

NADARAJAH
v.
JANATHA ESTATES DEVELOPMENT BOARD

SUPREME COURT
FERNANDO, J.,
DHEERARATNE, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 40/94
C.A. NO. 359/86
L.T. NO. 9/13507/85
DECEMBER 12TH, 1995

Industrial Dispute – Employer's right to transfer an employee – Change of management – Continuation of service under new employer – Employer's liability to transfer in the new situation.

The employee served as Estate Dispenser on "Stonycliff" group of estates. He was first employed by the Ceylon Tea Plantations Company (CTPC). When the estate was taken over by the Land Reform Commission, he was employed by the Janatha Estates Development Board (JEDB), with his consent, on the same terms and conditions enjoyed by him at the time of the take-over of the estate. After the employee had served on "Stonycliff" for 22 years, the JEDB transferred him to Ingestre Group, whereupon the employee applied to the Labour Tribunal for relief.

Held:

The original appointment of the employee was to "Rosita" estate which was later amalgamated with "Stonycliff". According to the terms of that appointment, his employment was on that estate only. The employer's implied right to transfer was thereby excluded. He was then employed by the JEDB on the same terms and conditions. He was therefore, not liable to be transferred to Ingestre.

Cases referred to:

Ceylon Estates Staffs Union v. Superintendent Meddecumbura Estate (1971)
73 NLR 278.

APPEAL from the judgment of the Court of Appeal.

S. Mahenthiran for appellant.

S. M. Fernando, PC with *Kenneth Perera* and *Hamilton Amerawickrema* for respondent.

Cur. adv. vult.

March 21, 1996.

FERNANDO, J.

Two questions are involved in this appeal: whether the 2nd employer-appellant-respondent (the 2nd respondent) was entitled, under the contract of employment, to transfer the applicant-respondent-Appellant (the applicant), and, if so, whether the applicant had vacated his post by his failure to comply with the impugned transfer order.

The applicant died while this appeal was pending, and his widow applied for substitution. She is accordingly substituted in his place.

In June, 1962, the applicant applied for a post of Dispenser on one of the estates owned by the Ceylon Tea Plantations Company Ltd. (CTPC). On 27.7.92 the Superintendent of Rosita Estate, owned by CTPC, sent him a telegram: "Report for duty August 1st. Letter of confirmation follows". By letter dated 1.9.62, the applicant was informed:

"This letter serves the purpose of confirming your appointment as Dispenser on this estate on the following terms:

1. Your salary commences at Rs. 240 per mensem . . .
2. Quarters are provided for you next to the Dispensary and you will occupy these quarters . . .
3.

Your duties will be as follows:

<i>Monday</i>	:	Rosita and Charing Cross Divisions
<i>Tuesday</i>	:	Lochiel Division
<i>Wednesday</i>	:	Wooton Factory Division
<i>Thursday</i>	:	Rosita and Charing Cross Divisions
<i>Friday</i>	:	Lochiel Division
<i>Saturday</i>	:	Wooton Factory Division
<i>Sunday</i>	:	Nothing

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Regarding the duties mentioned in this letter, except where specially mentioned, they only apply to Rosita estate and not Wooton; any special instructions that the Wooton Estate Superintendent may have for you, he will inform you himself".

It is common ground that later CTPC acquired Stonycliff estate. Rosita and Stonycliff estates were amalgamated, and known as Stonycliff Group (Stonycliff). Stonycliff was later taken over by the Land Reform Commission. On 22.3.76 the Superintendent of Stonycliff informed the applicant that the management of the estate would be transferred to the Janatha Estates Development Board, the 2nd respondent; that he would be informed of the terms and conditions of employment which would be effective from 1.1.77; and that he would be given a reasonable time to decide whether he would like to join the 2nd respondent on those terms. On 28.6.77, the 2nd respondent offered him employment "on the same terms and conditions enjoyed by [him] at the time of the take-over of the estate"; the applicant accepted. The applicant thus served on Stonycliff for 22 years until December, 1984, when the 2nd respondent sought to transfer him.

By letter dated 11.12.84, the Superintendent of Stonycliff, the 1st respondent, conveyed the 2nd respondent's instructions to the applicant, that he "has been transferred to Ingestre Group, Dickoya, with effect from 15th January, 1985 on the same terms and conditions enjoyed by [him] at present". The applicant replied on 20.12.84. While reserving the right to question the legitimacy of the transfer, he inquired whether the terms and conditions enjoyed by him on Stonycliff could be offered to him on Ingestre. He specified some of those facilities; in particular, his living quarters, and its electricity supply and extent of home garden, gross salary and additional allowances, and the CTPC "special facilities regarding service over 25 years" as he had completed 22 1/2 years. Instead of replying to this request, the 1st respondent asked him to forward a certified copy of the original of the letter of appointment issued to him saying that the letter (presumably, of 1.8.62) sent by the Superintendent appeared "to be only certain instructions that were given to [him] on confirmation of [his] appointment". The applicant replied that he had been unable to find any letter other than that sent by the Superintendent.

By letter dated 4.1.85, the 2nd respondent told the applicant that it was unable to consider the claim made in his earlier letter, and

advised him to comply with the transfer order of 10.12.84. Since that "claim" made by the applicant was for comparable facilities, this letter indicated uncertainty, if not unwillingness, about affording such facilities. The applicant replied on 7.1.85 that the terms and conditions of his contract could not unilaterally be changed, and that they did not provide for a transfer as proposed by the 2nd respondent. He said that he was unable to comply with the transfer order, adding that he would regard enforcement of that order as constructive termination of his services. On 24.1.85 the Superintendent of Ingestre wrote to him that, because he did not assume duties on Ingestre, he was being treated as having vacated his post. The applicant replied that he had no contract with the Superintendent of Ingestre, and informed the respondents that he continued to be willing to serve on Stonycliff. He then applied to the Labour Tribunal.

The applicant was not informed of the reason for the transfer order. The circumstances leading up to that transfer were these. Shortly before, the 2nd respondent had ordered one Jeevanadhan, the Medical Assistant on Chrystlers Farm Estate, to go on transfer to Ingestre as Medical Assistant; this transfer was cancelled; and thereafter two transfer orders were issued, to the applicant to go to Ingestre, and to Jeevanadhan to take his place at Stonycliff. The applicant had, by August, 1984, completed a three-month course of training, including intra-uterine contraceptive device (IUCD) insertion. The respondents claimed that Jeevanadhan's transfer to Ingestre was a routine transfer, and that the question whether Ingestre had IUCD facilities was not considered; that immediately thereafter health issues were discussed, and it was decided to transfer the applicant to Ingestre; however, no decision had been taken to provide IUCD facilities at Ingestre. On the other hand, the documentary evidence showed that immediately after the applicant had completed his training, an application had been made to the Family Health Bureau for approval of a family planning clinic at Stonycliff with IUCD services. In that application it was stated that the Estate Medical Assistant would conduct the clinic, indicating beyond doubt that this was the applicant, whose special training was mentioned. The Bureau by letter dated 5.11.84 had approved the Stonycliff family planning clinic. It appeared that Jeevanadhan had no

IUCD training. Thus although the impression sought to be given was that the transfer was intended to make the best use of the applicant's services, and that the applicant was the most suitable for Ingestre, the evidence was that the population of both estates was similar; that the necessary instruments were available on Stonycliff; and Jeevanadhan was not qualified to provide IUCD services.

The learned President of the Labour Tribunal held that although the applicant was transferable, the 2nd respondent had failed to justify the transfer order; that the termination of his services was wrongful and unjustified; and ordered the 2nd respondent to reinstate the applicant with back wages in a sum of Rs. 21,567.70, or as an alternative to reinstatement to pay a further sum of four years salary as compensation, amounting to Rs. 86,270.40.

On appeal, the Court of Appeal held that the 2nd respondent was entitled to transfer the applicant; that it was a routine transfer; that the order of the Tribunal requiring the management to inform the applicant of the reason for the transfer was perverse; and set aside the order of the Tribunal.

RIGHT TO TRANSFER

It was held in *Ceylon Estates Staffs Union v. Superintendent, Meddecombra Estate*, (1971) 73 NLR 278, that even if the contract of employment is silent, an employer has an implied right to transfer the employee. It is not necessary, for the purposes of this case, to consider whether that implied right is subject to some limitation or qualification: whether it extends to new situations not contemplated by the parties when the contract of employment was entered into.

However there can be no doubt that the implied right to transfer can be excluded, and in my view excluded either expressly or by necessary implication. Mr. S. M. Fernando, PC, on behalf of the 2nd respondent cited "Misconduct in Employment", by B. R. Chaiye, in which the following passage occurs:

"It is generally held that the right to transfer an employee is an implied right of the employer and, therefore, no express term in the contract is necessary. The right exists even in the absence of contract unless there is a contract to the contrary . . . However, when during the same period the employer used two different forms of appointment letter, in one of them there is a condition, then it will give rise to a strong inference that an employee who has been given the appointment letter without the condition of being transferred is not liable to be transferred because it follows by necessary implication that there was a contract of not being transferred. Where the contract of apprenticeship was that "the apprentice will work as an apprentice in the company's Manjumalai Estate for a period of three years" this militated against any right of the employer to transfer him during the currency of the agreement from that estate to another . . . In one case an employee of a sugar factory was transferred to another sugar factory which was not in existence at the time of appointment of an employee. When at the time of appointment the employer was running only one factory and at that time there was no intention to purchase another factory or to extend its activities in the same line at different places or in any case the employees had no knowledge of any such intention then it would not be right to imply any such term between the parties." (pages 238-239).

This does not help the 2nd respondent. The appointment of the applicant "as Dispenser on this Estate" *prima facie* suggests that his employment was on that estate only, and that therefore he was not transferable; there is nothing in the other provisions of the letter of appointment to rebut this. I therefore hold that the employer's implied right to transfer was thereby excluded.

Even if I were to assume that the letter of appointment did not exclude the implied right to transfer, it would still be necessary to ascertain whether the impugned transfer was within the scope of that right. At the time when that letter was issued the parties could be treated as having had in mind the possibility of transfer to other estates then owned by the 2nd respondent; and perhaps even to other estates

which the 2nd respondent might have acquired in the future. If, however, the 2nd respondent had become the owner of an estate in Indonesia or Kenya, I doubt whether the implied right to transfer would extend to a transfer abroad. In the present case, when the CTPC estates vested in the Land Reform Commission, the applicant continued in employment" on the same terms and conditions enjoyed . . . at the time of the take-over of the estate". If at that time the applicant was transferable, he was transferable to other estates owned by CTPC, but it is doubtful whether, when he became an employee of the 2nd respondent, his liability to transfer became more extensive making him subject to transfer not only to those estates which were formerly owned by CTPC, but also to the much wider category of all estates owned (or managed) by the 2nd respondent. That was an ambiguity in the new contract which resulted from the 2nd respondent's offer. Since that was an offer made by the 2nd respondent, that ambiguity must be resolved *contra proferentem* and in favour of the applicant, particularly because the 2nd respondent was then in a superior bargaining position.

I therefore hold that the applicant was not liable to be transferred to Ingestre. That finding makes it unnecessary for me to review the finding of fact that there was no justification for the transfer.

The appeal is allowed, the judgment of the Court of Appeal is set aside, and the order of the Labour Tribunal is affirmed. The 2nd respondent shall pay the substituted appellant the sum of Rs. 107,838. 10, with interest at 20% per annum from the date of the Labour Tribunal order up to the date of payment, and a sum of Rs. 20,000 as costs in this court and the Court of Appeal.

DHEERARATNE, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal allowed.