

INTERNATIONAL SCIENCE AND TECHNOLOGICAL  
INSTITUTE INC. (ISTI)

v.

ROSA AND ANOTHER

COURT OF APPEAL.  
SENANAYAKE, J.  
C.A.APPLICATION NO. 417/94  
L.T. NO. 1/153/93  
SEPTEMBER 6, 1994.

*Industrial dispute – Writs of certiorari and prohibition – Contract entered into abroad and performed in Sri Lanka – Jurisdiction of the Labour Tribunal – Proper law of the contract – Private International Law.*

The petitioner, International Science and Technology Institute Inc. (ISTI) was incorporated under the law of the District of Columbia, U.S.A., and its registered office was in Washington D.C. The applicant-respondent was a resident in California when on 4.2.93 she and ISTI entered into an employment agreement in Washington D.C. in terms of which the applicant was appointed Chief Operating Officer of the Financial Marketing Project in Sri Lanka for the period 24 February 1993 to May 1995. ISTI's project in Sri Lanka was for the providing of consultancy

services to the Securities and Exchange Commission of Sri Lanka, having its office at 73, W. A. D. Ramanayake Mawatha, Colombo 2. ISTI had no registered business address or a local branch and since they were providing a specialised training programme to the Securities and Exchange Commission, ISTI had the same postal address as the Commission. ISTI's Project Chief was Marshall Burke and the other staff were a training specialist, Seth Issacs and the applicant. The applicant assumed duties in Sri Lanka on 11.2.93. On 16th April 1993 Marshall Burke wrote to the applicant directing her to leave ISTI. The applicant replied on 19th April 1993 stating that Marshall Burke had no power and no reasons to terminate her services. By letter dated 20th April 1993 the President of ISTI ratified Marshall Burke's action. The applicant sought relief in the Labour Tribunal by her application dated 11th May 1993. Seth Issacs accepted notice of this application and filed answer in the Labour Tribunal on 21.6.93 objecting *inter alia* to jurisdiction. The Tribunal overruled the preliminary objection to jurisdiction on 13.1.94.

The matter being fixed for inquiry on 30.5.1994 before the Tribunal the petitioner moved for a postponement on the ground that Seth Issacs was ill and submitted a medical certificate. The Tribunal postponed the hearing for 29th July and 15th and 16th August on payment of costs. In the meantime the petitioner moved for writs of certiorari and prohibition in the High Court without disclosing the application to the Tribunal for postponement. After written submissions were filed, on objection taken to the jurisdiction of the High Court, the petitioner withdrew her application. The petitioner then filed the present application five months and five days after the Labour Tribunal overruled the objection to jurisdiction. The applicant alleged laches and *mala fides* on the part of ISTI.

**Held:**

(1) The proper law applicable in Private International Law is the law of the place of contract and not of the place of performance. The Labour Tribunal however does not function as a court of law and can vary contracts of service. A Tribunal must determine the rights and wrongs of the claim and in so doing it is free to apply principles of justice and equity keeping in view the fundamental fact that the jurisdiction is to prevent social injustice.

(2) The termination of the contract (on 16.4.1993) was made by Marshall Burke and it was only ratified by the President of ISTI. The employment was in Sri Lanka and the breach of contract took place within the jurisdiction of Sri Lanka and the dispute arose within the jurisdiction of the Tribunal.

(3) The proper law may be determined in three ways:

(a) by express selection of the parties; or failing this

(b) by inferred selection from the circumstances; or failing either of these

(3) by judicial determination of the system of law with which the transaction has the closest and most real connection.

Here there was no express choice nor could a choice of law be inferred. The courts select the system of law with which the transaction has the closest and most real connection by looking into all the circumstances. Strict rules cannot be laid down; the court should look at the place where the contract was entered, the place of performance, the place of residence of the parties and the nature of the subject matter of the contract. In the instant case the terms of the contract were to be performed in Sri Lanka and the applicant-respondent was to perform her work within Sri Lanka. Her services were *de facto* terminated by Marshall Burke within the jurisdiction of this Tribunal. This action was confirmed and ratified by the President of ISTI.

(4) The absence of a registered office for ISTI is not material. It functioned at the address of the Securities and Exchange Commission and all letters were accepted at this address and Seth Issacs in his answer had not taken this up as a defence.

(5) Hence the Labour Tribunal had jurisdiction to hear and determine this matter.

(6) The petitioner is also guilty of delay and *mala fides* and has not come into court with clean hands – it has not disclosed the fact that a postponement was obtained on payment of costs after tendering a medical certificate.

#### Cases referred to:

1. *Adelaide Electric Supply Co., Ltd., v. President Assurance Co., Ltd.*, (1934) AC 122, 152.
2. *Chatenay v. Brazilian Submarine Telegraph Company* (1891) 1 Q.B. 79.
3. *Rex. v. International Trustees* (1937) AC 574.
4. *Mount Albert Borough Council v. Australian Temperance and General Mutual Life Assurance Society* (1936) AC 224.
5. *United Engineering Workers Union v. Devanayagam* 69 N.L.R. 289.
6. *Caledonian (Ceylon) Tea & Rubber Estates Ltd., v. Hillman* 79 (1) N.L.R. 421, 430.

**APPLICATION** for writs of certiorari and prohibition.

*R. K. W. Gunasekera with Sri Nandalochana, and Mrs. S. Jayatilleke* for petitioner.  
*S. L. Gunasekera with Gomin Dayasiri* for applicant-respondents.

*Cur adv vult.*

October 11, 1994.

**SENANAYAKE, J.**

The Petitioner filed this application for an issue of a mandate in the nature of a writ of certiorari to quash the order of the Labour Tribunal dated 13.1.94 and a writ of prohibition prohibiting the Labour Tribunal from proceeding with the inquiry.

The relevant facts briefly are as follows. The Petitioner was the International Science and Technology Institute Inc. (hereinafter referred to as "ISTI") which was incorporated under the law of the District of Columbia, U.S.A. and has its registered office in Washington D.C., and was primarily a U.S. AID funded contractor and the Applicant-Respondent was a resident in California at the relevant time. On or about 4.2.93 the Applicant and the ISTI entered into an employment agreement in Washington D.C. and in terms of the agreement the Applicant was appointed Chief Operating Officer of the Financial Markets Project in Sri Lanka for the period 24th February 1993 to May 1995. ISTI's project in Sri Lanka was for the providing of consultancy service to the Securities and Exchange Commission of Sri Lanka having its office at 73, W. A. D. Ramanayake Mawatha, Colombo 2. ISTI has no registered business address or a local branch and since they were providing a specialised training programme to the Securities and Exchange Commission ISTI had the same postal address as the Commission. ISTI Project Chief was Marshall Burke and a Training Specialist, Seth Issacs and the Applicant was to work with him and she assumed duties in Sri Lanka on 11.2.93. The Petitioner averred that the Applicant's employment was terminated by the President of the ISTI by letter dated 28.4.93 issued from ISTI's headquarters in Washington D.C.

The Applicant filed an application dated 11.5.93 in the Labour Tribunal Colombo against ISTI as employer for wrongful termination and loss of career claiming a sum of US. Dollars 14500/- as compensation and the said notice of the application was served on the ISTI, C/o Securities and Exchange Commission, 73, W. A. D. Ramanayake Mawatha, Colombo 2 and Seth Issacs accepted the said notice and filed answer in the Labour Tribunal on 21.6.93. In the answer they objected to the jurisdiction to entertain the application and written submissions were tendered by both parties and thereafter the Tribunal overruled the preliminary objection and held that it has jurisdiction to hear and determine the matter.

The Petitioner filed an application in the High Court of the Western Province, Colombo No. 996/94 seeking a mandate in the nature of writs of certiorari and prohibition. When the matter came for support a preliminary objection was raised that the High Court had no

jurisdiction to issue the aforesaid writs, and the parties tendered written submissions on 30.5.94 and the Petitioner thereafter being advised that there were ambiguities in the constitutional and statutory provisions relating to the jurisdiction of the High Court, withdrew the applications pending in the High Court.

The Applicant-Respondent raised a preliminary objection to the application filed by the Petitioner. The Applicant averred that the Labour Tribunal delivered the order on the preliminary objection on 13.1.94 and the Petitioner filed the application for identical reliefs two months and five days of the said Order in the High Court of Colombo on the 13th March, 1994 and the application was supported on 18th March, 1994 and the High Court did not grant a stay order and in view of the objection to jurisdiction raised by the applicant, the parties were directed to file written submissions on the 30th May, 1994; in the meantime the inquiry being fixed for 30th March, 1994 before the Tribunal the Petitioner moved for a date on the grounds that Seth Issacs was ill and submitted a medical certificate from a Medical Attache of the Embassy of the United States in Sri Lanka. The Applicant averred that the Petitioner was acting *mala fide* with a view to delaying the inquiry before the Labour Tribunal in order to finish its business and depart from Sri Lanka before the final order of the Labour Tribunal. The Labour Tribunal rejected the medical certificate and on payment of costs postponed the inquiry for the 29th July and the 15th and 16th August.

The Applicant further averred that the Petitioner has failed to disclose the material facts that the Petitioner had made an application for a postponement two days after the Petitioner failed to get a stay order from the High Court or even the fact that the application was fixed for inquiry on the 30th March, 1994. The applicant averred that 5 months and five days after the Labour Tribunal delivered the order they made the said application to this Court.

The Applicant averred that the Petitioner cannot have and maintain this Application because of its laches because it was made *mala fide* and because the Petitioner had failed to disclose that the Petitioner had obtained a date by filing a medical certificate which was rejected

by the Tribunal and also failing to disclose that the matter had been fixed for inquiry on 30.3.94.

The Applicant-Respondent admitted that the Petitioner was incorporated and has its registered office in the United States of America and also admitted that the employment agreement was entered between the Petitioner and the Applicant-Respondent in Washington DC. The Respondent denied the averment in paragraph 5 of the petition and stated that the Petitioner has an office at the Securities and Exchange Commission at which office the Respondent was employed and the Petitioner had admitted that it has overseas offices in Colombo as evidenced by the documents A1 and A2 produced with the petition marked "B". The Respondent admitted the averments 6, 7 and 9 of the petition but denied the averments in paragraph 8 of the petition and stated that her services were terminated by the Petitioner by letter dated 16th April, 1993 signed and delivered by the Petitioner's Chief of Party in Sri Lanka at Colombo and the said termination was confirmed by letter dated 28th April, 1993 (A6) from the President of the Petitioner sent from Washington.

The Applicant-Respondent admitted that an answer was filed at the Labour Tribunal and Seth Issacs had signed the answer on behalf of the Petitioner and she further stated that at no stage had the Petitioner disowned the answer filed.

It was not in dispute that the contract of employment was signed and entered into at Washington D.C between the Petitioner and the Applicant-Respondent and that the Applicant was employed by the Petitioner only for the performance of duties in Sri Lanka. This was evidenced by the letter of appointment or the terms of contract dated 4.2.1993. On the terms of the contract the said assignment was exclusively limited to Sri Lanka.

It was not in dispute that Marshall Burke was the Chief of Party for the Project and was the direct supervisor. The Applicant-Respondent while in Sri Lanka was expected to observe the laws and customs of the host country and add to the project procedure established by the Chief of Party. It was not in dispute that by A3 on 16th April, 1993

Marshall Burke wrote to the Applicant-Respondent in no uncertain terms that she should leave the ISTI Financial Project and that she should hand over the keys and the relevant ISTI Financial Markets Project documents and workpapers that afternoon. The Applicant Respondent by letter dated 19.4.1993 marked A4 stated that Marshall Burke has no power and no reasons to terminate her services and the purported letter of termination was null and void. She had alleged that when she reported to work on 19.4.1993 she was not allowed entry to the work place by the security on instructions given by Marshall Burke. The Applicant-Respondent had contacted Nihal Goonewardene the President of the ISTI in Washington DC and stated that the aforesaid letter sent by Marshall Burke was null and void. By letter dated 20.4.93 the President of the ISTI ratified the said action of Marshall Burke and informed the Applicant-Respondent that her services were terminated with effect from 16th April, 1993.

The learned counsel for the Petitioner submitted that as the agreement of employment was entered into in the United States of America the jurisdiction of the local courts were ousted as the termination took place in Washington. His main submission was that territorial jurisdiction would conflict with Private International Law. He relied on **G. C. Cheshire Private International Law, 4th Edition** where he states "That part of the English Law known as Private International Law comes into operation whenever the Court is seized of a suit that contains a foreign market. It functions only when the element is present and its objects are three fold:

Firstly to prescribe the conditions under which the Court is competent to entertain such suit.

Secondly, to determine for each class of case the particular territorial system of law with reference to which the rights of the parties must be ascertained.

Thirdly, (a) to specify the circumstances in which a foreign judgment can be recognised as decisive of that question in dispute and (b) the right vested in the creditor by a foreign judgment can be enforced in England.

His submission was that the rights of the parties depend partly upon the circumstances of the transaction and partly upon the law which gave the termination its force and effect. His position was when the case is seen to be affected by a foreign element the court must look beyond its own internal law.

Despite the intention of the parties the normal law that would apply is the law of the country with which the contract has the most substantial connection. A contract may be terminated in one of three ways namely by express repudiation, implied repudiation or failure to perform. In the instant case the letter of termination was sent by Marshall Burke who was the immediate superior of the Applicant-Respondent and also who was the Chief of Party of the ISTI project. Though the Applicant did not recognise the right of Marshall Burke to terminate the contract for all intents and purposes the Applicant was not allowed to perform her contractual obligations in Sri Lanka and physically prevented from attending to the work and entering the premises of her work place by Marshall Burke by getting the security to keep her out from the premises of her normal work place and when this was brought to the notice of the President of the ISTI he confirmed and ratified the action of the Chief of Party Marshall Burke. One must not evade the question that the services of the Applicant-Respondent was to be performed exclusively in Sri Lanka and no where else. On this point in the case of *Adelaide Electric Supply Co., Ltd. v. President Assurance Co. Ltd* <sup>(1)</sup>, Lord Wright observed "whatever is the proper law of the contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country – the proper law of the contract" – though this position was subsequently abandoned by the English Judge.

However it was so even earlier held in *Chatenay v. Brazilian Submarine Telegraph Company* <sup>(2)</sup> where Lord Esher observed "But if the contract is to be carried out partly in another country than that in which it is made, that part which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country", which was also followed in the case of *Rex v. International Trustees* <sup>(3)</sup>.

The present concept is that the proper law applicable is the place of contract and not the place of performance. This was held in the case of *Mount Albert Borough Council v. Australian Temperance and General Mutual Life Assurance Society* <sup>(4)</sup>. If one were to accept this to be the modern position of the law, I am of the view that we should not lose sight of the equitable jurisdiction granted to the Labour Tribunals under the Industrial Disputes Act for the settlement of industrial disputes notwithstanding the terms and conditions of the terms of contract or agreement of employment. Section 31 (d) (4) reads as follows "any relief or redress may be granted by a Labour Tribunal to a workman upon an application made under subsection (1) notwithstanding anything to the contrary in any contract of service between him and his employer." In terms of Section 31C the Tribunal may make all inquiries into the application and hear all such evidence as the tribunal may consider necessary and thereafter make such order as may appear to the Tribunal to be just and equitable.

In the decision of the Privy Council in *United Engineering Workers Union v. Devanayagam* <sup>(5)</sup>, Their Lordships opinion may be summarised as that Labour Tribunals were established for the purpose of the Act namely to provide for the prevention, investigation and settlement of industrial disputes. The Act making provisions did not say that they were to perform the functions of a Court in giving effect to the legal rights of workmen in connection with their employment. A Labour Tribunal is required to do what is just and equitable and it is expressly provided that the Labour Tribunals when dealing with an application are not restricted by the terms of the contract of employment in granting relief and redress. In the course of hearing an application the tribunal may be informed of the terms of contract but it is not restricted to giving effect to legal rights. The Labour Tribunals were not required to act as courts of law.

The Labour Tribunals were created to make flexible the rigorous provisions of the common law. Thus the jurisdiction of a Labour Tribunal to give relief is far more wider and more comprehensive than that of the civil courts of the country.

In *Caledonian (Ceylon) Tea & Rubber Estates Ltd. v. Hillman* <sup>(6)</sup> Sharvananda, J. observed "The jurisdiction vested in a Labour

Tribunal by the Industrial Disputes Act is not for administering the existing Common Law and enforcing existing contracts. The relations between the employer and workman are no longer governed by the contract of service. The Tribunal has the right, nay the duty to vary contracts of service of the employer and the employee – a jurisdiction which can never be exercised by a civil court. In the course of adjudication a Tribunal must determine the rights and wrongs of the claim and in so doing it undoubtedly is free to apply principles of justice and equity keeping in view the fundamental fact that the jurisdiction is to prevent injustice.”

I am of the view the termination of employment was made by Marshall Burke and it was only ratified by the President of ISTI; the employment was in Sri Lanka and the breach of contract took place within the jurisdiction of Sri Lanka and the dispute arose within the jurisdiction of the Tribunal.

The submission of the learned counsel was that the Tribunal had no jurisdiction to hear and proceed with the case as the contract or the agreement was entered into in the United States of America. The Proper Law may be determined in three ways (a) by express selection by the parties (b) by inferred selection from the circumstances or failing either of this (c) by judicial determination of the system of law with which the transaction has the closest and most real connection.

In the instant case the parties have not expressly stipulated that the contract shall be governed by a particular law. As there is no express choice of the proper law the court may hold that there was an implied choice of law by the parties.

If there is no express or inferred choice of law in determining what system of law the transaction is most closely connected with, the court should look into all the circumstances; it's true no doubt that strict rules cannot be laid down and the court should look into the place where the contract was entered, the place of performance, the place of residence of the parties and the nature of the subject matter of the contract.

The constituent element of contract should contain the following requirements according to section 19 of the American Restatement:

- (a) A promiser and a promisee each of whom has capacity to act as such in the proposed contract.
- (b) A manifestation of assent by the parties who form the contract to the terms thereof and to every promisee, to the consideration of the promise except as otherwise stated.
- (c) A sufficient consideration except as otherwise stated.
- (d) The transaction though satisfying the foregoing must be one that is not void by statute or by special rules of the Common Law.

In the instant case the terms of the contract were to be performed in Sri Lanka and the Applicant-Respondent was to perform her work within Sri Lanka. Her services were *de facto* terminated by Marshall Burke within the jurisdiction of this Tribunal. The action of Burke was confirmed and ratified by the President of ISTI.

The other submission was that the Petitioner had no registered office. The notice was served on the Petitioner at a postal address and it was established that all letters were sent to the present address at the Securities Commission and all letters were accepted by them; and in fact Seth Issacs has filed an answer as Employer ISTI; though the answer was filed they had not averred that the registered office was not in Sri Lanka; in fact they by filing the answer subjected to the jurisdiction of the Tribunal though they averred that the Tribunal has no jurisdiction to hear and determine the case as the contract was entered in the U.S.A. and that the employer was a USAID funded International Organisation and the Applicant was nominated for employment by the employer and accepted for such employment by USAID. The acceptance of summons and filing of answer estopped the Petitioner taking up the position that there was no proper service of summons. If one were to accept this submission any foreigner could take the objection that the tribunal has no jurisdiction to hear

any matter regarding termination of employment because he has no registered office in Sri Lanka; for e.g. a foreigner during his stay in Sri Lanka if he retains the services of a nurse to look after his ailing wife and for some reason he summarily dismisses her that does not mean that the nurse is deprived of getting relief from the Labour Tribunal because the foreigner was only temporarily residing in Sri Lanka as a tourist and his registered business was outside the jurisdiction of the Court. For all intents and for transaction and other matters they were free to use the office C/O Securities and Exchange Commission of Sri Lanka, No. 71, W. A. D. Ramanayake Mawatha Colombo 2. I am unable to accept the submission that the Labour Tribunal has no jurisdiction to hear and determine this matter, in view of the fact that they carried on the project from the aforesaid address.

I am of the view that the Petitioner in the circumstances of the case had delayed in making this application and the Petitioner had not come with clean hands; they had not disclosed that the Petitioner had filed a medical certificate to obtain a date from the Tribunal and the Tribunal had rejected the medical certificate and had granted a date on payment of costs. Seth Issacs represented the employer. In the present context having the facilities of instant communication the Petitioner had unduly delayed in making the application to this court.

In the circumstances, I uphold the preliminary objection that the Petitioner had failed to disclose material matters and has not come with clean hands. In the circumstances, I refuse the application and dismiss the petition with costs fixed at Rs. 10,000/- to be paid to the Applicant-Respondent.

*Application refused.*