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

Hayleys MGT Knitting Mills PLC.,
No. 400, Deans Road,
Colombo 10.
Petitioner

CASE NO: CA/WRIT/94/2012

Vs.

1. Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat,
   Colombo 5.
2. Assistant Commissioner of Labour
   District Labour Office–Kalutara,
   No. 131/1, Old Road,
   Kalutara South.
3. Bandula Weerasinghe,
   No. 19,
   D. W. Rupasinghe Mawatha,
   Nugegoda.

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Geoffrey Alagarathnam, P.C., with Suren Fernando and Fahla Fahuzuldeen for the Petitioner.
Nayomi Kahavita, S.C., for the 1st and 2nd Respondents.
Nihal Fernando, P.C., with Rohan Dunuwila for the 3rd Respondent.

Argued on: 21.01.2020

Decided on: 05.02.2020

Mahinda Samayawardhena, J.

The petitioner employer filed this application naming the Commissioner General of Labour and the employee as respondents, seeking (a) to quash by way of certiorari the decision of the Commissioner General of Labour contained in P10 whereby the petitioner was ordered to pay gratuity to the employee, and (b) to prohibit the Commissioner General of Labour by way of a writ of prohibition from implementing the decision.

The employee had served as joint Managing Director of the petitioner company. By P2 dated 20.01.2011 he complained to the Commissioner General of Labour that he had given resignation from employment on 08.11.2010, which was accepted by the petitioner, but his statutory dues including gratuity were not paid.

At the inquiry into this matter by the Commissioner General of Labour, the petitioner sought refuge under section 13 of the Payment of Gratuity Act, No. 12 of 1983, as amended, not to pay gratuity to the employee.

Section 13 of the Payment of Gratuity Act reads as follows:

> *Any workman, to whom a gratuity is payable under Part II of this Act and, whose services have been terminated for reasons of fraud, misappropriation of funds of the employer, willful damage to property of the employer, or causing the loss of goods, articles or property of the employer, shall forfeit such gratuity to the extent of the damage or loss caused by him.*

After an inquiry, the Commissioner General of Labour came to the decision in P10 on the basis that there had been no termination of services in terms of section 13 of the Payment of Gratuity Act for the employer to exercise the right of forfeiture. According to the Commissioner General of Labour, there had only been a resignation tendered by the employee by R1 dated 08.11.2010 (annexed to P7), which was accepted by the petitioner by R3 and R4 (annexed to P7) on the same date.

I might straightaway add that there is no express acceptance of the resignation by the employer, although one may argue that the contents of R3 and R4 suggest acceptance.

In my view, in the facts and circumstances of this case, the finding of the Commissioner General of Labour is unsustainable. Let me explain.

It is the position of the petitioner that on or about 01.11.2010 the petitioner commenced investigations into several irregularities and frauds committed against the petitioner company and, towards facilitating the investigations, on 07.11.2010 the employee was asked not to report to the factory but to the Head Office in Colombo with immediate effect. The employee then purported to resign from employment with effect from 07.11.2010 by letter dated 08.11.2010.

As seen from the inquiry notes marked R1 and tendered with the statement of objections of the Commissioner General of Labour, the employee admitted before the Commissioner General of Labour that he was asked on 07.11.2010 to report for duty to the Head Office, but he declined.

Whilst the inquiry was pending before the Commissioner General of Labour, a charge sheet had been served on the employee marked R11 dated 25.03.2011 (annexed to P7) seeking explanation in respect of losses caused to the petitioner company. This was replied by the employee by R13 dated 23.04.2011 (annexed to P7).

It is clear by R1 that the employee had obtained legal assistance at the inquiry before the Commissioner General of Labour. Then there is no doubt that the R13 reply has been written by the employee with legal advice.

In this reply, the employee admits the petitioner company has suffered losses, but says that he cannot take responsibility for the same. It appears his position is that it is a shared responsibility, not his sole responsibility. The disciplinary

matters raised with him by the employer on 07.11.2010 are, according to him, unsubstantiated and the way he was treated thereafter disgraceful. According to the employee, this caused him to tender his resignation.

Let me quote the following portion of the said reply marked R13 to understand the background to this dispute. This letter is addressed to the Chairman of the petitioner company.

> *Sarath Ganegoda [Group Finance Director] called me around 15th October 2010, and informed me that from 18th October 2010, physical stock taking of the inventory would be carried out by M/s SJMS Associates and to make arrangement accordingly. I requested time until 1st November 21 to make such arrangements and physical stock taking was commenced on 1st November 2010. During the period of 18th October 2010 to 1st November 21 the arrangements for same was done by the undersigned with the assistance of the respective managers at different locations of the warehouses and at the same time stock count of the finished goods too were taken. It was at this juncture that I was informed that there were certain discrepancies in the finished goods stock.*
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> *At the Company audit account committee meeting held on 2nd November 201, I took immediate steps to convey that based on unofficial physical stock taking carried out, there is a possible difference in finished goods and value of such difference could be as high a s US$ 1 Mn. On 4th November 201, the Company board meeting was held and again I*

conveyed the same information. On 7th November 2010, Sarath Ganegoda informed me that you wanted to see me at his residence for discussion on the same day at 2.30 pm. I would like to remind you of what transpired at the said Meeting as it appears that you for reasons best known to you seem to have conveniently forgotten the events of the said meeting. As you are well aware and you cannot be unaware that at this meeting you together with Sarath Ganegoda and Sunil Dissanayake (Head of Group HR) were present and you made various unsubstantiated malicious and false allegation inter alia, with regards to promotion of employees, not taking actions against those who were found pilfering fabric, selling 2nd quality fabric without calling tenders etc. In addition, you said that the Board is totally unhappy about my performance and the new CEO would be appointed so. You further directed that I report to Colombo office from the following day (8th November 2010) for which I disagreed with. As you will recall, I asked you whether all these allegations were leveled against me with the expectation of me to tender my resignation and you replied in the affirmative. As such, I justifiably presumed that the various false allegations were merely leveled against me as an act of coercion to tender my resignation.

The employee concludes R13 in the following manner.

I further state that the manner in which you conducted yourself at the meeting of 7th November 2010 as morefully set out above amounts to constructive termination of my services by you and in such circumstances, contractual

> *notice is not possible and thus question of payment in lieu of notice does not arise*. (emphasis added)

There is no dispute that in the eyes of the law, constructive termination of employment is a legally accepted way of terminating employment.

This is not a new phenomenon. In the instant case, constructive termination of employment, according to the employee himself, preceded resignation. In the Supreme Court case of *Walker and Sons & Company Ltd. v. Gurusinghe [2008] 1 Sri LR 37*, this happened *vice versa* in that constructive termination of employment followed resignation. In the *Walker and Sons* case, the employee was promoted with additional duties. Thereafter, the employee gave Notice of Resignation on the ground that he was unable to accede to the new terms due to a lack of infrastructure facilities to achieve targets given by the employer. Pending formal acceptance of resignation, the employee was demoted to his earlier position and called to give explanation for his non-participation at Management Meetings etc. Thereafter, the employee informed the employer in writing that the latter had terminated his services constructively and instituted proceedings in the Labour Tribunal seeking relief for the unjustified constructive termination of employment. The question to be decided was whether the employee had resigned from employment or whether his services had been constructively terminated by the employer. This question was significant to clothe the Labour Tribunal with jurisdiction to grant relief to the employee, in that, if it was the former, the employee was not entitled to relief as, in terms of section

31B(1)(a) of the Industrial Disputes Act, No. 43 of 1950, as amended, there shall be a termination of services by the employer to grant relief. The Labour Tribunal, the High Court and the Supreme Court held that there was constructive termination of employment after the tendering of the Notice of Resignation. Reliefs were accordingly granted to the employee.

I cannot accept the argument of learned President's Counsel for the employee and learned State Counsel for the Commissioner General of Labour that to put in motion section 13 of the Payment of Gratuity Act, termination of employment by the employer shall necessarily be in writing. Constructive termination of employment by the employer is a valid termination for this purpose.

If the services of the employee were constructively terminated by the employer, as alleged by the employee in the instant case, there is no necessity to thereafter tender resignation.

The letter of resignation R1 (annexed to P7) had been given on 08.11.2010. On the same day, by R3 (annexed to P7) the petitioner informed the employee *inter alia* that "*your letter of resignation is not consistent with the provisions of your letter of appointment, by which you have agreed to give us 3 months notice or 3 months salary in lieu of notice. We believe that, as you have not given us 3 months notice you will make arrangements to make payment of 3 months salary in lieu of notice to the Company*." This refers to clause 15 of the Letter of Appointment marked R2 (annexed to P7), which reads as follows:

TERMINATION OF EMPLOYMENT

Your employment may be terminated by either party with three months' notice or by the payment of three months' salary in lieu of notice. Provided that the Company may terminate your employment at any time without notice or payment in lieu of notice on the ground of misconduct, and/or negligence, and/or inefficiency, and/or breach of any express or implied term of your employment.

Admittedly, this has not been complied with by the employee. Hence there is no valid resignation for the petitioner to accept. It is in this context the employee in R13 states that, as his services were constructively terminated, "*contractual notice is not possible and thus question of payment in lieu of notice does not arise*."

For a better understanding of the position of the petitioner in respect of acceptance of the purported resignation, let me reproduce the contents of the letter marked R3, issued to the employee on the same date of his resignation, in its entirety. It reads as follows:

We refer to your letter of resignation dated 8th November 2010, by which you have informed the Company that you would resign with effect from 7th November 2010.

In this regard, we need to refer to the discussion the undersigned had with you along with Messrs Sarath Ganegoda and Sunil Dissanayake on 7th November 201, on the high probability of the existence of

discrepancies/irregularities with regard to stocks and other matters of serious concern in relation to Hayleys MGT Knitting Mills Ltd was brought to your notice. You were clearly told that, as Joint Managing Director of the Company, you were directly responsible for same. You were also required not to report to the factory until further notice, pending investigations.

On the following day, 8th November 20, we received your letter of resignation, in which you have informed us that you have already resigned from 7th November 2010. Firstly your letter of resignation is not consistent with the provisions of your letter of appointment, by which you have agreed to give us 3 months notice or 3 months salary in lieu of notice. We believe that, as you have not given us 3 months notice you will make arrangements to make payment of 3 months salary in lieu of notice to the Company. Quite apart from the above, your resignation from service has come in at a time when the Management had initiated an interim audit in order to reconcile the financial statements and stocks and receivables. Depending on the findings of this investigation, if not for your resignation, the Management may have issued you a show cause letter in respect of serious acts of misconduct, especially in relation to loss caused, if any.

By your resignation, however, you have pre-empted the Management from proceeding with such a course of action. Although it is your prerogative to resign from service and you have already done so, from the point of view of

Management it is important to ascertain the factual situation in relation to the Company which will only be revealed after a thorough investigation.

In the circumstances, we write to inform you that, notwithstanding the fact that you have resigned from service, we would expect you to respond to matters relating to the Company during your tenure of office, whenever required during the investigations. It would be imperative to do so especially to ascertain your entitlement for gratuity. We wish to place on record that, in terms of section 13 of the Gratuity Act, forfeiture of gratuity is possible in certain circumstances. Therefore, we would expect you to be available for inquiry, at any time of the investigation processes.

Quite apart from the above, we would also reserve the right to pursue any action against you in terms of law, if necessary.

The same was communicated by the petitioner to the Commissioner General of Labour by R9 dated 30.11.2010 (annexed to P7). This was prior to the employee's complaint to the Commissioner General of Labour by P2 of non-payment of gratuity.

As seen from R14-R18 (annexed to P7), being dissatisfied with the show cause explanation given by the employee by R13, the petitioner held a domestic inquiry into this matter. However, the employee refused to participate in the inquiry. It is significant that this domestic inquiry was held whilst the inquiry before the

Commissioner General of Labour had been pending. After the domestic inquiry, rightly or wrongly, the petitioner was informed by letter dated 23.12.2011 annexed to P8 that "*your termination is inter alia in the background where you were guilty of fraud and/or misappropriation of funds and/or causing of losses to the Company, in sums of over Rs.349,500,000/-. In these circumstances the gratuity to which you otherwise may have been entitled, is forfeited in terms of section 13 of the Payment of Gratuity Act.*" This was informed by P8 dated 27.12.2011 to the Commissioner General of Labour as well.

Learned State Counsel appearing for the Commissioner General of Labour concedes that in terms of section 31B(1)(c) of the Industrial Disputes Act, No. 43 of 1950, as amended, the jurisdiction to inquire into "*the question whether the forfeiture of a gratuity in terms of the Payment of Gratuity Act, No.12 of 1983, has been correctly made*" vests with the Labour Tribunal and not with the Commissioner General of Labour.

Once the employee accepts that his services were terminated by the employer, and the employer states that it was done in the circumstances contemplated in section 13 of the Payment of Gratuity Act and proceeds to forfeit gratuity to the extent of the damage or loss alleged to have been caused by the employee, the Commissioner General of Labour lacks jurisdiction to further look into the matter. The remedy of the employee, in such circumstances, lies with the Labour Tribunal and not with the Commissioner General of Labour.

In the result, I hold that the decision of the Commissioner General of Labour contained in P10 is a nullity, as it has been made without jurisdiction.

For the aforesaid reasons, I set aside the impugned decision of the Commissioner General of Labour contained in P10 and grant relief to the petitioner as prayed for in paragraphs (b) and (c) of the prayer to the petition. I make no order as to costs.

Judge of the Court of Appeal