

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA**

In the matter of an Application in the nature of a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A.(Writ) Application No. 246/2013

S.D.S.A. Raymond,
No. 272/B, Pattiyawala,
Usvetakeiyyawa.

Complainant/First Party

Vs.

Asia Capital Limited,
No. 21-01, West Tower,
World Trade Center, Echelon Sq., Colombo 01.

Second Party

AND NOW BETWEEN

Asia Capital Limited,
No. 21-01, West Tower,
World Trade Center, Echelon Sq., Colombo 01.

Second Party-Petitioner

Vs.

1. S.D.S.A. Raymond,
No. 272/B, Pattiyawala,
Usetakeiyawa.

Complainant/First Party-Respondent

2. M. Ariff,
No. 47/1, Hospital Road,
Dehiwala.

Arbitrator-Respondent

3. K.D. Manoj Priyantha,
Labour Commissioner (Industrial),
Department of Labour,
Labour Secretariat,
P.O. Box 575, Colombo 05.
4. Commissioner General of Labour,
Department of Labour,
Labour Secretariat,
P.O. Box 575, Colombo 05.
5. Minister of Labour,
Department of Labour,
Labour Secretariat,
P.O. Box 575, Colombo 05.
6. Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondents

Before: Arjuna Obeyesekere, J

Counsel: Kamran Aziz for the Petitioner

Susantha Balapatabendi, Senior Deputy Solicitor General for the 3rd -
6th Respondents

Written Submissions of the

Petitioner tendered on: 27th March 2018

Written Submissions of the 3rd – 6th

Respondents tendered on: 09th April 2018

Decided on: 01st November 2018

Arjuna Obeyesekere, J

Although this application had been filed on 12th August 2013, this Court was informed by the Petitioner on 9th September 2013 that it would support this application on a later date, if the necessity arises. An amended petition had thereafter been filed on 9th March 2015 and this application has proceeded on the said amended petition.

This Court observes that notice of the amended petition had been served by the Petitioner on the 1st and 2nd Respondents prior to this application being supported on 27th May 2015 and that this Court too had issued notices on the 1st and 2nd Respondents. However, the 1st and 2nd Respondents have not appeared before

this Court in response to the said notices and the matter had been fixed for argument in the absence of the 1st and 2nd Respondents.

When this matter was taken up for argument on 30th July 2018, the learned Counsel for the Petitioner and the learned Senior Deputy Solicitor General for the 3rd – 6th Respondents informed Court that written submissions have already been tendered and moved that this Court deliver judgment on the said written submissions.

The facts of this matter very briefly are as follows.

By a letter dated 4th April 2003, the Petitioner company had appointed the 1st Respondent as an 'Office Assistant' in the 1st Petitioner company with effect from 1st February 2003. The said letter of appointment, which had been produced at the inquiry held before the 2nd Respondent, marked 'R1', sets out in brief the terms and conditions of employment of the 1st Respondent. It is not in dispute that although the 1st Respondent was employed in the position of "Office Assistant", in reality the 1st Respondent functioned as the Chairman's cook and carried out his duties and functions from the Chairman's residence. In fact, the letter of appointment stipulated that the 1st Respondent was required to report directly to the Chairman of the Petitioner company as opposed to the office of the Petitioner. The evidence led at the inquiry before the 2nd Respondent clearly demonstrates that the 1st Respondent did not have any interaction with the office staff of the Petitioner with regard to his day to day functions.

In June 2007, there was a change in the post of Chairman of the Petitioner company, with the then Chairman resigning from the Petitioner company. It appears from the evidence led at the inquiry that the 1st Respondent was not aware of this change of circumstances and that he continued to work for the former Chairman at his residence. The Petitioner did not remit the salary of the 1st Respondent for the month of July 2007 to the bank account of the 1st Respondent, as was the practice, in view of the change of circumstances referred to above. As his salary had not been remitted, the 1st Respondent claims that he called over at the office of the Petitioner company in late July and early August 2007 only to be told that he would not be paid his salary and for him to tender his resignation, which the 1st Respondent claims he refused to do.

The first written communication sent by the Petitioner was the letter dated 15th October 2007¹, by which the Petitioner informed the 1st Respondent as follows:

“You have not reported for work on your own accord since 1st July 2007. You are therefore deemed to have vacated your post.”

Although the 1st Respondent had complained to the Department of Labour in October 2007, neither party has submitted any material to demonstrate the nature of the complaint. However, it appears from the reference to arbitration, annexed to the petition marked 'P1' that a dispute had been referred for arbitration on 29th August 2008 but had subsequently been cancelled.

¹ This letter has been produced at the Inquiry, marked 'R2'.

In September 2008, the 1st Respondent had once again called over at the office of the Petitioner and requested for his “B card” in order to claim his EPF and ETF benefits. It was the position of the 1st Respondent at the hearing before the 2nd Respondent that the “B card” was withheld by the Petitioner until he “voluntarily” tendered his resignation. The 1st Respondent had claimed that due to financial difficulties, he needed to obtain his superannuation benefits and therefore he had submitted a hand written letter of resignation dated 5th September 2008². It is noted that the resignation has been given with effect from 30th June 2007, which is the date from which the Petitioner refrained from paying the salary to the 1st Respondent. The Petitioner had immediately accepted the letter of resignation with effect from 30th June 2007, as evidenced by the letter dated 5th September 2008³ issued to the 1st Respondent.

As there was no resolution of the complaint of the 1st Respondent at the Department of Labour, the Minister of Labour Relations and Manpower, acting in terms of Section 4(1) of the Industrial Disputes Act, made a reference for arbitration by letter dated 19th November 2009. The accompanying “statement of dispute” by the Commissioner of Labour, dated 16th September 2009, issued in terms of Section 16 of the Industrial Disputes Act, reads as follows:

“Whether it is justified to consider Mr. S.D.S.A Raymond who was recruited to the post of Office Assistant with effect from 01st February 2003 by Asia Capital Limited as having vacated his post on his own from 01st July 2007 and if not justified, to what relief he is entitled.”

² This letter has been produced at the Inquiry, marked ‘R3’.

³ This letter has been produced at the Inquiry, marked ‘R4’.

The inquiry before the 2nd Respondent Arbitrator began on 11th January 2010. The Petitioner had led the evidence of its Senior Manager, Human Resources while the 1st Respondent had given evidence on his own behalf. On 13th August 2012, the 2nd Respondent Arbitrator delivered his award, annexed to the petition marked 'P2'. By the said award, the 2nd Respondent held that the 1st Respondent had not vacated his post and hence ordered that a sum of Rs. 615,000, being the salary payable to the 1st Respondent from 1st July 2007 to 31st December 2010⁴ be paid by the Petitioner to the 1st Respondent.

The said award had been published in Gazette No. 1778/44 dated 5th October 2012 as required by Section 18(1) of the Industrial Disputes Act. By letter dated 5th August 2013, annexed to the petition marked 'P7', the Petitioner had issued a notice of repudiation of the award, as provided for in Section 20(1) of the Industrial Disputes Act. The said notice had been published in Gazette No. 1827/11 dated 11th September 2013, annexed to the petition, marked 'P8'.

Being dissatisfied with the said award of the 2nd Respondent, the Petitioner had filed this application, seeking a Writ of Certiorari to quash the said award. The Petitioner's complaint to this Court is that the material presented at the inquiry before the 2nd Respondent does not support the finding reached by the 2nd Respondent that the 1st Respondent had not vacated his post and therefore that the 2nd Respondent has erred in fact and in law. The Petitioner has also submitted that in any event, the compensation awarded by the 2nd Respondent is excessive.

⁴ This is the date on which the 1st Respondent would have turned 65 years of age.

The first question that needs to be considered by this Court is whether the conclusion reached by the 2nd Respondent that the 1st Respondent has not vacated his post is correct. What constitutes vacation of post was considered by this Court in Nelson Silva vs. Sri Lanka State Engineering Corporation⁵ where it was held as follows:

“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.”

This Court also held that the physical absence and the mental element should co-exist for there to be a vacation of post.

The Supreme Court in Coats Thread Lanka (Pvt) Limited vs Samarasundera⁶ has held as follows:

“It has been held in several instances by this court, which now can be considered as trite law that for abandonment of the contract to be proved proof of physical absence as well as the mental element of intent needs to be established....

⁵ (1996) 2 Sri LR 342 at 343.

⁶ 2010 (2) Sri LR 1 at page 9

I am of the opinion that "absence" here is a reference to the lack of presence when such presence is deemed necessary in the ordinary course of employment. In other words, where the Respondent is required to be present at the work place at a reasonable hour of the day and he absents himself and such absence continues it can be safely assumed that the first ingredient had been met. The mental element or what is referred to as *animus non revertendi* is the intention to abandon the contract permanently."

The above cases have been cited with approval by this Court in Mahaweli Authority of Sri Lanka vs Leslie Arambawela and others⁷ and has been followed in several other cases, both by this Court and by the Supreme Court⁸.

This Court will now examine the facts of this application and consider if the 1st Respondent could be said to have vacated his employment. There are two matters that the attention of this Court is drawn to. The first is the personal nature of the job responsibilities entrusted to the 1st Respondent. It was the position of the Petitioner that the 1st Respondent did not function as an Office Assistant, but as a cook to the former Chairman. The second is that the letter of appointment required the 1st Respondent to report to the Chairman of the Petitioner. The 1st Respondent was not required to report for duty at the office premises of the Petitioner. Thus, the work place of the 1st Respondent was the

⁷ CA (Writ) Application No. 293/2012; CA Minutes of 30th April 2014, per Sisira De Abrew, J [P/CA, as he then was]

⁸ See the judgment of the Supreme Court in D.M.B. Warnakulasooriya vs. Hotel Developers (Lanka) Ltd [SC Appeal No. 101/2014; SC Minutes of 26th July 2018]

residence of the Chairman of the Petitioner and not the office premises of the Petitioner. It was in fact the position of the Petitioner that the 1st Respondent reported for duty at the residence of the Chairman and did not report for duty at the office of the Petitioner.

In the said factual background, once the former Chairman ceased to hold office, the Petitioner should have informed the 1st Respondent, in writing or at least verbally, to report for duty at the Office of the Petitioner or at the residence of the new Chairman. This does not appear to have been done, for when the witness for the Petitioner was specifically asked whether a single letter had been sent requesting the 1st Respondent to report for work, prior to the letter dated 15th October 2007 being sent, there was no answer. In fact, it was the position of the witness for the Petitioner that the 1st Respondent continued to work for the former Chairman at his residence and that the new Chairman had in fact met the 1st Respondent at the residence of the former Chairman. Even at that point, the Petitioner did not think it fit to inform the 1st Respondent that he should report for duty at the office of the Petitioner or at the residence of the new Chairman and not to continue to report at the residence of the former Chairman.

It was also in evidence that the 1st Respondent called over at the office of the Petitioner in July 2007 as well as thereafter and met senior officers of the Petitioner, only to be told that no salary will be paid and for the 1st Respondent to tender his resignation, which the 1st Respondent refused to do. It was only thereafter that the 1st Respondent had complained to the Department of Labour seeking payment of his salary and employment. This is a clear indication that the

1st Respondent had no intention to vacate his employment and that his absence from his employment was for reasons beyond his control.

The fact that the Petitioner had asked the 1st Respondent to tender his resignation as early as August 2007 is also an indication that even at that time, the Petitioner had not treated the 1st Respondent as having vacated his post. This is further evidenced by the fact that in September 2008, the Petitioner appears to have 'forced' the 1st Respondent to tender a letter of resignation, whereas there was no necessity to do so, if the 1st Respondent had in fact vacated his post from 30th June 2007.

This Court is of the view that the above events are sufficient to establish that the 1st Respondent did not have any intention to vacate his post and that his absence from his work place was as a result of the action of the Petitioner, over which the 1st Respondent had no control. This is the evidence that was available before the arbitrator and this Court is of the view that the conclusion of the arbitrator that the 1st Respondent had not vacated his post is a reasonable conclusion. Hence, this Court does not agree with the first submission of the Petitioner that the 2nd Respondent erred in fact and in law, when he arrived at the said conclusion.

The next question that needs to be considered by this Court is whether the decision of the arbitrator to award 41 months' salary as compensation to the 1st Respondent for his loss of employment is reasonable. The 1st Respondent was 57 years of age at the time he commenced his employment with the Petitioner in 2003. At the time the former Chairman left office in June 2007, the 1st

Respondent was over 61 years of age. Thus, while the letter of appointment did not specify an age of retirement, it is clear that the Petitioner was not insisting that the 1st Respondent retire at the age of 60 years, which the Petitioner states is the compulsory age of retirement for employees in the private sector. The 2nd Respondent has proceeded on the basis that the 1st Respondent could have served until the age of 65 years. This Court does not find any material to contradict this position, especially given the personal nature of the services provided by the 1st Respondent and does not find the said conclusion of the 2nd Respondent to be unreasonable. This Court must observe that although the 1st Respondent was drawing an all inclusive salary of Rs. 50,000 per month, the 2nd Respondent has only taken into consideration the basic salary that was paid to the 1st Respondent. Viewed from this point too, the quantum of compensation awarded by the 2nd Respondent is not excessive or unreasonable.

For the reasons set out in this judgment, this Court does not see any legal basis to issue the Writs of Certiorari prayed for. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal