HASSAN
v.
FAIRLINE GARMENTS INTERNATIONAL LTD. AND OTHERS

SUPREME COURT
S.C. APPEAL No. 50/88,
C.A. APPLICATION No. 1064/87,
T.E.U./C/56/85,
ATUKORALE, J., H.A.G. DE SILVA, J., AND BANDARANAYAKE, J.
MAY 12TH, 25TH AND 26TH AND JUNE 06TH, 1989.

Industrial dispute – Termination of employment – Transfer of the worker to a different establishment without consent – Is such right implicit in every contract of service in the absence of contractual provisions or statutory provisions to the contrary? – Assignment of new functions to the workman – Did the contract of employment permit it? – In any event does the transfer in law amount to a termination? – Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 as amended by Law No. 04 of 1976.

The appellant workman had been appointed as the purchasing officer of the respondent company. When he had functioned in that capacity for several years he was informed by the respondents that he would no longer be required to do purchasing as that function was being delegated to a subsidiary company and he was asked to conclude the existing purchasing assignments. Thereafter the appellant was informed that he had been transferred to Jetro, a subsidiary company of the respondent company, and asked to commence the new assignments there which were different from purchasing. Having refused to discharge those functions the appellant complained to the Commissioner of Labour that the respondents have stopped his work without his or the Commissioner's written consent and asked the Commissioner to restore him in the capacity of purchasing officer as per his letter of appointment which however included a clause inter alia that the appellant should carry out all duties entrusted to him by the respondent company.

Held –

(1) A workman has an inalienable right to choose for himself the employer he will serve. Once the contractual relationship between himself and his employer is established, the employer cannot transfer his services to another without his (the employee's) consent or against his will.

(2) It is reasonable to infer that the appellent's appointment was to a specific post, namely that of purchasing officer, which doubtless would have required skill and experience of some sort. The clause that the appellant should carry out all duties entrusted to him by the respondent company in the context must be construed to mean duties within the ambit of a purchasing officer. It cannot possibly be taken to embrace every kind of duty which the company may decide to assign to him.

(3) The proposition that the employer enjoys an implied right, in the absence of contractual provisions or other rules to the contrary to transfer a workman from one establishment to another at a different place within the service of the employer has no application to the present case as here the appellant was transferred to another place of work not within but outside the repondent's service

and in the service of another and altogether different company, namely, 'Jetro.'

(4) The whole purpose of the Termination of Employment (Special Provisions) Act is to ensure that the workman continues in employment in the same capacity in which he was employed by his employer.

Per Atukorale, J. – "The decision in *Ceylon Estates Staff's Union* Vs. *The Superintendant, Meddecombra Estate* (1) and several other decisions from Ceylon, Indian and English Common Law jurisdiction, referred to by Weeramantry, J. in his judgment relates to instances where the workman had been transferred from one division of an estate or from one department of a company or from one establishment of a business concern to another division, department or establishment at a different place within the service of the same employer or management".

Cases referred to:

(1) *Ceylon Estate Staff's Union V The Superintendent, Meddecombra Estate* 73 NLR 278

(2) *Nokes V Doncaster Amalgamated Collieries Ltd.* (1940) A.C. 1014

(3) *Kundan Sugar Mills V Ziyauddin* and *Others A.I.R.* 1960 S.C. 650

APPEAL from Judgment of the Court of Appeal

Dr. H.W. Jayewardene, Q.C. with *Ifthikar Hassim, Harsha Amerasekera, Harsha Cabraal* and *R.L. Jayasuriya* for appellant.

Faiz Mustapha, P.C. with *Shirley Fernando, Rauff Hakim, M.S.M. Suhaid, Nigel Hatch* and *Hemasiri Witanachchi* for 1st respondent.

Cur. adv. vult.

August 21, 1989.

ATUKORALE, J.

This is an appeal, with leave of the Court of Appeal, from its judgment quashing by way of a writ of certiorari the order (P5) of the Commissioner of Labour made under s.6 of the Termination of Employment of Workmen (Special Provisions) Act, No.45 of 1971, as amended by Law No.4 of 1976, directing the 1st respondent Company, the employer, (hereinafter referred to as the Company) to re-instate the appellant, the workman, in the post of Purchasing Officer and to pay him his wages for the period of his non-employment. The Company – Fairline Garments (International) Ltd. – is a limited liability company incorporated under the provisions of the Companies Ordinance and carrying on the business of the manufacture of garments. The letter of appointment dated 3.9.1982 issued by the Company to the appellant, in so far as is relevant for our purposes, reads as follows:

Dear Sir,

Appointment as Purchasing Officer

We have the pleasure to appoint you as the Purchasing Officer of our Company subject to the following terms and conditions:

1) Your appointment shall be with effect from 14th September 1982.

2) Your appointment is subject to a period of probation of three months and in the event of your voluntary termination of services during this period you are required to give one month's notice in writing to the management.

3) You will be placed on an initial salary scale of Rupees two thousand (Rs.2,000/-) per mensem ....

4) You will faithfully observe and honestly carry out all duties entrusted to you .... and shall further refrain from divulging to any third party or otherwise any and all information of a confidential nature concerning this Company that you may acquire in the course of the performance of your duties.

5) .....

6) .....

7) .....

8) .....

9) .....

10) .....

We wish you every success and hope you will have a long and happy career with us."

It is signed by a Director on behalf of the Company. It also contained certain conditions in regard to the termination of the appellant's services, after confirmation, by either party upon notice or by the Company without notice. The appellant accepted this appointment and was, after the expiration of the probationary period, confirmed in and functioned as the Purchasing Officer of the Company until the present dispute arose about three years later.

In or about August 1985 the Company decided to set up a subsidiary company – Fairline Crescent – located at Pettah (where most of the purchasing work had to be done) to handle its overall purchasing functions. On 7th August 1985 the Company, through its

General Manager (Lovell), addressed the following memorandum (A5) to the appellant:

"It has been agreed with the Chairman that you will no longer be required to attend to purchasing mainly because this function is being delegated to Fairline Crescent in Pettah.

From today you will only conclude the current assignments you are carrying out and thereafter report to me from this office for further instructions."

On 12th August the appellant was informed by Lovell to report to Faleel or Sarath at Jetro Textile Mills (Pvt.) Ltd. (hereinafter referred to as Jetro) at Katubedda. The appellant accordingly reported to Sarath, the Factory Manager of Jetro, who gave him the note A6 stating that he had no specific instructions regarding his problem and requesting him to report for instructions the following morning by which time he would have things clarified. Accordingly on the 13th August the appellant reported for instructions. Sarath asked him to await Faleel's arrival. Faleel was a Director of Jetro. Faleel did not turn up that day and the appellant left at closing time without doing any work. On the next day (14th August) the appellant again reported for instructions and met Faleel who arrived at about 4.45 p.m. Faleel asked him to supervise some carpenters and welders working on the 2nd floor but the appellant protested that he could not do that type of work. Faleel then requested him to collect a letter that was in the car in regard to his functions. He collected this letter (A7) and left at about 5 p.m. It read:

August 13, 1985

To: Mr. Kamil Hassan Re-location.
From: The Group Manager

I confirm the note given to you on 12th morning, that you are transferred with immediate effect to Jetro Textile Mills (Pvt) Ltd., where you have been asked to report to Mr. Faleel for further instructions regarding your full functions.

It is the Chairman's wish that you handle matters related to Grey Stores, Finished Products, bonding etc. No doubt Mr. Faleel will give more details including the programme to complete separate facilities for storing and bonding before 30th August.

The vehicle you are now using should be taken with you and all petrol as well as maintenance expenses should be drawn direct from

Jetro. Mr. Faleel will lay down standards regarding petrol and maintenance expenses claimable.

I wish you all the best in your new assignment."

This letter was signed by Lovell with copies to Faleel and another. On 15th August the appellant did not report for work but sent a telegram (A8) to Faleel at Jetro stating that he is unable to report for work and requesting for leave and that a letter will follow. On the next day (16th August) he addressed letter (A9) to the Commissioner of Labour complaining as follows:

Dear Sir,

Violation of the Termination of Employment Act by
Fairline Garments (International) Ltd. of 36,
Kynsey Road, Colombo 8.

1. I was employed as Purchasing Officer of Fairline Garments (International) Ltd., with effect from 14th September 1982 by *letter dated 3rd September 1982.* (photocopy annexed marked "A").
2. .....
3. .....
4. By letter dated 7th August 1985 (photocopy annexed marked "B") I was informed that my purchasing functions had been stopped.
5. Thereafter *I have been instructed to work under other companies* and I have been *assigned new functions which have nothing to do with my contractual duties as Purchasing Officer.* My employment as Purchasing Officer with Fairline Garments (International) Ltd. has come to an end.
6. My prior written consent has not been obtained for this change of employment nor has the prior written approval of the Commissioner of Labour been obtained.
7. Therefore, please be good enough to restore me to my employment as Purchasing Officer as per my letter of Appointment marked "A".
8. I annex for your information, marked "C", a copy of my letter dated 16th August 1985 to Fairline Garments (International) Ltd."

The letter (A 10) sent by the appellant to the Company referred to in the last paragraph as well as in the telegram is as follows:

"ATTENTION MR. SAMUEL S. LOVELL, GENERAL MANAGER.

Dear Sirs,

I refer to my *telegram dated 15th August 1985.*

I have brought to the notice of the Commissioner of Labour the contents of your letter dated 7th August 1985, and the subsequent events, and I have requested him to inquire into the matter and *restore me to my employment as Purchasing Officer in terms of your letter of appointment dated 3rd September 1982.*

I am anxious to resume my employment under you as Purchasing Officer in terms of the said Letter of Appointment. Please be good enough to advise me when you are prepared to re-instate me.

I am copying this letter to the Commissioner of Labour for his information and necessary action."

The following correspondence then ensued between the Company and the appellant. By its letter dated 19th August, the Company sent the following reply to the appellant:

"Dear Sir,

Reference is made to your letter dated 16th August 1985. Firstly, you have failed to comply with the contents of the memo dated 13th August wherein you were required to take up an urgent and important assignment at one of our Subsidiary Companies, but you have so far failed to respond at least by your attendance. Your attitude and action as an executive is most disappointing. Ample opportunity was also given you to discuss your feelings with either the Directors or the undersigned but you have chosen to disregard reasonable means and resorted to an intransigent approach.

I am therefore requesting you to report once again to your new posting and commence your new assignments which are of extreme importance to the Company, which includes purchasing to a considerable extent."

It was signed by Lovell, Group General Manager and copied to Faleel of Jetro. It was produced marked A 22. The appellant then sent the following reply (A 23) dated 22nd August to the Company:

"Dear Sirs,

I do not accept the correctness of what is set out in your letter dated

19th August 1985.

Please advise me by return whether your memorandum dated *7th August 1985* which states that I "will no longer be required to attend to purchasing mainly because this function is being delegated to Fairline Crescent in Pettah" and subsequent letters assigning me to other employments and duties are cancelled, and whether you are prepared to reinstate me as Purchasing Officer of Fairline Garments (International) Ltd.

This letter is written without prejudice to my complaint to the Commissioner of Labour."

The Company also despatched the following letter (A20) dated 23rd August to the appellant, which the appellant maintained had been pre-dated:

"Dear Sir,

With reference to the letter dated 19th August 1985, it is noted with regret that you are still refusing to comply with the simple instructions which originated from the Chairman himself. Your failure to report to work since 14th August '85 leaves us no option but to issue you this letter of severe caution and placing a deadline for you to report to Mr. A.C.M. Faleel, the Director of Jetro Textiles Pvt. Ltd., where you were assigned work on 12th August '85. Should you fail again to resume work within 7 (seven) days hereof, we will consider you as having vacated your post and take action accordingly.

In the meantime, we must ask you to immediately return the Company vehicle you are issued as in any event you are not carrying out any business activities and keeping the vehicle in your possession is totally unwarranted ...."

To this the appellant sent to the Company the following reply (A27) dated 29th August:

"Dear Sirs,

I write with reference to your letter dated 23rd August 1985 ....

I regret to state that you have failed to acknowledge or give a straight forward reply to:–

(1) My letter dated 16th August 1985 where I have requested you to re-instate me immediately as Purchasing Officer in terms of my Letter of Appointment.

(2) My letter dated 22nd August 1985 where I reiterated my request.

Please be good enough to confirm unequivocally whether you will restore me to my employment as Purchasing Officer of Fairline Garments (International) Ltd., and whether your letter dated 7th August 1985 is withdrawn.

Although it would appear from your letters that you are attempting to force me to abandon my contractual employment as Purchasing Officer of Fairline Garments (International) Ltd., I refuse to abandon or vacate my said employment, and I hold you to the terms set out in my letter of appointment dated 3rd September 1982.

If you are not prepared to reinstate me to my position as Purchasing Officer of Fairline Garments (International) Ltd., I have no objection to your sending your driver or other representative duly authorised to take possession of the vehicle after issuing me a proper receipt.

I am copying this letter to the Commissioner of Labour for necessary action."

Finally on 6.11.1985 the Company sent the following letter (A26) to the appellant:

"Dear Sir,

Further to the letter dated 23rd August 1985 sent to you by our Group General Manager under registered cover, we write to inform that you, by your conduct, have vacated your post with effect from 7th August 1985.

We will, however, deposit your earned wages from 1st August 1985 to 7th August 1985 with the Commissioner of Labour, today."

On 30th August the Company took over the vehicle which was in the appellant's possession – vide A21. This substantially is the documentary evidence in the case. The oral evidence, which comprised of that of the appellant and Lovell (the General Manager), established, inter alia, that in compliance with the instructions given in A5 of 7th August the appellant attended to his current assignments relating to purchasing work of the Company on Wednesday the 7th, Thursday the 8th and Friday the 9th of August, on which day he concluded the same. Saturday the 10th and Sunday the 11th were not working days. On Monday the 12th, the first day after the conclusion of his current purchasing assignments, he reported to the office address of the Company at No. 36, Kynsey Road, Colombo 8.

Lovell had left a note to him requesting him to report to Sarath or Faleel at Jetro, which, as set out by me already, he did on the same day. The appellant acknowledged the payment to him by the Company of his wages up to 14th August, 1985.

The Commissioner of Labour made order directing the Company to reinstate the appellant in the post of Purchasing Officer with effect from 8.9.1987 and to pay him a sum of Rs.139,437.50 cts. as back wages for the period of his non-employment. The Commissioner did not set out any reasons in his order. In quashing this order the Court of Appeal took the view that neither the re-location of the appellant's place of work nor the assignment to him by the Company of new functions, both being permissible in terms of the contract of employment, amounted to a termination of the appellant's services. In regard to the first of these two matters the Court of Appeal held that there was considerable authority for the proposition that the employer enjoys an implied right, in the absence of contractual provisions or other rules to the contrary, to transfer a workman from one establishment to another at a different place within the service of the employer. Reliance for this proposition was placed mainly on the decision in *Ceylon Estates Staffs' Union v. The Superintendent, Meddecombra Estate* (1). In that case the workman who was the senior (and the acting head) factory officer of the northern division of Meddecombra Estate was transferred by the management to its southern division as the senior assistant factory officer on the same terms and conditions as those attached to his post in the northern division. The workman repeatedly refused to accept this transfer to the southern factory. Weeramantry J., in the course of his judgment, stated that the employer's right to transfer his staff within his service was too well established to need elaboration and had received firm recognition in Ceylon, India and under the English Common Law. He cited several decisions from all three jurisdictions to support this legal position. But, as rightly pointed out by learned Queen's Counsel, the decisions referred to by Weeramantry, J. in his judgment relate to instances where the workman had been transferred from one division of an estate or from one department of a company or from one establishment of a business concern to another division, department or establishment at a different place *within the service of the same employer or management.* In fact learned Queen's Counsel did not dispute the appellant's liability to be transferred to another branch or

department of the Company, although he maintained that even so it should be in the same capacity, namely that of a Purchasing Officer. It was, therefore, his contention that the decision in *The Ceylon Estates Staffs' Union v. the Superintendent, Meddecombra Estate* (supra) which the Court of Appeal purported to follow had no application to the facts and circumstances of this case, the reason being that here the appellant, the workman, was transferred by the Company, his employer, to another place of work not within but outside its own service and in the service of another and altogether different company, namely, Jetro.

Upon a careful consideration of this submission of learned Queen's Counsel I am inclined to uphold the same. It seems to me that the Court of Appeal was in error when it held that the legal principle referred to and adopted by Weeramantry, J.in the aforesaid case had application to the facts of this case. The contents of A5 and A7 read by themselves and in the light of the subsequent letters A22 and A20 make it abundantly clear that the Company directed the appellant to work at another company. A5 of 7th August informs the appellant that he will no longer be required to do purchasing work for the Company and that he should conclude his current purchasing assignments. A7 of 13th August transfers him with immediate effect to Jetro. These two documents by themselves show that, in so far as the Company was concerned, the appellant's duties and functions at the Company had ceased and that he was directed to commence work at Jetro. This position is fortified by the fact that a new subsidiary company (Fairline Crescent) was floated to attend to the Company's purchasing work. It is also confirmed by the contents of both A22, in which the Company insisted that the appellant should take up an assignment at one of its subsidiary companies (Jetro) to which 'new posting' he was again requested to report to commence his 'new assignment', as well as A20 in which the Company regretted that the appellant had still failed to report for work at Jetro. Admittedly Jetro, being itself a limited liability company, is a legal entity quite distinct and different from the Company even though it was one of its subsidiaries. Employment in or under the Company is not employment in or under Jetro. Learned President's Counsel reiterated before us that the so-called transfer constituted nothing more than a re-location of the appellant's place of work from the Company's head office at Kynsey Road to its bonded store at Katubedda, which is a transfer within the service of the Company. No

doubt Lovell in his oral evidence did endeavour to show that it was so. He went even further and tried to maintain that the Stores assignment, though envisaging a variation of the appellant's former functions, did not entail new functions totally alien to them. But, in my view, no weight can be attached to his oral testimony in view of the explicit and unequivocal language in which the letters A5, A7, A22 and A20 are couched. Their contents can admit of no other construction than that the appellant was required by the Company to report to and commence work at Jetro in a new assignment and not at the Company's store at Katubedda. In A7 Lovell himself states that the appellant is transferred with immediate effect to Jetro Textiles Mills Ltd., where the appellant, according to A20, was assigned work. Nothing more is necessary to discredit Lovell's oral evidence on this point.

I shall now refer to the contract of employment. A1, the letter of appointment, shows that the appellant's contract of employment was with the Company. He was recruited and employed by the Company. He in turn agreed to serve the Company. He undertook and was obliged to work for the Company, for which he was paid by the Company. His hours of work and the power of control over his work were laid down and exercised by the Company. But there is nothing in the contract which would enable or empower the Company to transfer, unilaterally, the right to or the benefit of his services to another legal person or entity. The Court of Appeal seems to have placed some reliance on clauses 4 of A1 to justify the transfer of the appellant. This clause, no doubt, expressly provided that the appellant should carry out all duties entrusted to him by the Company. But there is no agreement (expressed or implied) that he should obey orders or carry out duties of another company. A workman has an inalienable right to choose for himself the employer he will serve. Once the contractual relationship between himself and his employer is established, the employer cannot transfer his services to another without his consent or against his will. In this connection the following observations of the House of Lords in *Nokes v. Doncaster Amalgamated Collieries Ltd.* (2) are of relevance:

> "It is, of course, indisputable that (apart from statutory provision to the contrary) the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent, which is the same thing as saying that, in order to produce the desired result, the old contract between A

and X would have to be terminated by notice or by mutual consent and a new contract of service entered into by agreement between A and Y."

Learned Queen's Counsel relied very strongly on the decision in *Kundan Sugar Mills v. Ziyauddin and others* (3) which he submitted was conclusive of the issue before us. In that case the workmen were employed by the appellant-Mills at a sugar mill at Amroha in the year 1946. In 1951 the partners of the appellant-Mills purchased another sugar mill at a different place (Kiccha). They closed the latter mill and started it at another place, Bulandshahr. In 1955 the General Manager of the appellant-Mills ordered the transfer of the workmen to the new mills at Bulandshahr. The workmen refused to obey the transfer order in consequence of which the General manager dismissed them. It was not disputed that the partners of the sugar mills at Amroha owned also the sugar mills at Bulandshahr; that they became the owners of the former mills in 1946 and of the latter mills in 1951 which was later in or about 1955 started at Bulandshahr; that though the same partners owned both mills they were two different concerns or entities, and that there was no express term in the contract of service between the employer-appellant and the workmen that the latter should serve in any future concerns which the appellant might acquire or start. It was submitted on behalf of the appellant that the right to transfer an employee by an employer from one of his concerns to another is implicit in every contract of service. Subba Rao J. in dealing with this submission said:

"The argument of the learned counsel for the appellant that the right to transfer is implicit in every contract of service is too wide the mark. Apart from any statutory provision, the rights of an employer and an employee are governed by the terms of contracts between them or by the terms necessarily implied therefrom. It is conceded that there is no express agreement between the appellant and the respondents (workmen) whereunder the appellant has the right to transfer the respondents to any of its concerns in any place and the respondents the duty to join the concerns to which they may be transferred. If so, can it be said that such a term has to be necessarily implied between the parties? When the respondents 1 to 4 were employed by the appellant, the latter was running only one factory at Amroha. There is nothing on record to

indicate that at that time it was intended to purchase factories at other places or to extend its activities in the same line at different places. It is also not suggested that even if the appellant had had such an intention, the respondents 1 to 4 had knowledge of the same. Under such circumstances without more, it would not be right to imply any such term between the contracting parties when the idea of starting new factories at different places was not in contemplation. Ordinarily the employees would have agreed only to serve in the factory then in existence and the employer would have employed them only in respect of that factory. The matter does not stop there. In the instant case, as we have indicated, the two factories are distinct entities, situated at different places and, to import a term conferring a right on the employer to transfer respondents 1 to 4 to a different concern is really to make a new contract between them."

In the instant case, however, there is no material to establish the precise date of incorporation of Jetro – whether it was before or after the appointment of the appellant as the Purchasing Officer of the Company. As such I do not think it can be said that the Indian decision is conclusive of the issue before us. But in the light of the facts and circumstances of the instant case the decision does lend support for the proposition contended for by learned Queen's Counsel.

In regard to the second matter referred to by me above, namely, the finding of the Court of Appeal that the contract of employment permitted the assignment of new functions to the appellant by the Company, I am of the view that this finding too is erroneous. The Court of Appeal based its finding on clause 4 of the letter of appointment A1 which has already been referred to by me. A1, however, is titled 'Appointment as Purchasing Officer'. It appoints the appellant to the post of purchasing officer of the Company. In pursuance thereof the appellant functioned as the Company's purchasing officer from the date of his appointment until the present dispute arose about 3 years later. He protested on the very first date that he was called upon to do work other than that of purchasing. It is thus reasonable to infer that the appellant's appointment was to a specific post, namely, that of Purchasing Officer, which doubtless would have required skill and experience of some sort. Clause 4 must in the context be construed to mean duties within the ambit of

a purchasing officer. It cannot possibly be taken to embrace every kind of duty which the Company may decide to assign to him.

Learned President's Counsel submitted that even if the appellant had been transferred to and asked to work at Jetro, it did not in law amount to a termination of his services by the Company. In short his submission was that our Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, (unlike the English law) was intended to protect the employment relationship and not the contract of employment. He contended that, historically and otherwise, the primary objective of our Act was to ensure that a workman is not thrown to the wolves, as it were, by being deprived of the means of his livelihood. He urged that in the instant case there was no radical or fundamental change in the functions of the appellant who was guaranteed continued employment at Jetro upon the same terms and conditions as he enjoyed under the Company. As such he maintained there was no termination within the provisions of the Act. I am unable to agree with this contention of learned President's Counsel. Such a construction would enable the employer to decide for himself the nature of the employment that a workman should do. The whole purpose of the Act is to ensure that the workman continues in employment in the same capacity in which he was employed by his employer. S. 6. of the Act makes this very clear. The interpretation sought to be placed by learned President's Counsel would render nugatory the salutary protection granted to workmen under the Act.

For the above reasons the appeal is allowed, the judgment of the Court of Appeal is set aside and the order of the Commissioner of Labour is restored. The 1st respondent Company is directed to reinstate the appellant in the post of its Purchasing Officer on or before 22nd September 1989 with all back wages from the date of his non-employment to the date of his reinstatement. All such back wages including all benefits which the appellant would have been entitled to will be paid by the Company on or before 22nd September 1989. The appellant will also be entitled to costs fixed at Rs.1500/-.

H.A.G DE SILVA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal allowed