

BUILDING MATERIALS CORPORATION
v.
JATHIKA SEVAKA SANGAMAYA
(on behalf of D. N. T. Warnakulasuriya)

SUPREME COURT.
BANDARANAYAKE, J.
DHEERARATNE, J. AND PERERA, J.
S. C. APPEAL NO. 54/92
PROV. H. C. GALLE CASE NO. 53/91
L. T. GALLE CASE NO. G/17635/88
21 MAY 1993.

Industrial Dispute – Unlawful termination of employment – Transfer and failure to report for duty – Vacation of Service -

Absence from work of an employee on the ground of illness or other reason beyond his control is inconsistent with the intention to abandon his employment provided that there are no other circumstances from which an inference to the contrary could be drawn.

Where an employee endeavours to keep away from work or refuses or fails to report to work or duty without an acceptable excuse for a reasonably long period of time such conduct would necessarily be a ground which justifies the employer to consider the employee as having vacated service.

Where the respondent who was in a transferable service failed although he had been given several opportunities to regularize his position and to report for duty at his new station on transfer, his persistent failure to report for work will give rise to the necessary inference of an intention to remain away permanently. Long absence without obtaining leave or authority is evidence of desertion or abandonment of service. Illness not supported by acceptable medical certificates was a mere ruse to avoid reporting for work at the new station.

Cases referred to :

1. *Ceylon Estate Staffs Union v. Superintendent, Meddaccumbura Estate* 73 NLR 281.
2. *C. T. B. v. Thungadasa* 73 NLR 211.
3. *Jeevan Lal v. Their Workmen* 1961 – 11 LJ 517.

APPEAL from order of the High Court.

L. G. Weeramantry with Jacob Joseph for employer – respondent – appellant.

Ananda Kasthuriarachchi for applicant – appellant – respondent.

Cur. adv. vult.

October 17, 1993.

PERERA, J.

The Applicant–Appellant–Respondent (hereinafter referred to as the Applicant–Respondent) made an application to the Labour Tribunal, Galle, on or about 8th March 1988 alleging that his services were terminated unjustly and unlawfully by the Employer–Respondent–Appellant (hereinafter referred to as the Employer–Appellant)

The Employer–Appellant by its answer dated 20th April 1988 denied termination of the Respondent's services and stated inter–alia that;

(1) the Applicant–Respondent was transferred to the Anuradhapura branch of the Employer–Appellant Corporation by letter dated 3rd November 1987 with effect from 02.12.87;

(2) he had failed to report for duty at Anuradhapura despite several requests from the Employer–Appellant; and that

(3) the Applicant–Respondent was finally treated as having vacated his services with effect from 15th December 1987 by letter dated 10th February 1988 which has been produced marked R–11.

The President of the Labour Tribunal after inquiry held that the Applicant–Respondent did not have any intention of reporting for duty at Anuradhapura and had vacated service. He accordingly dismissed the application of the Applicant–Respondent.

The Applicant–Respondent appealed against the said order to the High Court of Galle.

The High Court having heard submissions of Counsel on behalf of the parties held that the order of the learned President was erroneous when he held that the Applicant–Respondent had vacated service and accordingly directed that the Applicant–Respondent be reinstated in service with back wages.

The present appeal is against the order of the High Court.

It was the case of the Applicant-Respondent that he was appointed to the Employer-Appellant's branch in Galle as a Grade 4 clerk on the 7th October 1978 (A - 1). On the 29th of July 1992, he was promoted to the post of storekeeper Grade III and was functioning in that capacity at the Galle branch, when in November 1987, by letter (R - 1) he was transferred in the same capacity to the branch office Anuradhapura with effect from 2nd December 1987.

The Applicant-Respondent appealed against this transfer by his letter dated 09.11.87 (A - 6). In this letter he sought the cancellation of this transfer on the following grounds.

- (a) unsettled state of the country and the danger to be away from home,
- (b) his economic problems,
- (c) his difficulties of travel and
- (d) his personal family problems.

Thereafter the Applicant-Respondent by his letters dated 19.11.87 (A - 7) and 22.11.87 (A - 8) had made representations to the Branch manager, Galle and the Prime Minister to have his transfer to Anuradhapura cancelled. In document A - 7 and A - 8 he has urged his state of ill-health among other reasons to justify his request. In the petition addressed to the Prime Minister the Employee-Respondent states as follows:

" I ' m not in a position to leave a four month old daughter and my wife all alone at Galle and leave to such a distant and remote place as Anuradhapura.

It is not possible for me to maintain a family with Rs. 750, as Rs. 880 from my salary is being deducted for the bank loan..... This pittance is insufficient even as travelling expenses to Anuradhapura."

" Finally my health condition is so weak that it does not permit me to work in a place like Anuradhapura for I had been an asthmatic from my boy-hood as such it may be aggravated by this transfer to an uncongenial place as Anuradhapura."

Admittedly on the 8th November 1987 the Applicant-Respondent was informed by letter R - 1 that he was transferred from the Galle

depot to the Anuradhapura depot with effect from 2nd December 1987. By R – 2 dated 30.11.87 he was informed that he was relieved of his duties at the Galle depot from 30.11.87, and was directed to report to work at the Anuradhapura branch.

According to the evidence the Applicant–Respondent failed to report for work at the Anuradhapura depot as directed but submitted an application for leave from 1st – 14th of December 1987 (A – 10a) together with a Medical certificate (A –10b) which was issued by a private doctor, stating that the Applicant–Respondent was suffering from asthma and recommending that he be granted 14 days leave from 01.12.87.

According to the Employer–Appellant on receipt of the leave application together with the Medical certificate marked A – 10 b the Corporation by letter dated 27.12.87 R – 2 informed the Applicant – Respondent that although the medical certificate has been received to cover a period of 14 days from 01.12.87 no notification of absence whatsoever had been received thereafter although he had still failed to report for work.

He was also informed by R – 3 dated 24.12.87 that if the cause of his continued absence was illness, a medical certificate from a government doctor should be submitted within 7 days of the receipt of that letter. If not the Applicant–Respondent would be considered as having vacated his post. (The submission of a medical certificate from a government doctor is a requirement for obtaining medical leave in terms of section 3.2 of leave circular produced marked R–13).

Further by letter dated 28.12.87 (R–5) the Corporation informed the Applicant–Respondent that his failure to report for work at Anuradhapura had stalled stock taking and handing over operations at that depot, and that his request for the cancellation of his transfer could not be granted. The Applicant–Respondent was also directed to report for work at the Anuradhapura depot forthwith. This letter was followed by a letter dated 8th January 1988. (R–4) whereby the Personnel Manager of the Corporation informed the Applicant–Respondent that although he was transferred from the Galle depot to the Anuradhapura depot with effect from, 2nd December 1987, the Applicant–Respondent had yet failed to report to work at Anuradhapura up to 25th December 1987. He was warned finally that

if he failed to report for work immediately at that branch he would be treated as having vacated his post.

Finally on the 10th of February 1988, the Appellant Corporation informed the Applicant-Respondent that having furnished a medical certificate from a private doctor dated 30.11.87 covering a period of 14 days from 1 December 1987, he had failed to forward a medical certificate from a government medical officer for the period commencing 15th December 1987, although he had been repeatedly requested to do so on a number of occasions. As he had failed to report for work at the Anuradhapura depot upto that date, he was deemed to have vacated service with effect from 15th December 1987 (R-11).

The Applicant-Respondent did not reply letter R - 11 but instead filed an application in the Labour Tribunal on the 8th March 1988 alleging unlawful termination of his employment by the Employer Appellant.

Having regard to the facts set out above I am of the view that the learned President has rightly held that the evidence and documents produced at the inquiry established that,

(a) Applicant who was transferred to Anuradhapura with effect from 02.12.87 failed to report for work at the Anuradhapura depot, but absented himself from work on the ground of illness.

(b) that it was a requirement that the period of absence in such a circumstance should be covered by a medical certificate from a government medical practitioner and that

(c) as the Applicant continued to absent himself without producing such acceptable certificates in proof of illness the employer could act on the basis that the applicant had vacated his post. The learned President has also observed that it was clear on the evidence that the Applicant-Respondent had no intention to report to work at Anuradhapura and had thus voluntarily vacated service.

Counsel for the Applicant-Respondent urged that on the evidence adduced before the Labour Tribunal, it was not established that the Applicant-Respondent has vacated service, and that such a finding on the part of the President was not based on the evidence led at

the inquiry. It was counsel's submission that the desertion or abandonment (vacation of employment) means absence without leave coupled with an intention not to return to work. It was also submitted that the burden was on the employer – Appellant to prove both these elements. Counsel contended that the absence of an employee on grounds of illness or other reason beyond his control was inconsistent with an intention to desert. That in the present case the act of forwarding a medical certificate clearly militates against any inference being drawn of an intention to desert on the part of the employee.

Counsel also submitted that an employee who refused to accept an unjust order of transfer cannot be considered to have vacated his post though it may be a ground of dismissal upon inquiry. Counsel urged that there was *animus-revertendi* or intention to report for work on the part of the Applicant–Respondent and refusal to permit a workmen to continue in employment in such circumstances would constitute a constructive termination of his employment.

Counsel submitted further that it would have been open for the Employer–Appellant to have placed the Applicant–Respondent on no-pay leave for non-compliance with the leave circular R–13. The failure to produce a medical certificate from a Government doctor in contravention of R–13 per se however would not constitute an intention to abandon employment.

I am in agreement with the submission of counsel for the Applicant–Respondent that the absence from work, of an employee on the ground of illness or other reason beyond his control is inconsistent with the intention to abandon his employment provided that there were no other circumstances from which an inference to the contrary could be drawn.

In the present case however there are numerous circumstances from which it is possible to draw the inference that illness was merely a ruse to avoid reporting for work at the Anuradhapura depot and in the light of the evidence in this case the learned President was right when he came to the conclusion that the Employee–Respondent had no intention whatsoever of reporting to work at Anuradhapura in compliance with the order of transfer. In this connection it would be relevant to state that the only medical certificate which itself was not issued by a government medical practitioner described the nature

of the Employee-Respondent's illness as asthma. The Applicant-Respondent has in his evidence before the Labour Tribunal admitted that the nature of this illness was not one which prevented him from working and therefore he could have reported at his place of work.

It must also be observed that having regard to the evidence in this case and the documents produced, a grave doubt arises as to whether his absence from work was actually due to illness. This doubt is strengthened by the fact that his original protest against the transfer in document A – 6 dated 09.11.87 – he has made no reference whatsoever to the fact that he was unable to report to work at Anuradhapura due to ill health. Yet another matter which gives rise to a very strong doubt regarding his ill health is the fact that despite several letters written by the corporation to the Applicant-Respondent to furnish a medical certificate in accordance with the rules set out in circular R – 13 the Applicant-Respondent has failed to satisfy the employer that he was in fact ill and that he was not fit to report for work at Anuradhapura.

In the circumstances I am of the view that the Employer-Appellant has in this case proved that the Applicant-Respondent was absent without leave from 15.12.87 for a period of approximately two months and that it is reasonable on the facts established in this case to draw the inference that the Applicant-Respondent had no intention to report for work at the Anuradhapura depot.

Where an employee endeavours to keep away from work or refuses or fails to report to work or duty without an acceptable excuse for a reasonably long period of time such conduct would necessarily be a ground which justifies the employer to consider the employee as having vacated service. In this case it is clear that the document R – 11 was served on the Applicant-Respondent after he had been given several opportunities to regularise his position and to report for duty at Anuradhapura which he persistently failed to do.

The Applicant-Respondent was admittedly in a transferable service and the Employer's right to transfer his staff within his service is too well established and has received firm recognition in this country. See *Ceylon Estate Staff Union v. Superintendent Meddacombra Estate* ⁽¹⁾ and *CTB v. Thungadasa* ⁽²⁾.

An intention to remain away permanently must necessarily be inferred from the Employee's conduct and I hold that long absence without obtaining leave or authority is evidence of desertion or abandonment of service.

I find support for this view in the observations of the Indian Supreme Court in *Jeevan Lal v. Their Workmen* ⁽³⁾.

" If an employee continues to be absent from duty without obtaining leave and in an unauthorised manner for such a long period of time.....an inference may reasonably be drawn from such absence that due to his absence he has abandoned service "

It is clear from the evidence in this case that the Employee-Respondent by his conduct severed the contract of service which resulted in the termination of his service.

I accordingly set aside the judgment of the High Court dated 14.05.92 and affirm the order of the Labour Tribunal dated 18.06.90 dismissing the Application of the Applicant-Respondent.

The appeal is allowed. There will be no costs.

BANDARANAYAKE, J. - I agree

DHEERARATNE, J. - I agree.

Appeal allowed.