

NELSON DE SILVA
V.
SRI LANKA STATE ENGINEERING CORPORATION

COURT OF APPEAL.
F.N.D. JAYASURIYA, J.
C.A. CASE NO. 21/89
L.T. CASE NO. 1/Addl./5778/84
JUNE 26, 1996.

Industrial Dispute - Vacation of post - Elements required to establish vacation of post.

The concept of vacation of post involves two aspects. One is the mental element, that is the intention to desert and abandon the employment and second is the failure to report at the work place of the employee. To constitute the first element it must be established that the applicant is not reporting at the work place, was actuated by an intention to voluntarily vacate his employment. The physical absence and the mental element should co-exist for there to be a vacation of post in law. A temporary absence from a place does not mean that the place is abandoned; there must be shown also an intention not to return. So to the physical failure to perform a contractual duty there must be added the intention to abandon future performance. A reasonable explanation may negative the intention to abandon. A bona fide challenge to the validity of an order is a satisfactory explanation for not complying with it. By challenging the order the complainant was affirming the contract not abandoning it.

Cases referred to :

1. *The Superintendent of Hewagama Estate v. Lanka Eksath Workers Union* SC 7-9/69 SCM 2.2.70.
2. *Nandasena v. Uva Regional Transport Board* - 1993-1 SLR 318.
3. *Re Durand - (No.2) Judgment No. 392 of the Administrative Tribunal of the International Labour Organisation.*
4. *Sri Lanka Jathika Pravahana Sevaka Sangamaya v. Central Region Transport Board and Sri Lanka Central Transport Board* - C.A. 402/81 - C.A. Minutes dated 07.05.1987.
5. *Wijenaike v. Air Lanka Ltd.*, (1990) 1 Sri L.R. 293, 300.
6. *Somarathna v. Pullimodan Chetty and Sons Ltd* - SC 160/71 - SCM 7.6.1972.

APPEAL from the order of the Labour Tribunal.

Nimal Muthukumarana for the Applicant-Appellant.

Ms. Eva Wanasundara, Senior State Counsel for the Employer-Respondent.

Cur.adv.vult.

June 26, 1996.

F.N.D. JAYASURIYA, J.

I have heard both learned Counsel for the Appellant and the Respondent. I have perused the contents of the order dated 16.09.89 pronounced by the learned President of the Labour Tribunal. The said President has considered only one aspect of the issue of vacation of post. The concept of vacation of post involves two aspects; one is the mental element, that is intention to desert and abandon the employment and the more familiar element of the concept of vacation of post, which is the failure to report at the work place of the employee. To constitute the first element, it must be established that the Applicant in not reporting at the work place, was actuated by an intention to voluntarily vacate his employment.

Having particular regard to the attendant circumstances of the instant application, this court is called upon to determine whether a voluntary and intentional vacation of post on the part of the Applicant-Appellant has been established by the Employer-Respondent. In *Lanka Estate Workers Union v. The Superintendent of Hewagama Estate* the learned President of the Labour Tribunal held on the facts that there was no abandonment of employment by the workman as the workman in question had no intention of abandoning his employment. The learned President correctly applying the legal principles observed that the physical absence and the mental element should co-exist for there to be a vacation of post in law. Besides, he held on this issue the Tribunal ought to be guided by the common law of the land which is Roman-Dutch Law and consequently the English doctrine of frustration, relied upon by learned Counsel, has no application whatsoever to the situation under consideration. An appeal preferred by the employer against this order of the learned President of the Labour Tribunal was considered by the Supreme Court in *The Superintendent of Hewagama Estate v. Lanka Estate Workers Union*⁽¹⁾ and the order of the learned President was affirmed in Appeal.

In *K. V. Jayaratne v the University of Ceylon** The High Court Judge affirmed the aforesaid principles of law and remarked "We have to approach this problem guided by the overriding common law principles and one has to ascertain whether an intention to abandon employment can reasonably be inferred from the proved circumstances in each particular situation. The mere physical aspect of the workman's conduct cannot be singled out and taken in law to signify the abandonment of the contract of employment". Likewise, in the dissenting judgment pronounced by Justice Mark Fernando in *Nandasena v Uva Regional Transport Board*.⁽²⁾ His Lordship observed "From the fact that an employer deems his employee to have vacated post, it does not conclusively follow that there has been a termination by the employee; that would depend on the circumstances whether the Appellant's failure to report for work was a *bona fide* challenge to a disputed order is relevant. His Lordship relied upon passages in the decision In *Re Durand*⁽³⁾ to the following effect - "It (abandonment of employment) contains both a physical and a mental element. A temporary absence from a place does not mean that the place is abandoned; there must be shown also an intention not to return. So to the physical failure to perform a contractual duty, there must be added the intention to abandon future performance a reasonable explanation may negative the intention to abandon..... a *bona fide* challenge to the validity of an order is a satisfactory explanation for not complying with it. By challenging the order..... the complainant was affirming the contract not abandoning it."

In *A.A.W.B. Adi Kavi v Colombo Dockyard Co. Ltd.*** The High Court Judge set aside the order of the President, holding that he had altogether failed to give his mind to a vital ingredient in regard to the mental state of the Applicant. The judge remarked "the party seeking to establish a vacation of post against an employee, must not merely prove the physical absence from work but a burden lies upon him to establish that physical absence co-existed with the requisite mental intent. The Learned President has completely failed to consider whether the employer has established this vital ingredient. The evidence led by the applicant (of mental ill-health) negatives such a mental element on his part in the circumstances of this case. Further the absence from

* LT/13/11428/89 - HCLTA 43/91

** LT/2/276/87 - H.C.M. 17.1.94 - HCLTA 4/90

work (from 25.05.1987 till 02.06.1987) in this situation is for a short duration of time.

In this context I wish to cite a passage from the author Alfred Avins - *Employee's Misconduct* at page 26. "I wish to advert to the judgment of Justice Jayalath in *Sri Lanka Jathika Pravahana Sevaka Sangamaya v. Central Region Transport Board and Sri Lanka Central Transport Board*⁽⁴⁾ where the identical principles were applied by the learned judge. Justice Kulatunga in a fundamental rights application before the Supreme Court - *Wijenaike v. Air Lanka Ltd.*⁽⁵⁾ - referred to the same principle and emphasised that physical absence alone is insufficient and that the party seeking to establish a vacation of post must prove that the physical absence co-existed with the mental *intent - animus non revertendi*.

The learned President has not considered the first important element in regard to the concept of vacation of post in his order. He has only discussed the element related to the physical aspect and has held that by his conduct, the Applicant, after receiving document A21, had voluntarily vacated his post. The President has held that after receiving the telegram marked A21 which was sent by the Resident Engineer to the Applicant, the appellant has failed to report for work and thereby he has vacated his post. He has held that by letter dated 29.05.84 (marked A24) the Chairman of the State Engineering Corporation has regretted that he cannot make any change to the said order of transfer and had required him to report for work within three days. However the Applicant did not report for work at Digana within the period of three days and that therefore his absence should be regarded as vacation of post. He has held that the letter marked as A22 dated 07.03.84 written by the Applicant to the Personnel Manager cannot have any effect to change or vary the firm direction set forth in the letter marked A21. Thus, he has proceeded on the basis of physical vacation of post but has not given his mind to consider the issue whether the applicant had indulged in such conduct with the requisite intention of vacating his post permanently. The attendant circumstances established upon this application disclosed that the Applicant had made an attempt in securing a mutual transfer with another workman and had followed it up with an application to obtain approval for application for a mutual transfer and was in fact awaiting the response of the employer to that mutual transfer.

There is evidence that considerable time lapsed since the handing over of the application for the mutual transfer. Thereafter, the applicant continued to attend to the work at the Peliyagoda work site. The Learned President has also further observed that there is evidence that the Chief Security Officer of the State Engineering Corporation had written a letter dated 22.03.84 to the Officer-in-charge of the Digana work site, stating that the applicant could not take up his duties as he was not released from his previous site. The contents of this letter substantiates the position taken up by the applicant in regard to the cause for the delay and failure to report immediately at Digana. The applicant has not been released from the Peliyagoda site.

The learned Counsel for the applicant-appellant has submitted that on these vital facts the learned President has misdirected himself and wrongfully assumed that the applicant was ordered to be transferred from the Peliyagoda Central workshop to Digana, which was a false position asserted and maintained by the employer. Learned Counsel for the Appellant points out that in fact he was transferred from the worksite of the employer Corporation at the Law Faculty premises of the University of Ceylon to the Digana site and that the learned President has misdirected himself on this material issue. However, these misdirections do not impinge upon the crucial issue in the case. For it is manifest that after receiving the telegram marked A21 and after the clear intimation made by the witness Piyaratne, the Chief Security Officer, the applicant did not proceed to Digana even by 13.03.1984. The applicant after the lapse of two weeks had failed to report for duty at Digana or satisfactorily explain his failure to do so.

However in regard to the aforesaid mental element on the part of the applicant to abandon his employment the learned President has not considered this important element and his order is liable to be judicially reviewed before this Court on the aforesaid non-direction in law which amounts to a misdirection in law. In the circumstances, I allow the appeal of the Applicant-Appellant and direct the respondent to reinstate the Applicant in the post of Security Inspector in the service of the respondent Corporation from the 1st of August 1996, but I refrain from making any order for the payment of back wages to the applicant-appellant for reasons outlined above. The loss of employment has been due entirely to the misconceptions and the defaults of the applicant-

appellant and therefore I hold that he is not entitled to an order for back wages. Vide *Somarathna v. Pullimodan Chetty and Sons Ltd.*⁽⁶⁾ In the result, I make order directing the employer-respondent to reinstate the applicant-appellant in the post of Security Inspector. In these circumstances the applicant-appellant is reinstated in the service of the respondent in the post of Security Inspector with effect from 01.08.96 without the need to pay back wages on the specific condition that the Applicant-Appellant is in a transferable service and if a transfer order issues from Employer-Respondent that the Applicant-Appellant is bound to accept that transfer and report for work at the place to which he is so transferred by such order. Applicant-Appellant's Counsel concedes that the Employer-Respondent is entitled to transfer its employees to any station chosen by the employer and the employees who receive such orders are required to report for work at particular sites. This order of reinstatement is made in favour of the Applicant-Appellant with the aforesaid clear condition and if the Applicant-Appellant fails to comply with that condition stipulated by the employer, his services would in such circumstances, be lawfully terminated. I allow the appeal with costs in a sum of Rs.1050/- payable by the employer-respondent to the Applicant-Appellant.

Appeal allowed.