

THAKSALA WEAVERS LTD.
v.
DHANAWATHIE PERERA AND OTHERS

COURT OF APPEAL.
GRERO, J.,
C.A. NO. 78/72
L.T. NO. 8/361/91
SEPTEMBER 9, 1992.

Writs of Certiorari and Prohibition – Industrial Law – Section 31 (B) 1 of the Industrial Disputes Act – Constructive termination – Suspension – Does it amount to constructive termination?

Held:

It depends on the facts and circumstances of each case whether there has been a constructive termination of the services of a workman.

An employer could suspend the services of a workman on disciplinary grounds. Once a charge sheet is served and the workman denies the charges it is the duty of the employer to hold a domestic inquiry within a reasonable time without keeping the workman under interdiction for any length of time.

Where the employer failed to inform the employee that an inquiry will be held in the near future, the intention of the employee would appear to be to discontinue the services of the employee under the pretext of suspending the work of the employee. Thus the employer has constructively terminated the services of the employee. The employee is then entitled to seek relief in the Labour Tribunal on the ground of constructive termination and the Labour Tribunal has jurisdiction to hear the case.

APPLICATION for writs of certiorari and prohibition against the order of the Labour Tribunal.

Isidore Fernando with C. E. de Silva for Petitioner
Daya Guruge with D. P. Abey Siriwardena for respondents.

Cur adv vult.

April 1, 1993.
GRERO, J.

In this case the petitioner made an application for mandates in the nature of Writs of Certiorari and Prohibition, and prayed that the order

of the Labour Tribunal dated 5.12.91 be quashed, and also to restrain the 3rd respondent from taking any further action to enforce the order of the 2nd respondent to this application.

The 1st respondent to this application made an application to the Labour Tribunal on 12.3.91 stating that her services had been constructively terminated by petitioner-employer and asked for reinstatement with back wages and other reliefs that the Tribunal could grant her.

At the inquiry a preliminary objection was taken up by the Counsel for the respondent (i.e. the present petitioner) that as the applicant's (i.e. the 1st respondent to this application) services had not been terminated at any time, she could not have made her application to the Labour Tribunal in terms of Section 31B (1) (a) of the Industrial Disputes Act. It was further contended by the learned Counsel, that as there was no termination of services of the applicant the Tribunal has no jurisdiction to entertain the application. The Counsel has heavily relied on a judgment given by D. P. S. Gunasekera, J. in the Court of Appeal Case No. 975/85 dated 5.4.91.

After hearing submissions of both Counsel, the Labour Tribunal President had given his order on 5.12.91 rejecting the preliminary objection of the respondent, and allowed the applicant to proceed with the application on the basis of constructive termination of the services of the applicant (i.e. the 1st respondent to the present application). Against the aforesaid order the petitioner has made this present application to this Court.

When this matter was taken up before this Court it was contended by the learned Counsel for the petitioner that in the absence of specific averment in the application of the 1st respondent to the Tribunal that her services were terminated the President of the Tribunal had no jurisdiction to entertain and hear her application. It was further contended that suspension of services does not amount to termination whether constructive or otherwise. The learned Counsel for the petitioner cited the judgment of D. P. S. Gunasekera, J. in C.A. Case No. 975/85, dated 5.4.91, and the judgment of A. de Z. Gunawardana, J. in C.A. Case No. 381/83, dated 23.5.91 (both are unreported judgments) to support his contention.

It was the contention of the learned Counsel for the 1st respondent that the facts of this case clearly disclosed that there had been a constructive termination of her services by the employer-petitioner, and therefore she is entitled to seek relief on the basis of such termination from the Labour Tribunal. He contended that the 1st respondent in her application pleaded that her services were constructively terminated. He cited two unreported judgments of Jayalath, J. in C.A. Case No. 402/81, dated 7.5.87 and Anandacoomaraswamy, J. in C.A. Case No. 1192/88 dated 28.6.89 respectively.

In the C.A. Case No.975/85, as the workman was using the residence given to him for purposes other than residential purposes, his services were suspended until he commenced to use the residence solely for residential purposes. In the said case on the basis of the aforesaid facts Gunasekera, J. held that there was in fact no termination of the services of the workman but there was only suspension of his work and therefore the application made under Section 31 (B) (1) of the Industrial Disputes Act was not maintainable.

In C.A. No 381/83, the employer suspended the services of the workman as he continued to occupy the quarters given to him, contrary to the settlement arrived at between the parties. Referring to a letter produced marked R4 at the inquiry, Gunawardena, J. observed "It is seen from this letter that the intention of the employer was not to terminate the services, but to take disciplinary action by way of interdiction with a view to getting the applicant to comply with his order. Furthermore, interdiction cannot be considered as termination of services either directly or constructively in the given circumstances". Having considered all the facts and circumstances of the case, Gunawardena, J. held that an inference of constructive termination of the applicant's services by the appellant was not warranted.

It depends on the facts and circumstances of each case to find out whether in fact there was, constructive termination of the services of a workman or not.

In the instant case the 1st respondent's services were suspended on 1.8.90, for keeping two new towels in her personal "locker". But no

charge sheet was served on her. Then she wrote a letter to the Secretary of the petitioner Company, that no charge sheet was received by her, (vide P1) up to the date of writing that letter.

Then she had received a charge sheet on 18.9.90, and by letter dated 4.10.90 (P2) she had written to the petitioner denying that she committed any offence and expressing her willingness to face any domestic inquiry. Thereafter she wrote another letter dated 11.6.90 (P3) drawing the attention of the petitioner to her letter dated 4.10.90. Then on 29.12.90 she sent a letter to the petitioner through her Attorney-at-law asking the petitioner to hold an inquiry or to reinstate her with back wages. The petitioner did not reply to any of those letters. No domestic inquiry was held. Finally on 12.3.91 she made an application to the Labour Tribunal praying that she be reinstated with back wages.

Considering the facts of this case, this Court has to decide whether the work of the 1st respondent was suspended by the petitioner, or whether her services were constructively terminated by the former. If it was merely a suspension of her work, then she is not entitled to make an application to the Labour Tribunal in terms of Section 31 (B) (1) of the Industrial Disputes Act.

In C.A. Case No. 402/81, mentioned earlier Jayalath, J. held as follows:-

"The failure on the part of the employer to carry on his duties in spite of the workman's appeals to the respondents in my view is a breach of the contract of employment by the employer which amounts to constructive termination".

In the instant case too the 1st respondent requested or appealed to the petitioner to hold a domestic inquiry with regard to the charge levelled against her. She had in fact denied that she committed an offence by her letter dated 4.10.90. Even thereafter twice she requested the petitioner to either conduct an inquiry into the alleged offence of retaining two towels in her personal "locker" or to reinstate her with back wages. But the petitioner was silent and no reply was sent to her letters indicating the steps that the petitioner intended to

take. In fact she was kept in suspense. When such an attitude was taken by the petitioner she was justified in presuming that her services were terminated due to the unreasonable conduct on the part of the petitioner.

An employer on disciplinary grounds could suspend the services of a workman. Once a charge sheet is served on him, and the workman denied such charges, then it is the duty of the employer to hold a domestic inquiry within a reasonable time without keeping the worker under interdiction for any length of time. In this instant case the petitioner did not have at least the courtesy to inform the employee that an inquiry would be held in the near future. In such circumstances, the intention of the employer petitioner appears to be to discontinue the services of the employee under the pretext of suspending the work of the employee. Once he does so, then he terminates the contract of services by reason of the employer's conduct. He then has constructively terminated the services of the employee.

For the aforesaid reasons, I am of the view that there had been a constructive termination of services of the 1st respondent to this application and therefore she is entitled to come before the Labour Tribunal to get the reliefs she had asked for in her application. In the circumstances, the order of the learned President of the Labour Tribunal is correct, and the petitioner is not entitled to get any one of the reliefs prayed for in the petition. Thus the application for Writs of Certiorari and Prohibition is hereby dismissed subject to costs fixed at Rs. 450/-.

It should be stated that this Court only considered the issue whether there was constructive termination or not of the services of the 1st respondent, and the issue whether the application has been made within the prescribed time limits of the Industrial Disputes Act was not considered as both Counsel did not press for such a determination.

Application dismissed.