

unnecessary and lengthy descriptions and therefore it

should be amended is not tenable at law and is a griev-

ous misdirection at law.

Although the Plaintiff initially asserted that at the time of

fling the leave to appeal application there was no reasoned

order of the High Court when it refused leave there has been

an order made by the High Court setting out its reasons for

refusing such leave a copy of which had been obtained by the

Plaintiff after fling her application in Court and subsequently

fled by motion dated 9th October 2009. Therefore there is no

necessity to deal with question 17(a) set out above.

Regarding question 17(c) a consideration of the provi-

sions of the Industrial Disputes Act No. 43 of 1950 specif-

cally S.31B (5) would be necessary. S. 31B (5) states that

*“Where an application under subsection (1) is enter-*

*tained by a Labour Tribunal and proceedings thereon are*

*taken and concluded, the workman to whom the application*

*relates shall not be entitled to any other legal remedy in*

*respect of the matter to which that application relates, and*

*where he has frst resorted to any other legal remedy, he shall*

*not thereafter be entitled to the remedy under subsection 1.”*

According to the above section it is quite clear that an

employee who complains of unlawful termination can seek

relief from a forum other than the Labour Tribunal as well

and where such person has sought relief from more than one

forum, only one application can be pursued. The Plaintiff in

the present case has chosen to seek relief from the District

Court which she is entitled to. Therefore the reasoning of the

District Judge that the jurisdiction to grant relief in respect

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of termination of services was vested in the Labour Tribunal

by s.31B(1)(a) of the Industrial Disputes Act is erroneous and

is therefore a misdirection of law. The High Court fell into the

same error by affrming the reasoning of the District Court.

Regarding question 17(d) on the matter of whether the

plaint discloses a causes of action, a perusal of the aver-

ments in the plaint do disclose a cause of action. The plaintiff

complains of a termination of her services by the Respondent

and states that such termination was a constructive termina-

tion of services and that the said termination was wrongful

and that she was claiming various reliefs.

Regarding question 17(e) objection has been taken

regarding the application of S.9 of the Civil Procedure Code

in respect of the question whether the Respondent is resident

within the jurisdiction of the District Court. The caption of

the plaint describes the Respondent as a legal person having

its “Principal Offce and Principal place of business” in

Colombo and paragraph 2 of the plaint also described the

Respondent in that way.

The learned District Judge concluded that the

Respondent’s place of business cannot be considered as the

residence relying on the judgment in *Blue Diamonds*

*Limited v Amsterdam-Rotterdam Bank M.V. and another*(1),

In that case the Defendant did not have a place of busi-

ness in Sri Lanka whereas in the present instance the

Respondent has a place of business and it is not in dispute

that the Principal Offce and Principal Place of business is

at No. 37, York Street, Colombo 1 which is the jurisdiction

of the District Court of Colombo. The Respondent has

submitted that the place of business of a juristic person can-

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not be considered as the residence of such legal entity and

that if such were the case every place of business of such

entity would have to be described as the residence of such

entity. There is much substance in this submission but

however when a foreign organization engaged in business

matters in Sri Lanka and operates from a place of business,

special consideration will have to given in determining the

residence of such organizations in relation to Section 9 of the

Civil Procedure Code which may result in placing them at

an advantage when actions have to be taken against them.

In the presence instance the Respondent does not dispute

that its Principal Offce and Principal place of business is

at the address given in the plaint. Therefore it is our view

that the principal place of business of the Respondent would

come within the meaning of residence in section 9 of the Civil

Procedure Code.

In respect of question 17(f) it is our view that an objec-

tion can be raised by way of a motion under section 46(2)

of the Civil Procedure Code, as has been submitted by the

respondent which was the view of this court in *Actalina*

*Fonseka v. Dharshanie Fonseka*(2) and therefore, We are of the

view that these was no misdirection in considering the objec-

tions brought before Court by way of a motion under section

46 (2) of the Civil Procedure Code.

Regarding question 17(g), a perusal of the plaint shows

that the plaintiff has put down in detail her position in

life, the circumstances that she faced during her tenure of

employment, her achievements and thereby has given a full

disclosure of her case, which in a way facilitates the defendant

to prepare its case. This is not the manner in which a plaint

is presented to Court normally and would give the impression

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that such a plaint is prolix. The learned District judge and

the Civil Appellate High Court cannot be faulted for having

concluded that the plaint has been prolix. In such a situation

it would be the ordinary course of action to return such

plaint for amendment, but in the present case the Respon-

dent has fled answer adverting to all the averments in the

plaint. If the plaint is to be returned for amendment, it

would result in the Respondent having got to fle answer

again, which process would result in further delaying the

adjudication of this case. Though we are of the view that the

plaint fled by the petitioner is not the most suitable way in

which a plaint should be fled, in the circumstances of this

case specially since the respondent has fled answer we do

not consider that returning the plaint for amendment would

be appropriate.

In the above circumstances, we are of the view that the

ends of justice would be met if the case is proceeded with

from the stage where the answer was fled. The Judgment of

the Civil Appellate High Court and the order of the District

Court is set aside and we direct the District Court to proceed

with the case expeditiously from the stage of the acceptance

of the answer of the Respondent. The appeal of the Petitioner

is allowed without costs.

**RAtnAyAkE J.** - I agree.

**ImAm J.** - I agree.

*Appeal allowed. District Court directed to proceed with the*

*case from the stage of the acceptance of the answer of the*

*Respondent.*

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**SUDATH ROHANA AND ANOTHER V.**

**MOHAMED ZEENA AND ANOTHER**

SUPREME COURT

DR. SHIRANI A. BANDARANAYAKE, CJ.

EKANAYAKE, J. AND

IMAM, J.

S.C.H. C. CA LA. NO 111/2010

H.C. (Southern Province) NO. SP/HCCA/GA/LA/0030/2009

D.C. GALLE NO. 1417/L

JULY 14, 2010, SEPTEMBER 03, 2010, AUGUST 31, 2010

***Supreme Court Rules – Leave to appeal – Failure to comply with***

***Rules – Rules 8(3), 27(3) and 27(8) – To ensure that all necessary***

***parties are properly notifed on the matter which is before the***

***Supreme Court – Rule 8 – To ensure that all parties are notifed in***

***order to give a hearing – Do the Supreme Court Rules 1990 apply***

***to appeals from the High Courts (Civil Appeal).***

When this application was taken for support for leave to appeal, the

Plaintiff – Judgment Creditor – Respondent (Respondent) took up a

preliminary objection stating that the Petitioners had not complied with

Rule 8(3) of the Supreme Court Rules, 1990 and hence the Petitioner’s

application should be rejected *in limine.*

The objection raised by the Respondent was that the Petitioners had

not given notice to the Respondents as required by the Supreme Court

Rules.

**Held:**

(1) Rule 28 deals with the procedure that has to be followed when

fling an application against the judgment of a High Court of the

Provinces. Similar to Rule 8(3), Rule 28 (3) refers to the necessity

of tendering notice to the Registrar.

(2) The purpose of the Rule 8(3) as well as Rule 27 (3) of the S.C.

Rules 1990 is to ensure that all necessary parties are properly

notifed on a matter coming up before the Supreme Court, for all the

parties to participate at the hearing.

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(3) The Rules 28(3) and 27(3) are mandatory rules that should be

followed and objections raised on non-compliance with such rules,

cannot be taken as mere technical objections. As the said Rules

are mandatory, the notice has to be served through the Registry of

the Supreme Court.

Per Dr. Shirani A. Bandaranayake, CJ.-

 “When it is stated that the substantive law and procedural law are

complementary, it signifes the importance of procedural law in

a legal system. Whilst the substantive law lays down the rights,

duties, powers and liberties, the procedural law refers to the

enforcement of such rights and duties. In other words the

procedural law breathes life into substantive law, sets it in motion

and functions side by side with substantive law.”

(4) The provisions in Rule 28(3) are similar to that of Rule 8(3); the

only difference being that Rule 8(3) applies to application for

special leave to appeal and Rule 28(3) for all other appeals to the

Supreme Court from an order, judgment, decree or sentence of the

Court of Appeal or any other Court or tribunal.

**Cases referred to:**

(1) *A.H.M. Fowzie and 2 others v. Vehicles Lanka (Pvt) Ltd -* (2008) Sri

L.R. 23.

(2) *Fernando v. Sybil Fernando and Others –* (1997) 3 Sri L.R. 1

(3) *Dulfer Umma v. U.DC. Matale –* (1939) 40 NLR 474

(4) *Samantha Niroshana v. Senerath Abeyruwan –* SC (Spl.) LA

No. 145/2006 – S. C. Minutes, 28.2007

(5) *Wickramatillake v. Marikar –* (1894) 2 NLR 9

(6) *Re Chenwell* – (8 Ch. D 2506)

(7) *K. Reaindran v. JJ. Velusomasundram –* SC (Spl.) L.A. Application

No. 298/99 – S. C. (Spl.) Minutes of 7.2.2000

(8) *N.A. Premadasa v. The People’s Bank –* S.C. (Spl.) L.A. Application

No. 212/99 – (S.C. Minutes of 24.2.2000)

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(9) *Hameed v. Majibdeen and others –* S.C. (Spl.) L.A. Application No.

38/2001 – S.C. Minutes of 23.07.2001

(10) *K. M. Samarasinghe V. R. M. D. Ratnayake and Others –* S.C.

(Special) L.A. Application No. 51/2001 – S.C. Minutes of

27.07.2001.

(11) *Soong Che Foo v. Harosha K. de Silva and Others –* S.C. (Spl.) L.A.

Application No. 184/2003 – S.C. Minutes of 25.11.2003

(12) *C.A. Haroon v. S.K. Muzoor and others –* S.C. (Spl.) LA Application

No. 158/2006 – S.C. Minutes of 24.11.2006

(13) *Woodman Exports (Pvt) Ltd. v. Commissioner –* General of Labour

S.C. (Spl.) L.A. Application No. 335/2008 – S.C. Minutes of

13.12.2010

**ApplICAtIon** for Leave to Appeal from an order of the Provincial High

Court, Southern Province.

*M. Farook Thahir* with *N. M. Reyaz* for – Respondents – Petitioners -

Petitioners

*N. Sirimanne* for Plaintiff – Judgment Creditor – Respondent – Respon-

dent

*Cur.adv.vult*

March 17th 2011

**DR. SHIRAnI A. BAnDARAnAyAkE, J.**

This is an application for leave to appeal from the order

of the Provincial High Court of the Southern Province Holden

in Galle, dated 24.03.2010. By that order the learned Judges

of the High Court dismissed the application made by the

respondents - petitioners-petitioners (hereinafter referred to

as the petitioners). The petitioners had thereafter preferred

an application for leave to appeal to this Court.

When this application was taken for support for leave to

appeal, learned Counsel for the plaintiff – judgment creditor

– respondent – respondent (hereinafter referred to as the

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respondent) took up a preliminary objection stating that the

petitioners had not complied with rule 8(3) of the Supreme

Court Rules 1990 and therefore the leave to appeal applica-

tion fled by the petitioners should be dismissed *in limine*.

The facts relevant to the preliminary objection raised by

the learned Counsel for the respondent, as submitted by him,

*albeit* brief, are as follows:

On 23.04.2010, the petitioners had fled an application

seeking leave to appeal before this Court. Thereafter with

an undated motion the petitioners had sent a copy of the

petition, affdavit and the annexures referred to in the

petition to the respondent. In that motion, the registered

attorney-at-Law for the petitioners had sought three (3) dates

for the learned Counsel for the petitioners to support the said

application. Learned Counsel for the respondent contended

that although a motion was fled by the learned Instruct-

ing Attorney–at-Law for the petitioners, that no notice was

sent to the respondent directly or through the Registry of the

Supreme Court. Upon receipt of the motion fled by the

learned Instructing Attorney-at-Law for the petitioner, learned

Counsel for the respondent had fled a motion dated 21.05.2010

raising a preliminary objection stating that the petitioners

had not complied with the mandatory requirements of Rule

8(3) of the Supreme Court Rules of 1990 and therefore to

reject the petitioners’ application fled in the Supreme Court,

*in limine*.

Learned Counsel for the petitioners submitted that, if

there is a procedure laid down with regard to the fling of

applications before the Supreme Court, that such procedure

should be followed. However, learned Counsel contended that

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since the application in question is for an appeal from the

High Court of the Provinces, and only appeals from the Court

of Appeal to the Supreme Court are governed by the Supreme

Court Rules of 1990, that there is no requirement for the

petitioners to follow the procedure contemplated in terms of

Rules 8(3) of the Supreme Court Rules of 1990.

Having stated the submissions of the learned Counsel for

the respondent and the learned Counsel for the petitioners let

me now turn to consider the preliminary objection raised by

the learned Counsel for the respondent on the basis of the

Supreme Court Rules, 1990.

The objection of the learned Counsel for the respondent

is based on the fact that the petitioners had not given notice

to the respondent, as required by the Supreme Court Rules.

The Original Record of this application clearly shows

that on 23.04.2010, the learned Instructing Attorney-at-Law

for the petitioners had fled a proxy ‘together with petition,

affdavit and documents.” However there was no reference

with regard to notice being handed over to the Registry of the

Supreme Court.

Thereafter the respondent had fled a motion dated

17.05.2010 and had fled a caveat on behalf of the respon-

dent. On 20.05.2010 the learned Instructing Attorney–at-Law

for the petitioner had fled a motion along with the documents

marked P1, P2, P4, P5 and P6. Soon after, on 21.05.2010

the learned Instructing Attorney-at-Law for the respon-

dent had fled a motion stating that the respondent had not

received notice in terms of Supreme Court Rules and had only

received a motion including petition, affdavit and annexures

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and therefore had moved this Court to dismiss the petitioners’

application *in limine*. That motion was to be supported in

open Court on 14.07.2010 on which date both parties were

heard on the preliminary objection.

A perusal of the Original Record of this application clear-

ly shows that the learned Instructing Attorney – at – Law for

the petitioner had not fled notices and what has been fled on

23.04.2010 was the petition, affdavit and documents marked

P1 to P18. The said motion is as follows:

 “I tender herewith my appointment as the Attorney-at-

Law for the petitioners together with the petition and the

affdavit and documents marked P1 to P18 with copies of

same and respectfully move that Your Lordships Court be

pleased to accept same.

 I further move that Your Lordships Court be pleased to

accept copies of the said documents as I am unable to

submit certifed copies of same and I undertake to submit

the said copies as soon as I receive them from the

Registry of the Provincial High Court.

 I further move that Your Lordships Court be pleased to

call this application on any one of the following dates for

Counsel to support the said application.

6th May 24th May 2nd June

 **notice of this motion has been served on the respon-**

**dent together with copies of the petition, affdavit and**

**documents marked p1 to p18 by registered post and**

**the receipts are tendered herewith”** (emphasis added).

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It is therefore evident that, the learned Instructing

Attorney-at-Law for the petitioner had not tendered notices to

the Registry of the Supreme Court along with his application,

but had served the motion, which was fled in the Registry

directly to the respondent.

The contention of the learned Counsel for the petition-

ers was that the present application is an appeal from the

judgment of the High Court of the Southern Province and

was fled in terms of section 5c of the High Court of the

Provinces (Special Provisions) Act, No. 54 of 2006. Learned

Counsel for the Petitioners further contended that, although

express provision was made under section 6 of the High Court

of the Provinces Act, No. 10 of 1996 regarding the procedure

to be followed when making applications for leave to appeal

to the Supreme Court, no such provision was made regarding

appeals from the High Court of the Provinces under and in

terms of the Act, No. 54 of 2006.

In the circumstances, learned Counsel for the petition-

ers submitted that as there are no provisions either in the

Act under which the relevant application is fled or in the

Supreme Court Rules of 1990, the preliminary objection

raised by the learned Counsel for the respondent that no

notices were served on him and therefore the petitioners

had not complied with the Supreme Court Rules cannot be

accepted.

It is not disputed that the present application is an

appeal from the High Court of the Province to the Supreme

Court.

Part I of the Supreme Court Rules 1990, refers to three

types of appeals which are dealt with by the Supreme

Court, viz., special leave to appeal, leave to appeal and other