NANDASENA
v.
UVA REGIONAL TRANSPORT BOARD

SUPREME COURT.
FERNANDO J.
GOONEWARDENA J. AND
WADUGODAPITIYA J.
S.C. APPEAL NO. 59/92.
C.A. NO. 385/86.
L.T. NO. R/22975.
DECEMBER 07, 1992.

Industrial Dispute – Transfer of employer – Constructive termination – Vacation of post.

The applicant-appellant was employed by the respondent Board as a bus conductor attached to the Embilipitiya Depot. On 3.4.1984 he was interdicted without pay on charges falling into two categories :

1. Assault and conspiracy to assault the Depot Manager on 26.3.1984.

2. Failing to reveal to the respondent the correct facts relating to the incident of 26.3.84.

After a domestic inquiry he was found not guilty of the first charge but guilty of the second charge of misleading the Board by concealing the truth and/or making a false statement relating to the incident of assault which took place on 26.3.1984. Consequently he was held to be not a fit and proper person to hold employment under the Board. On 26.12.84 the Personnel Manager informed the appellant of the result of the domestic inquiry and indicated that the punishments meted out were disentitlement to salary during the period of interdiction and a disciplinary transfer to a new station of which he will be informed subsequently. On 31.12.84 he was informed that his new station was the Ratnapura Depot with effect from 1.1.1985.

On 2.1.1985 the appellant wrote to the Personnel Manager asserting his innocence and that he was not at Embilipitiya on the day of the incident and stating that the unlawful deprivation of wages and transfer constituted a constructive termination of his services and he would be appealing against the order of 26.12.84. He asked for stay of the transfer pending the appeal. He called for a reply on or before 15.1.1985. On 11.1.85 the Personnel Manager replied that he had no power to stay the transfer citing the Board's rule 14 which provided that upon an appeal being made a punishment transfer would not be stayed. The appellant wrote again to the Personnel Manager on 21.1.1985 asking for a reconsideration and that pending the result of the appeal he be transferred to the Godawala Depot as this was within the limit of his free travel pass whereas Ratnapura was not and would involve him in additional expenses. The Personnel Manager did not reply.

On 8.2.1985 the Depot Manager Ratnapura issued a vacation of post notice giving seven days to explain his absence. On 10.2.85 the appellant replied he was awaiting the Personnel Manager's final decision. On 22.2.85 the Depot Manager Ratnapura informed the appellant that he was deemed to have vacated his post on 5.1.85 by failing to report for work on or after that date.

On 28.2.85 the appellant wrote to the Personnel Manager seeking a reinstatement and a posting to either Kahawatta or Godakawela pending the result of his appeal. On 1.4.85 the Personnel Manager replied rejecting the appeal and reiterating the position set out in the letter of 11.1.1985.

On 28.2.1985 the appellant made an application to the Labour Tribunal in respect of the termination of his services. The Board took up the position that the appellant had been transferred to Ratnapura as a punishment upon being found guilty of serious misconduct. The transfer order continued to be operative despite the appellant's appeal and upon his failing to report for work at the Ratnapura Depot he was properly deemed to have vacated his post.

The notes of inquiry of the domestic hearing were not produced before the Labour Tribunal and the application by the appellant to have them so produced was objected to by the respondent and disallowed by the Tribunal.

Held : (Fernando J. dissenting)

1. If the disciplinary transfer was an injustice and an unfair imposition of punishment, it would still be so whether the new station be Ratnapura or Godakawela suggested by the appellant. The imposition of the transfer and the forfeiture of salary by way of punishment, after an adverse finding at a domestic inquiry did not have the effect of a constructive termination of the contract of employment there being no other complaint of wrong doing by the respondent other than with regard to the infliction of this punishment.

If the appellant had made an application to the Labour Tribunal claiming that the punishment meted out to him after the domestic inquiry was in reality a constructive termination of services then he could have properly urged the Labour Tribunal to order the production of the notes of inquiry held by the domestic tribunal.

2. There is no material to say that the disciplinary order of transfer was unjustified or constituted arbitrary punishment.

3. Even assuming the transfer was invalid the employee must obey it. He could appeal against the order but he cannot refuse to carry it out. He must comply and complain.

4. The failure to report at the Ratnapura Depot was a deliberate and calculated act of disobedience and a virtual repudiation of his contract. The appellant of his own volition secured his own discharge from employment under the Board by vacating his post.

Per Gunawardene J.

" This Court is the last Court and the tribunal of ultimate jurisdiction in the judicial hierarchy. Its orders, rulings and judgments are immune from legal challenge and anyone dissatisfied therewith has no recourse to further legal remedies. A consciousness of this I think, must constantly be in the Court's mind, reminding it of the need for the exercise of self-discipline and self-restraint in its attempt to ensure that the influence of its actions is never other than for the public good."

Cases referred to :

1. *Ceylon Estate Employers Federation v. Manakulasooriya* S.C. 254/73 S.C. Minutes of 13.9.73.
2. *Re Duran* (No. 2) Judgment No. 392 of the Administrative Tribunal of the International Labour Organisation.
3. *Re Reynolds* Judgment No. 38 of the Administrative Tribunal of the International Labour Organisation.
4. *Ceylon Estate Staffs' Union v. Superintendent, Meddecombra Estate, Watagoda* (1970) 73 N.L.R. 278, 287, 288.
5. *Janatha Estates Development Board v. Kurukuladitta* (1990) 2 Sri L.R. 169.
6. *Hayleys Ltd. v. De Silva* (1963) 64 N.L.R. 130, 139.
7. *Lewis Brown & Co. Ltd. v. Periyapperuma* (1971) 76 N.L.R. 115.
8. *Colombo Apothecaries Co. Ltd. v. Ceylon Press Workers Union* (1972) 75 N.L.R. 182.
9. *Brooke Bond (Ceylon) Ltd. v. Tea, Rubber etc. Workers Union* (1976) 77 N.L.R. 6.
10. *Workman of Phillips (India) Ltd. v. Phillips (India) Limited* (1960) 2 Labour Law Journal pp. 135–6.
11. *Gulam Haqquani Khan v,. State of Uttar Pradesh* (1958) 2 Labour Law Journal p. 673, 676.

APPEAL from judgment of the Court of Appeal.

Percy Wickremasekera for applicant–appellant.

Ranjith de Silva for respondent Board.

Cur. adv. vult.

January 29, 1993.

FERNANDO, J.

The Applicant–Appellant was employed by the Respondent as a bus conductor from 1.8.75. While serving at the Embilipitiya Depot, he was interdicted without pay on 3.4.84 on several charges, falling into two categories : assault and conspiracy to assault the Depot Manager on 26.3.84, and failing " to reveal to the (Respondent) the correct facts relating to the incident of 26.3.84 " (" the second charge "). After the disciplinary inquiry, by letter dated 26.12.84, the Appellant was informed that he had been found guilty of the latter charge, for which two punishments would be imposed, namely the withholding of his salary for the period of interdiction and a transfer on disciplinary grounds ; by letter dated 31.12.84 he was informed that he was transferred to the Ratnapura Depot with effect from 1.1.85. On 2.1.85 the Appellant complained to the Assistant Commissioner of Labour that the denial of half-pay during interdiction, and the withholding of his salary by way of punishment, were wrongful. On the same day he wrote to the Personnel Manager, asserting that he had not been at Embilipitiya at the time of the incident and that therefore he was innocent of the second charge ; that he intended to file an appeal against the order of 26.12.84 ; that the denial of half-pay during interdiction and the punishments imposed were unlawful ; that a transfer pending appeal, after having being deprived of his salary for nine months, would be a grave injustice, for which there could be no redress even if his appeal succeeded ; and requesting a stay of the transfer pending appeal. The caption of that letter suggests that he was treating the order as a constructive termination. The Personnel Manager replied that he had no power to stay the transfer, citing the Board's disciplinary rule 14, which provided that upon an appeal being filed there would be an automatic stay of punishments other than, *inter alia,* punishment transfers. It is common ground that the Appellant filed an appeal on or about 22.1.85. Thereafter he again sought a stay of the transfer, suggesting that pending appeal he could

be transferred to Godakawela which would fall within the limit of his free travel pass (unlike Ratnapura), thus eliminating additional expense to him. Pending the outcome of this correspondence he did not report for duty at Ratnapura. On 8.2.85 the Depot Manager, Ratnapura, issued a vacation of post notice giving him seven days time to explain his absence ; the Appellant replied on 10.2.85 saying that he was awaiting the Personnel Manager's final decision. Before he received any further reply from the Personnel Manager, on 22.2.85 the Depot Manager, Ratnapura, informed him that he was deemed to have vacated his post on 5.1.85 by failing to report for work on and after that date. This was before the Appellant had received any communication regarding his appeal. On 28.2.85 the Appellant appealed against the vacation of post order, seeking reinstatement, again urging that, pending the determination of his first appeal, he be transferred to a station falling within the limit of his free travel pass. This appeal was refused on 1.4.85, without considering the correctness of the finding or the punishment in respect of the second charge.

On 28.2.85 the Appellant made an application to the Labour Tribunal in respect of the termination of his services. In the answer the Respondent sought to justify the termination on the basis that the Appellant had been transferred to Ratnapura as a punishment, upon being found guilty of serious misconduct ; that the transfer order continued to be operative notwithstanding appeal ; and that upon his failure to report for work at Ratnapura he had properly been deemed to have vacated his post.

At the inquiry the Appellant gave evidence to the effect that he had been away in Colombo, at the time of the incident of 26.3.84; not only was there no contradiction of this evidence but it was not even suggested in cross-examination that this was untrue, or that he had concealed matters within his knowledge. The only evidence led on behalf of the Respondent was in regard to his admitted failure to report at the Ratnapura Depot on and after 5.1.85.

The President of the Labour Tribunal did not consider the second charge levelled against the Appellant, or the validity and proportionality of the punishments imposed. She took the view that the admitted failure of the Appellant to report for work had not been explained in terms of the rules, by proof that the Appellant had been absent

for reasons of illness or other unavoidable cause or that he had been on leave ; and that the transfer had not been stayed by reason of the pending appeal. The application was dismissed. For the same reasons, the Court of Appeal dismissed his appeal stressing that " the facts leading to the disciplinary transfer was not the issue to be determined by the Tribunal."

Learned Counsel for the Appellant strenuously contests this position. The Appellant not only disputed the findings of guilt on the second charge, but considered the punishments imposed as being so wrongful, unreasonable and disproportionate as to amount to a constructive termination of his services ; the refusal to stay the punishment transfer pending the appeal was also unreasonable and unjust, particularly as the prejudice caused could not be remedied even if his appeal succeeded. Had he complied with the transfer order pending appeal, if the order in appeal proved to be adverse, he would then have been unable to canvass that order on the basis of a constructive termination. because he would then be deemed to have accepted and acquiesced therein.

The issue before the Labour Tribunal was whether there had been a termination of the Appellant's services by the Respondent, and if so whether that termination was justified. From the fact that an employer deems his employee to have vacated his post it does not conclusively follow that there has been a termination by the employee : that would depend on the circumstances. Accordingly, the issue before the Tribunal also involved the question whether the Appellant's failure to report for work amounted to a repudiation of the contract of employment ; or whether it was a transgression only justifying disciplinary action short of dismissal ; or whether it was a *bona fide* challenge to a disputed order ; or whether it was a justifiable or permissible response to a wrongful or unreasonable punishment. That question therefore could not have been answered without considering the basic issue, whether the Appellant was guilty of the second charge, and if so the consequential question whether the punishments imposed were proper, reasonable and proportionate.

In *Ceylon Estate Employers' Federation v. Manakulasooriya* [1], it was held that although under the contract of employment the Federation was entitled to transfer the workman, nevertheless in the circumstances the transfer was not justified ; that although the

workman should have, in the interests of the institution, proceeded to his new station, reported for work, and thereafter made his protest, nevertheless he had not vacated his post by his failure to proceed on transfer ; and that the workman was entitled to reinstatement, with some back wages, the Federation being given the option of paying compensation in lieu of reinstatement. This is a general principle which is internationally recognised. Thus C.F. Amerasinghe (Law of the International Civil Service, 1988, pp. 903–904) says :

> " a refusal to comply with a transfer order renders [an employee] subject to disciplinary measures entailing the institution of disciplinary proceedings..... The refusal of a transfer cannot normally be treated *per se* as a case of abandonment of post entailing automatic termination. It is also not a basis for summary dismissal for serious misconduct."

He cites *Re Duran (No. 2)* [2], Judgment No. 392, and *Re Reynolds* [3], Judgment No. 38, both judgments of the Administrative Tribunal of the International Labour Organisation. In *Re Duran* it was observed :

> " If one party to a contract fails or refuses to perform his duties under the contract in circumstances which show that he does not intend ever again to resume them, i.e. show in effect that he is abandoning his post, the other party is entitled to treat the contract as at an end ; he is not obliged to wait indefinitely in case the first party might change his mind. This is what abandonment means. It 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. Proof of intention is not always easy, and the object of Rule 980 is to allow the intention to be assumed from the fact of absence without reasonable explanation for fifteen days. The explanation has not got to be one that exonerates the staff member from breach of contract or from other disciplinary measures, but it has to be one which negatives 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 in the manner prescribed by the regulations, the complainant was affirming the contract, not abandoning it."

This principle has been consistently applied in Sri Lanka. In *Ceylon Estate Staffs' Union v. Superintendent, Meddecombra Estate* [4], a workman had refused to accept a transfer on the ground that it would amount to a demotion ; he was dismissed for failure to comply with the transfer order. Since there was no evidence that the workman was down-graded, and since his position remained unaffected by the transfer, Weeramantry, J., upheld the termination of his services. However, it is quite clear that if the transfer did involve a demotion, the termination would not have been upheld. Weeramantry, J., posed the questions for decision in this way ;

> " This appeal thus involves a consideration of two matters, namely whether the transfer was so prejudicial to the employee as to make the transfer wrongful, and secondly the propriety and legality of the order of termination of services made for defying a transfer order."

In the instant case, too, like questions arose for decision in appeal, both by the Court of Appeal and by this Court. Having referred to a judgment of the Indian Supreme Court, which recognized the right of industrial tribunals to interfere if a transfer order was made *mala fide* or for the ulterior purpose of punishing an employee for trade union activities, Weeramantry, J., held that the evidence placed before the Tribunal by the workman did not show that his emoluments would be affected to an exent rendering justifiable his refusal to accept a transfer. Here, however, the evidence before the Tribunal could lead only to one conclusion, that the disciplinary findings and order were unjustified. While it is true that Weeramantry, J., observed :

> " No doubt the employee was entitled to contest the right of the management to make this transfer and the employee was entitled to take the necessary steps towards bringing this dispute to adjudication in the manner provided by law. The employee was not entitled however to set the employer at defiance by flatly refusing to carry out orders ",

It is relevant that he nevertheless proceeded immediately to add :

> " There is of course no general principle that an employee is in all cases bound to accept such a transfer order under protest, for there may be cases where the *mala fides* prompting such an order is so self-evident or the circumstances of the transfer so humiliating that the employee may well refuse to act upon it even under protest. In the present case however I do not think the orders were of such a nature that it can fairly be said that the employee was entitled flatly to refuse to obey them even under protest."

In *Janatha Estates Development Board v. Kurukuladitta* [5] the workman was transferred as a punitive measure upon a finding of misconduct ; he denied the charge, and refused to comply with the transfer order, whereupon he was dismissed. The Labour Tribunal having considered the evidence, took the view that the allegations against him had not been proved in the Tribunal ; and therefore that the transfer order was unreasonable, that order was upheld on appeal. The only difference in that case is that the finding of misconduct was reached without an inquiry, whereas here the finding was after an inquiry, but an appeal was pending. What is material, however, is that in both cases the evidence before the Tribunal did not establish the charge. Thus it is settled law that in the ordinary exercise of the jurisdiction of the Labour Tribunal and of the appellate courts, questions undoubtedly arise as to whether the charge (in respect of which a punitive transfer has been ordered) has been established in the Tribunal, whether the transfer was wrongful or inappropriate, and whether termination was, in all the circumstances, an appropriate punishment for non-compliance. Neither in law nor in equity does the fact that an employer has a disciplinary rule purporting to make dismissal (even if termed vacation of post) mandatory for non-compliance with a transfer order compel those questions to be answered in favour of the employer, or in any way fetter the jurisdiction of the Labour Tribunal or the appellate courts.

It has been urged that any recognition of an employee's right to refrain from complying with a transfer order would result in serious abuse, in that there would be non-compliance with every transfer order. It is contended in reply that non-recognition of a limited right of *bona fide* challenge of an improper transfer order would enable

an employer to dismiss an employee for frivolous reasons, with impunity, by falsely finding him guilty of some trumped-up charge ; and then, without imposing the desired punishment of dismissal, to subject him to a vexatious punishment transfer. The employee will then be in a dilemma : if he proceeds on transfer, he thereby acquiesces and accepts his guilt ; if he does not, he will be deemed to have abandoned his post, and, on the Respondent's contention, upon an application to a Labour Tribunal, the Tribunal can only consider the question of vacation of post and is not empowered to inquire into the finding of guilt. There is considerable force in the Appellant's contention. It may well be that a vexatious punishment transfer amounts to a constructive termination, and that an employee may challenge such a termination in the Labour Tribunal ; and that compliance with such an order will not amount to acquiescence which bars his right to invoke the jurisdiction of the Tribunal. But that point has not been argued, and has to be decided another day.

The employer's argument based on the possibility of abuse cannot succeed. The recognition of a limited right, *bona fide* to challenge an improper transfer order cannot result in any injustice to the employer. If the employer treats the employee as having vacated post, and the Labour Tribunal holds that the employee was guilty of the charge, and that the transfer was an appropriate punishment, the vacation of post order will stand. If the Tribunal, however, finds that the employee was not guilty, there would be no injustice whatsoever in the consequential finding that the punishment transfer was unjustified, that the vacation of post order was unwarranted, and that reinstatement must be awarded. Indeed, it would be a travesty of justice, as in this case, for a Court to find that an employee's guilt has not been finally established either in the internal "due process" provided by the employer's rules and regulations, or by the procedures established by law, but that nevertheless the punishment was proper, and therefore that non-compliance with the punishment justifies termination. That would be to set aside the conviction, but allow the sentence to stand.

The contention on behalf of the employee has the advantage of consistency both with legal principle and equity. The employee who declines to comply with a transfer order runs a great risk. If a Tribunal holds that he was guilty of the charge against him, and that non-compliance with the transfer order was not *bona fide*, his

dismissal will stand. If, however, he is not found to be guilty, reason and justice require that the punishment be annulled.

The Tribunal and the Court of Appeal therefore erred in failing to address the basic issue of misconduct. At the commencement of the proceedings, the Appellant had moved for summons on the Respondent to produce the disciplinary inquiry notes and findings : the Respondent requested time and the matter was postponed for 21.1.86. On that day it was submitted on behalf of the Respondent that these documents were not being produced as they were irrelevant, because the Appellant had been dismissed not on the disciplinary findings, but for failing to report for work. It was further submitted that the Respondent could not be compelled to produce these documents because batta had not been deposited ; in answer to the Tribunal, it was indicated that even if batta was deposited, they would not be produced ; and also that the witnesses who gave evidence at the disciplinary inquiry would not be called to testify before the Tribunal.

Even if the Appellant was guilty of failing to reveal the correct facts in relation to the incident in connection with which he was facing charges, I am inclined to the view that the two punishments imposed were unreasonable and disproportionate to the offence. Learned counsel for the Respondent did not contend that the deprivation of half-pay during interdiction was proper. That apart, the deprivation of nine months salary was well as a punishment transfer is patently excessive. However, that question does not now arise for determination, for on the evidence before the Tribunal, only one finding was possible – that the Appellant was not guilty of the second charge – because there was no evidence, suggestion or submission to the contrary either before the Tribunal or on appeal. The Appellant's appeal does not appear to have been disposed of by the Respondent ; had that appeal succeeded, then necessarily the punishments imposed had to be set aside ; even if the appeal did not wholly succeed, it was nevertheless possible that the appellate body might have held that the transfer was an excessive punishment.

I do not need to consider whether the Respondent ought, notwithstanding the disciplinary rules (perhaps upon the application of section 31(B) 4 of the Industrial Disputes Act), to have stayed the transfer or to have transferred him to a place within the limits of his

free travel pass. On the facts as they now appear, the punishment transfer was unjustified ; the refusal to proceed on transfer was based both on a *bona fide* challenge of the transfer order as well as on circumstances which arguably supported a stay or a variation ; that refusal was therefore at most a technical breach not motivated by an intention to repudiate the contract, or to abandon his post, or defy the employer ; it did not warrant termination. The problem that now confronts the Respondent could have been avoided if the inquiry conducted by the Respondent in respect of the appeal against the vacation of post order had been consolidated with the appeal in respect of the disciplinary proceedings.

I have considered whether this matter should be remitted to the Tribunal for a further inquiry to enable the Respondent to lead evidence on the second charge. There are two reasons why this should not be done. The Respondent categorically refused to produce the witnesses and documents in relation to the second charge ; this is therefore not a case of an inadvertent omission to prove some incidental fact, but a deliberate refusal to produce the evidence relating to one of the main facts in issue. A party litigant in that position should not be given a second chance to rectify omissions or defects of his case. Although that is a sufficient reason in itself, here there has been a lapse of over seven years since the incident, and a further inquiry may well result in the lapse of another seven years before a final decision.

It is settled law that if, as in this case, a Labour Tribunal fails to consider and decide a relevant issue, or addresses the wrong question, there is an error of law which entitles the aggrieved party to redress from appellate courts in the exercise of their ordinary appellate jurisdiction (*Hayleys Ltd. v. de Silva*[6] ; *Lewis Brown & Co. Ltd. v. Periyapperuma* [7] ; *Colombo Apothecaries Co. Ltd. v. Ceylon Press Workers Union* [8] ; *Brooke Bond (Ceylon) Ltd. v. Tea, Rubber (etc.) Workers Union* [9] ; and it is that jurisdiction with which we are here concerned, and not with an attempt to invoke powers of review, such as Certiorari for error of law. Where the error of law is so fundamental, as in this case, the undoubted duty and responsibility of the appellate courts is, and their inveterate practice has been, to grant redress by ensuring a just and equitable order : not to decline jurisdiction. Section 31C of the Industrial Disputes Act does not authorise a Labour Tribunal to deny an aggrieved party his right to

an order which is just and equitable as between the parties, and within the framework of the law, on some uncertain and undefined assumption, of fluctuating content, as to public benefit and the like ; and if a Labour Tribunal makes an order which it is not empowered to make, it would be contrary to law (and hence to the public interest also) for the appellate courts to allow that order to stand.

I therefore set aside the judgements and orders of the Labour Tribunal and the Court of Appeal, and make order as follows :

1. The Appellant will be reinstated forthwith with full back wages (inclusive of increments and other salary increases) from the date of interdiction.

2. If the Respondent does not wish to continue the Appellant in employment for any reason, the Respondent shall have the option of paying compensation, in lieu of reinstatement, in a sum equivalent to three years salary, (computed on the basis of the salary he would presently be entitled to had he been reinstated). This payment shall be in addition to the back wages ordered under (1) above.

3. The Appellant will be entitled to a sum of Rs. 5,000 as costs in the Labour Tribunal, in the Court of Appeal, and in this Court.

S. B. GOONEWARDENE, J.

This is an appeal taken against a judgment of the Court of Appeal, which considered and dealt with an order made by the Labour Tribunal upon an invocation of the jurisdiction conferred upon it by section 31B (1) (a) of the Industrial Disputes Act.

To examine the questions that arise on such appeal, the following background material is relevant.

The appellant joined the Ceylon Transport Board as a conductor in 1975 and on the decentralisation of the Board in 1978, was assigned to the Uva Regional Transport Board, the respondent in this appeal. He was attached to the Embilipitiya depot in the same capacity as a conductor from the inception of such Regional Board

and, except for a brief period during 1982–83, continued to be attached to such depot.

Consequent upon an alleged incident of assault of the Depot Manager of the Embilipitiya Depot on 26.3.84, the appellant was interdicted from service on 3.4.84 and a charge sheet (A2) was served on him containing seven charges. The main charges related to an allegation of assault of such Depot Manager or of being concerned or connected therewith, although the appellant in his evidence before the Labour Tribunal had endeavoured to make out that such allegation related only to an attempt to assault.

After a domestic inquiry upon those charges, he was found not guilty of such main charge but guilty of two others, one of which (charge No. 5) was of misleading the Board by concealing the truth and/or making a false statement relating to such incident of assault and the other (charge No. 7), that in consequence, he was not a fit and proper person to hold employment under the Board.

The result of the inquiry was made known to the appellant by the Personnel Manager of the Board by a communication dated 26th December 1984 (A1), which indicated that the punishments meted out to him were that he was disentitled to his salary payable during the period of his interdiction and that he was being subjected to a disciplinary transfer to another place of work. He was called upon by such communication to report forthwith to the Depot Manager of the Embilipitiya Depot in order to resume work and notified that he would be informed of his new station subsequently. It was also indicated to him that if he was dissatisfied with the result of the inquiry, he was at liberty to make an appeal within one month. The appellant contended before the Labour Tribunal that he did file such an appeal and though that would appear to be the true position, a copy of such appeal was not made available to such Tribunal, nor indeed any material adduced to show whether the same had been disposed of and if so with what result.

By R7 dated 31.12. 84 the new station to which the appellant had been assigned to take up duties, namely the Ratnapura Depot, was made known to him, and by R7A of 10.1.85 while being notified that he had been released from Embilipitiya for this purpose, had

his attention drawn to the fact that up to that point of time he had failed to report to the Depot Manager of Embilipitiya as directed by notification A1.

On 2.1.1985 the appellant addressed a communication to the Personnel Manager (A5) under a heading indicating that the topic of such communication was that in connection with the incident of assault on the Depot Manager, Embilipitiya, by resorting to the unlawful deprivation of wages and transfer to another station, there was a constructive termination of his employment. In the body of such communication he had stated that he was intending to appeal against that order and requested that pending the appeal, the order of transfer to Ratnapura be cancelled, failing which, he had added that he would, on the basis of the unlawful acts committed up to that time, namely, the failure to stay the transfer and the deprivation of his salary, consider that there was a constructive termination of his employment and take action according to law. He had also called for a reply on or before 15.1.1985.

On 11.1.85 the Personnel Manager addressed a communication to the appellant (A6), stating that according to the policy of the Board, whenever an employee committed an act against its principal administrative officer in the depot, he had to be moved away forthwith from that depot. While stating that a very fair course had been adopted in holding such a disciplinary inquiry and in making the resulting order, the Depot Manager had stressed that he had no authority to cancel the disciplinary order of transfer already made, but that the appellant was free to appeal and thereby endeavour to obtain any measure of relief.

The appellant next addressed a communication dated 21.1.1985 to the Personnel Manager (A7), drawing attention to the contents of his earlier letter of 2.1.1985 (A5). Therein, he had stated that although upon an order in appeal, punishment could ordinarily be alleviated, there was no possible reversal of any punishment resulting in a transfer already given effect to and thus requested that pending the result of the appeal he be transferred to the Godakawela Depot, as this would enable him to utilise his free travel pass and thereby avoid extra expenditure.

On the appellant's failure to take up duty at Ratnapura, a telegram had been sent to him asking him to report for work immediately. His response, also by telegram (R1), was to the effect that he had sent a letter to the Personnel Manager and was awaiting a reply. On his failure to report for duty at the Ratnapura depot, the Depot Manager Ratnapura then sent to the appellant a letter dated 8.2.85 (A8) which stated that the reasons contained in the telegram were not acceptable and that the appellant had without giving notice, kept away and not reported or work. The appellant was called upon to tender an explanation within seven days and in doing so, to support his absence with a medical certificate, had he been ill. It contained a statement to the effect that if the appellant failed to furnish an acceptable explanation, he would be treated as having vacated his post with effect from 5.1.1985 and that action would be taken accordingly. In response, the appellant addressed a communication dated 10.2.85 to the Depot Manager, Ratnapura (A9), wherein he had stated that there had been an exchange of letters between himself and the Personnel Manager and that he was awaiting a final decision. He had added that in response to letter A6 sent to him by the Personnel Manager, he had replied by letter A7 and was awaiting a reply thereto, to advice himself as to what lawful action he should take.

Thereafter, the Depot Manager Ratnapura addressed a communication dated 22.2.1985 to the appellant under the heading, " Failure to report for work without giving notice " (A10), which contained a statement that there had not been an explanation as to why he had failed to report for work from 5.1.1985 without giving notice, and that accordingly he would be treated as having abandoned his employment under the Board with effect from that date. The appellant then addressed an appeal dated 28.2.85 to the Personnel Manager (A12), seeking a reinstatement and a posting to the depot either at Kahawatta or at Godakawela, pending the result of his earlier appeal. By A13 of 1.4.1985, the Personnel Manager replied to the appellant rejecting such appeal, stating that since he himself had abandoned his post the Board could not accept any responsibility in that regard, that the reasons adduced for not reporting for work were insufficient and that despite the true position having been made clear to the appellant by his letter dated 11.1.85 (A6), he, the appellant, upon his own interpretation of matters had elected not to report for work, that the appellant's absence was due, not to unavoidable or acceptable causes and that he was therefore treated as having vacated his post.

Apart from noting these factual matters which advisedly have been set out somewhat in detail, it is important also to note that the conditions of service to which the appellant was subject, made applicable the Board's disciplinary rules (R6), in terms of which there could be no stay of a disciplinary transfer pending the result of an appeal to the domestic appellate body, for which there was provision in the rules. It is likewise necessary to note that the rules pertaining to leave (R8), also contained a provision that if an employee kept away from work without informing the Board for a period of three consecutive days, a notice to him in terms similar to those contained in the notice A8 sent to the Appellant, had to be sent and that he should be treated as having vacated his post.

The appellant subsequently went before the Labour Tribunal alleging that before a definite decision had been made by the Personnel Manager, the Depot Manager of the Ratnapura Depot had notified him that he had failed to report for duty without giving notice and that he was treated as having vacated his post. Upon a claim that by punishing him and denying him his salary for the period of his interdiction and subsequently treating him as having vacated his post there was an unlawful termination of his employment, he sought relief by way of reinstatement and back wages.

At the inquiry before such Tribunal an endeavour had been made on behalf of the appellant, to have brought before it, the notes relating to the disciplinary inquiry earlier held against him, but this had been resisted by the respondent Board upon an assertion that his services were not terminated as a consequence of the findings made or punishment imposed after such disciplinary inquiry, but that the appellant was deemed to have vacated his employment since he had not reported for duty as he had to do, when he was transferred to another depot. The President of the Labour Tribunal for her part, considered that the failure of the appellant to report for duty in the expectation of a reply, despite an earlier communication by the Personnel Manager that he was unable to cancel the disciplinary transfer, was without justification. The President was of the view that the document A5 written by the appellant to the Personnel Manager itself showed that the appellant was aware that despite an appeal, his transfer was to take effect. On the basis that the appellant had not obtained leave during the period of his absence and that in terms of the disciplinary rules the reason adduced by him for not reporting

for work was not acceptable, the President concluded that the appellant himself had vacated his post, and accordingly dismissed his application.

The appellant's subsequent appeal to the Court of Appeal produced the same result, that court concluding that the facts leading to the disciplinary transfer had no bearing on the issue to be decided by the Labour Tribunal, that the appellant who was in a transferable service failed to report for work without obtaining leave and that therefore the conclusion reached by the Labour Tribunal was a correct one.

Dissatisfied with that result, the appellant has once again taken this appeal and has placed in the forefront of his case the contention that the Labour Tribunal failed to have before it the notes relating to the disciplinary inquiry held against him and therefore failed to make all such inquiries and hear all such evidence, as is required by the Industrial Disputes Act. The appellant has also contended that the Court of Appeal failed to determine the question as to whether an employee is bound to accept an unjust, punitive transfer and/or whether an employer could treat an employee who refuses to accept an unreasonable punitive transfer as having vacated his employment. It was submitted for the appellant in argument ; firstly with respect to the disciplinary transfer that it was not possible for him to have complied and thereafter complained, for the reason that if he succeeded on his appeal to the domestic appellate body there could not have been restitution as regards the period already served upon such punitive transfer ; and secondly, in effect that, as the only way in which he could have invoked the jurisdiction of the Labour Tribunal was on the footing of an actual termination of his employment, he had, so to say, to bring about that result, a position I find difficult to reconcile with the appellant's own claim I referred to earlier, that the very infliction of punishment upon him, he considered a constructive termination of his employment. It would suffice to say at this point that if his employment had been constructively terminated earlier, there should have been no need for him to have thereafter brought matters to a head by failing to report for work and thus exposing himself to the possibility of his own discharge from employment, as in the event happened.

If I understood Counsel for the appellant correctly, the effect of what he said was that if the appellant acted upon his transfer, he would have continued in his employment and he could then not have invoked the jurisdiction of the Labour Tribunal so as to enable him to challenge before such Tribunal the findings made and the punishment imposed after such domestic inquiry, and therefore if he did not adopt this course of action which as it happened produced the result of his losing his employment, the appellant would have found himself serving at Ratnapura upon his punishment transfer. That may have been an ingenious way of trying to achieve a particular result, but I am not altogether satisfied that it was something done with due regard to the demands of propriety, as could be used to lead to the ultimate success of the appellant's endeavours in this regard. The course adopted, to my mind, savours of an attempted contrivance to confer a jurisdiction upon the Labour Tribunal that the legislature did not intend it should have, a manipulation of events in order to try to do indirectly, that which could not have been done directly.

Be that as it may, I will now proceed to consider the case put forward by the appellant on a twofold basis. The first is as to whether the imposition of this punishment transfer to Ratnapura as a consequence of having been found guilty by the domestic inquiring body after an inquiry at which an opportunity of presenting his case was available and which he availed of (there being no complaint in that regard), could reasonably have been considered by the appellant as a constructive termination of his employment. We are here dealing with a situation where there was an express right available to the employer, the Board, as a matter of contract between the parties, to transfer the appellant out of the Embilipitiya Depot or any other, from time to time. Under what circumstances then might it have been possible for the appellant to have reasonably considered that there had been a constructive termination of his employment, having regard to the fact that he was sought to be subjected to this single and solitary instance of transfer, though no doubt by way of punishment, after a disciplinary inquiry had been held. Usefully one might consider here a view expressed by S. R. de Silva in his Monograph No. 4 " The Contract of Employment " at page 162 thus :

" But perhaps the conduct on the part of an employer which would amount to a constructive dismissal would have to amount to at least a breach of an implied obligation fundamental to the employment relationship. For instance, repeated transfers of an employee from one geographical locality to another in circumstances which make it impossible for the employee to comply would, even where an express right of transfer exists, amount to a *mala fide* exercise of that power, thus amounting to a constructive dismissal of the employee "

While not finding anything indicating a breach by the employer of an implied obligation fundamental to the employment relationship, I do not find anything suggesting the existence of a *mala fide* exercise of a power of transfer either, or indeed even an allegation to that effect. On the other hand, I find it difficult to reconcile the existence even of a state of affairs suggesting something much less, such as perhaps would point to some impropriety on the part of the respondent Board, with the readiness expressed by the appellant to take up duties at a station of his choice at another depot. If the appellant was truly affronted by what he felt was an injustice done to him by unfairly imposing a punishment by way of a disciplinary transfer, that should have been so, whether the new station was Ratnapura he was ordered to report at, or Godakawela the station he suggested instead. This, to my mind, alters the basis of his true grievance from the claimed one of unfair treatment meted out to him by the very act of transfer, to the actual one of unwillingness to undergo the inconvenience and expenditure involved in a transfer to a station not of his choice. On an objective evaluation of the appellant's case, I do not consider that the imposition of this transfer and the forfeiture of his salary by way of punishment, after an adverse finding at a domestic disciplinary inquiry, had the effect of a constructive termination of his contract of employment as claimed, there being no other complaint of wrongdoing by the respondent Board other than with regard to the infliction of this punishment.

On the second basis, I will examine the appellan's position on a subjective footing, as perhaps in the manner suggested in his correspondence with the Board, that he honestly considered himself entitled to treat the punishment transfer made as amounting to a constructive termination of his employment. What then could he have done upon his conclusion to that effect, after receiving his orders

to proceed to Ratnapura followed by the refusal to vary such order, despite his threat that such refusal would result in his taking appropriate action on the basis that such unlawful transfer was a constructive termination of his employment? Before proceeding to answer that question, it will be useful to reproduce the following passages from S. R. de Silva's Monograph " The Contract of Employment " (ibid) at pages 157 and 158 thus :–

> " However, it is essential to bear in mind that in law a termination by the employer or by the employee can arise in consequence of the conduct of the employer or the employee as the case may be. In other words, either party may, in a given situation, though not expressly terminating the contract of employment, by his conduct in relation to the other party, be guilty of what is generally described as a constructive termination.
>
> Where the conduct of one party amounts to a constructive termination, then the law deems the contract in question to have terminated as a result of the action of the party who has so misconducted himself. Therefore, if the employer has conducted himself in relation to the employee in such a way as to amount to a constructive termination of the contract, then the termination of the contract, will be deemed to be by the employer and such termination attracts the consequences of an express termination by the employer. eg. the employee can have recourse to the Labour Tribunal on the basis that the employer has terminated his services."

The answer then to the question I have posed is, to say that in accordance with what he threatened to do, no sooner he learnt of the respondent Board's position that the order of transfer was to remain unaltered, independent of his appeal made to the domestic appellate body, the appellant could have made an application to the Labour Tribunal claiming that the punishment meted out to him after the domestic inquiry was in reality a constructive termination of his services and on that basis, and not on the basis he did, sought appropriate relief. Had he taken that step in that way, then, and only then, in my view, may it have been possible to have properly urged the Labour Tribunal to secure the production before it of the disciplinary inquiry notes, as the very foundation of such application would then have been a challenge to the legality of that order of

punishment made consequent to such disciplinary inquiry, that it amounted in reality to a constructive termination of his employment, thus rendering an examination of such notes by such Tribunal, an act that it could not have refrained from undertaking, in the proper discharge of its duty upon such application.

Instead, what course did the appellant choose to adopt? He opted to act in the manner he did of not reporting for work at his new station, giving as his excuse that he was awaiting a final decision from the Personnel Manager, when in fact such decision had already been made known to him by the latter, by his communication of 11.1.85 (A6), wherein he had clearly pointed out that he lacked the authority to cancel a disciplinary order or transfer. I therefore cannot take the view that the respondent Board was remiss in any regard, in contending, at the stage it did, which was in proceedings initiated after it was compelled to discharge him from employment for absenting himself without excuse, that the notes relating to the disciplinary inquiry had no relevance to the issue before the Labour Tribunal.

I will now proceed to consider the submission made for the appellant that it was not competent for the Board to discharge him from employment on his failure to report for work as ordered, at Ratnapura. Two cases were relied on as being favourable to him, which it was claimed the Court of Appeal failed to take into account, the first of them was the unreported case of the *Ceylon Estate Employers Federation v. Manukulasuriya and others* [1]. That case was decided on the basis of a finding by the President of the Labour Tribunal in proceedings by way of reference by the Minister of Labour for settlement by arbitration, that the available material clearly demonstrated that the order of transfer there was unjustified and consequently it was held that one who refused to accept such a transfer had not repudiated his employment. The other case was that of the *J. E. D. B. v. Kurukuladitta* [5], where the Court of Appeal held that an employee was not bound to comply with an arbitrary, punitive transfer and that a termination of service in such a situation was not justified. In the instant case, there is no material upon which to say that the disciplinary order of transfer was unjustified or constituted arbitrary punishment.

The views reflected in the following passages from the judgment of Weeramantry J. in the case of *Ceylon Estates Staffs' Union v. Superintendent Meddecombra Estate, Watagoda* [4], commend themselves to me as being of much relevance and importance in deciding the present case.

" No doubt the employee was entitled to contest the right of the management to make this transfer and the employee was entitled to take the necessary steps towards bringing this dispute to adjudication in the manner provided by law. The employee was not entitled however to set the employer at defiance by flatly refusing to carry out orders.

.....One can well visualise the enormous practical difficulties and the indiscipline that would result from the view that pending any dispute as to transfer, the employee can refuse to act in the position to which he has been transferred."

I have not been referred to any dicta or judgments of this Court relating to the result of the disobedience to a transfer order. There would appear however to be Indian authority to the effect that disobedience to a transfer order can amount to misconduct justifying termination. In *Workman of Phillips (India) Ltd. v. Phillips (India) Limited* [10] where a workman refused to accept a transfer order it was held by the Labour Court of Madras that it could not be contended that the order of termination for disobeying the order of transfer was bad and inoperative on the ground that it was passed without holding any domestic inquiry after the receipt of the explanation from the employee concerned. In cases where it is not the employee's position that there was no such refusal on his part, but he only challenges the legality of the order of transfer which he has admittedly disobeyed, it was held to be unnecessary to hold a further inquiry on this matter. By way of analogy with the public service, reference may also be made to *Gulam Haqquani Khan v. State of Uttar Pradesh* [11], where it was held (ibid At p. 676) regarding a public officer, that " even assuming that the transfer was invalid the petitioner was bound to have obeyed it. He could have filed an appeal or representation but he could not have refused to carry it out ".

The same approach of complying and then complaining did indeed commend itself to Wijayatilleke J. as being the prudent course to adopt, in the case of the *Ceylon Estate Employer's Federation v. Manukulasooriya and others* (supra).

The response of the Personnel Manager to the appellant's request made to him in that regard by A5, was to inform the latter by A6, that he had no authority to interfere with the disciplinary transfer. Nonetheless the appellant by A7 made another request to the same Personnel Manager on similar lines, but could hardly have reasonably expected a different response, having regard to the contents of A6 which reflected the Personnel Manager's position that he had no such authority, a position consistent with the Board's disciplinary rules. It is not possible to say therefore that it was incumbent upon the Personnel Manager to have replied to A7, to repeat once again the same thing, that he had no such authority. Indeed there can scarcely be any other reasonable conclusion here except that the appellant's endeavour was not so much an attempt at obtaining genuine relief in this regard, but rather that it was a thought out move to protract and prolong matters and thereby strive to secure a result he desired. It seems to me therefore that the failure to report at the Ratnapura Depot, giving as his ostensible reason that he was awaiting a reply to A7 from the Depot Manager, was a deliberate and calculated act of disobedience amounting to a refusal to take up duty in that station, although not expressly stated in those terms and perhaps disguised to look different. Even if one is therefore to take the view that the respondent Board terminated the appellant's contract of employment, I think there was ample justification for taking that action, having regard to the appellant's conduct in doing what he did, which in my view amounted to a wilful defiance of the authority of the respondent Board and in the light of the provisions governing his employment, a virtual repudiation of his contract.

I however incline to the view, one which learned Counsel for the respondent strenuously contended for, that rather than the respondent Board terminating his employment under it, the appellant of his own volition secured his own discharge from employment under the Board by vacating his post, which according to the disciplinary rules binding on him had to be the result of his being absent from work without having obtained leave and failing to show justification for such absence. There is no doubt in my mind that the appellant conducted himself

in a way which resulted in his discharge from employment, forcing upon the Board a step he compelled it to take, leaving it no other choice. I cannot agree that he could have been permitted the liberty of considering himself the arbiter of whether what was inflicted upon him by way of punishment was unjust or unlawful, so as to have entitled him in the circumstances of this case to force the Board to do what it did, which was to treat him as having vacated his post and discharge him from employment, and thereupon to make application to have himself reinstated by the Labour Tribunal which if successful would have carried with it the effect also of nullifying the punishment imposed after the adverse findings against him at the disciplinary inquiry. I do not think, having regard to the entire sequence of events, that it was any act for which the Board could be held responsible which resulted in the appellant losing his employment so that there would have been justification for ordering his reinstatement.

The Court of Appeal in dealing with the appellant's appeal to it, was exercising an appellate power given to it by law. It was not exercising a supervisory power and therefore by extension, this Court upon this appeal is not exercising any supervisory power either. The Court of Appeal was therefore not called upon, and by the same token this Court is not called upon, to decide upon the legality or reasonableness of the Board's rules relating to discipline and leave. I am not therefore prepared, sitting on this appeal, as I might perhaps have been, *if called upon to do in the exercise of a jurisdiction* involving public law remedies, to examine these rules by reference to which the Personnel Manager guided himself in refusing to stay a disciplinary transfer pending an appeal to the domestic appellate body, and pronounce upon them by way of review as to their reasonableness or legality, so as to say or imply that such Personnel Manager or any other functionary of the Board should have acted differently, and it follows that I am not prepared to think that these rules should have been changed, modified or disregarded in order to accommodate the demands of the appellant. Lest there be a likelihood of undesirable repercussions and consequences exercising influence beyond the area of the questions involved in the present appeal, I am not prepared to hold that the Personnel Manager, himself acting in disregard of the rules framed by the Board as binding on its employees and embodied as a condition of service in the appellant's contract of employment, could have felt free to stay the

transfer of the appellant pending a decision on his appeal to the domestic appellate body. This Court is the last Court and the tribunal of ultimate jurisdiction in the judicial hiararchy. Its orders rulings and judgments are immune from legal challenge and anyone dissatisfied therewith has no recourse to further legal remedies. A consciousness of this I think must constantly be in the Court's mind, reminding it of the need for the exercise of selfdiscipline and self-restraint in its attempt to ensure that the influence of its actions is never other than for the public good.

To hold, as is what he asks the Court to do, that the appellant must be reinstated would virtually amount to all or any of the following : to saying without there being, for whatever reason, any material upon which to do so, that the decision of the domestic tribunal that the appellant was guilty was wrong ; to saying alternatively, if the findings against him after the disciplinary inquiry were justified, that the punishment consequently imposed upon the appellant, was harsh, excessive or without justification ; to act on this appeal as if it was, or has contained within it, the appeal to the domestic appellate body and in effect deciding such appeal in the appellant's favour ; to saying that notwithstanding the rules that should be considered he was bound by, the appellant was relieved of the duty to report forthwith to the Depot Manager of the Embilipitiya depot after his period of interdiction as he was called upon to do by document A1 ; to saying likewise that the appellant had a right both to persist in not wanting to take up his employment in the Ratnapura depot, albeit as a result of a disciplinary transfer, and to keep away without leave, when in fact the appellant was in transferable employment and otherwise liable to be transferred to the Ratnapura depot or elsewhere and thus to say in effect that the Board rules did not apply to him or alternatively that the Board had to act as though they did not so apply ; to saying that the appellant was at liberty to nominate other stations of transfer of his choice other than Ratnapura in the event that the disciplinary transfer was being given effect to ; to saying that the appellant was entitled to even disregard communications which had the effect of pointing out to him the consequences of his refusal to report for work as directed and to saying that he had the licence even in his application for reinstatement made to the Board, to nominate stations other than Ratnapura as stations of transfer. Indeed if the appellant was to be reinstated by an order of this Court, it would not surprise me to think that he would

want that to be done, so as to enable him to work at the Embilipitiya Depot and if not there, at a station of his choice.

For myself, I am not prepared to go along with an order that would have the effect of bringing about any such result and therefore expressing agreement with the concurrent findings of the Labour Tribunal and the Court of Appeal that the answer to the only material issue was that the appellant by his own conduct vacated his post and lost his employment, I would dismiss this appeal although without costs.

WADUGODAPITIYA, J.

I have had the advantage of reading the judgment of my brother, S. B. Goonewardene, J; with which Judgment I agree.

I make order that this appeal be dismissed without costs.

Appeal dismissed.