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

Ajith Upashantha Samarasundara

No 161, Pahala Naragala

Govinna

Applicant

SC Appeal No 18/2009

SCSCLA 57/2008

PHP Kalu No LT/04/2005

Kalutara LT No 18/KT/3107/03

Vs

Coats Thread Lanka (Pvt) Ltd.

P.O. Box 250, Colombo

Level 3-6, No 163, Union Place,

Colombo 02.

Respondent

And Between

Ajith Upashantha Samarasundara

No 161, Pahala Naragala

Govinna

Applicant-Appellant

Vs

Coats Thread Lanka (Pvt) Ltd.

P.O. Box 250, Colombo

Level 3-6, No 163, Union Place,

Colombo 02.

Respondent-Respondent

And now Between

Coats Thread Lanka (Pvt) Ltd.

P.O. Box 250, Colombo

Level 3-6, No 163, Union Place,

Colombo 02.

Respondent-Respondent-Petitioner

Vs

Ajith Upashantha Samarasundara

No 161, Pahala Naragala

Govinna

Applicant-Appellant-Respondent

Before : J.A.N. de Silva CJ.
P.A.Ratnayake J.
C Ekanayake J.

Counsel : Sanjeewa Jayawardana with Sandamali Chandrasekere instructed by Sudath Perera Associates for the Respondent-Respondent-Petitioner.
AP Niles with Irosha Silva instructed by Ranabahu Galhenage Applicant-Appellant-Respondent

Argued on : 11- 11-2009 , 17-02-2010 and 11-03-2010

Decided on :

J.A.N. de Silva C J

This is an appeal against an order of the High Court of the western province directing the reinstatement of the Respondent or in the alternative, payment of three years' salary as compensation. Leave was granted on the following questions set out in paragraph 10(a) to (e) and prayers (a), (b) and (c) of the petition.

(a) Did the High Court fall into error by failing to appreciate that the Respondent, by entering into a contract of employment with another organization (within 14 days of the suspension of services of the Appellant), had acted in breach of the aforesaid clause

16(c) of the contract of employment, going to the very foundation of the said contract and thereby, attracting a terminal situation?

(b) In any event did the High Court err by failing to appreciate that there was no termination by the employer as contemplated by the section 31B of the industrial disputes act and that as such, no relief could be granted?

(c) Did the High Court misdirect itself by failing to consider that the Appellant, by entering into another organization had intentionally and willfully terminated his contract of employment of his own accord and volition?

(d) Did the High Court misdirect itself by failing to appreciate that a suspension of an employee did not amount to a termination of his contract of employment and that a suspension is only a temporary measure pending investigations and further conclusive evidence?

(e) Did the High Court misdirect itself by holding that the failure of the petitioner to conduct the domestic inquiry within reasonable time amounted to "constructive termination" despite the Respondent having repudiated the contract within 14 days of the suspension of his services?

(f) Did the High Court misdirect itself by failing to consider that the Respondent had, unjustly enriched himself by accepting the payment of a half month's salary made by the Appellant company while concealing the fact that the Respondent had entered into a contract of employment with another organization?

(g) Did the High Court in any event, err in law by failing to conclusively determine the purported relief to which the workman was entitled to, if at all?

(h) Did the High Court fail to appreciate the fact that the reinstatement of the Respondent would be subversive of discipline and undermine the authority of the management and as such be prejudicial to the establishment?

The facts in so far as they are relevant are as follows.

The Respondent was employed by the Appellant Company as a work study assistant at the time of the alleged termination. The Respondent had also been elected to the post of treasurer of the staff welfare association of the Appellant Company. Due to discrepancies in the accounts of the welfare association and allegations of corruption leveled against the Respondent the

Appellant Company conducted an investigation in to the said allegations. Thereafter the Appellant Company suspended the Respondent without pay in order to conduct a full inquiry in to the allegations. During the course of the inquiry the Respondent intimated his difficulty in attending the said inquiry on Saturdays as he had obtained employment elsewhere. Upon this revelation the Appellant Company considered the Appellant as having repudiated his contract of employment of his own accord and volition. However the Appellant also informed the Respondent by a subsequent letter that his services would have been terminated in any event on the strength of the findings of the inquiry.

I first turn my attention to the question of repudiation of the contract of employment by the worker. The learned counsel for the Appellants directed our attention to clause 16(c) of the contract of employment.

"*You will not be able to enter into any activities similar to that for which you are employed by this company or* ***obtain employment elsewhere while in service with us.***

It was urged before us that the said breach was one that could be termed as a fundamental breach resulting in the repudiation of the contract by the employee.

At the outset it is necessary to note that the Respondent had admitted to obtaining employment elsewhere, namely Vinter Fashions Ltd., whom the Appellant submits is a rival business entity. The Respondent denies the said contention.

It was strenuously argued by the Respondent before the labour Tribunal that the said clause was in restraint of trade and hence illegal and void. It is pertinent to note that the Respondent had not canvassed the same in his submissions to this court. Nonetheless I would venture to weigh the merits of this submission.

The test of validity of any covenant alleged to be in restraint of trade is the test of reasonability as held in *Maxim Nordenfelt Gun Co. V. Nordenfelt (1894) AC 335.*

The law on this matter was correctly stated by Lord Macnaghten in the *Nordenfelt* case. He said:

> *"Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."*

In ascertaining the reasonableness the extent of the prohibition and the time period within which the prohibition is operative are important considerations. Covenants of this nature are upheld where they operate to protect the legitimate interests of the employer, for instance where there is a risk of trade secrets being divulged by an employee.

Does clause 16(c) withstand the test of reasonability? Clause 16(c) envisages a blanket prohibition whilst the worker is in the service of the employer.

Our courts have dealt with a similar issue in the *Ceylon Bank Employees Union v. The Bank of Ceylon* (79 (1) NLR 133). In the said case Sirimanne J in interpreting a clause to the effect that "*I will give my whole time and attention to the discharge of duties"* held the clause to mean that the workman must not devote any part of his time to any other gainful employment, except with respect minor dealings in his spare time.

In the said case the worker concerned was one holding a responsible position and who was privy to confidential information. In light of the above the said clause may be justified in limiting his employment and his sources of income. However I do not think that Sirimanne J intended this to be the general rule. A person is entitled to seek employment with multiple employers so as to maximize his monthly income. Where such employment impacts adversely on the quality of his work, appropriate action may be taken at that stage. Therefore I am of the view that such concerns of the employer cannot restrict a person's reasonable right to seek employment at multiple establishments.

Selwyn`s *law of Employment (*9th Ed pages 381) offers assistance on the point of an employee taking additional employment. He too suggests that it may be a ground for dismissal if such employment has an adverse effect on the employers business. The cases of Nova Plastics Ltd v. Frogatt (1982 IRLR 146) and Hall Fire Protection Ltd v Buckley ([1995] UKEAT 5_94_0606) are illustrative of this point.

Hence I hold that the second limb of clause 16(c) prohibiting employment elsewhere as being void. This position is further justified as the Appellant in this case was employed as a mere work study assistant as opposed to a manager or a similar high position in the organizational hierarchy.

The above discussion refers to the question of automatic repudiation by the operation of the contract due to the conduct of the employee.

However it yet remains to be seen whether the employee deliberately and repudiated his contract by seeking employment elsewhere. As noted earlier, the right to seek secondary employment is subject to the important condition that such employment takes place outside the usual working hours of his primary place of employment. It is pertinent to note that in the

instant case the Respondent's alternate employment by his own employment clashes with the working hours of the Appellants.

Weeramantry in his *law of contract* defines repudiation as follows.

> "*Repudiation may occur either expressly, as where a party states in so many words that he will not discharge the obligations he has undertaken, or impliedly, as whereby his own act a party disables himself from performance or makes it impossible for the other party to render performance"*

It was urged before us that the employee in the instant case had by seeking employment elsewhere, impliedly repudiated his contract of employment, in other words that he had vacated his post.

It has been held in several instances by this court, which now can be considered as trite law that for abandonment of the contract to be proved, proof of physical absence as well as the mental element of intent needs to be established (*Lanka Estate Workers union v. Superintendent Hewagam Estate* SC min 9/69, 2nd February 1970 and affirmed in *Nelson de Silva v. Sri Lanka State Engineering Corp*. 1996 (2) SLR 342)

In the instant case the employee had been "suspended" from work and therefore was required to absent himself. This form of absence does not, in my opinion satisfy the requisite absence in order to prove vacation of post.

The Appellant submits that the Respondent had admitted that he commenced work under another employer on 1st January 2003. It is from this point onwards that the aforementioned test must be applied in order to ascertain whether the employee had vacated his post.

I am of the opinion that "absence" here is a reference to the lack of presence when such presence is deemed necessary in the ordinary course of employment. In other words, where the Respondent is required to be present at the work place at a reasonable hour of the day and he absents himself and such absence continues it can be safely assumed that the first ingredient had been met.

The mental element or what is referred to as *animus non revertendi* is the intention to abandon the contract permanently.

In the present case the Respondent had been suspended and subsequently been called for inquiry. The Respondent had albeit briefly replied to the charge sheet. The inquiry was scheduled to be held on 4th September 2003. The Respondent absented himself on that day. However on the following day of inquiry the Respondent gives evidence and also cross

examines witnesses. He however absents himself from the afternoon session held on that very same day. Prior to his departure he requests that the inquiry be held on Sundays. These facts suggest that the Respondent had submitted himself to the jurisdiction of the inquiring body and expressed a willingness to continue to do so. On account of the aforesaid I do not think that the employee's physical absence could be considered as satisfying the prerequisites discussed above. It is also pertinent to note that that the employee had expressed a willingness to recommence employment under the Appellant in his evidence before the labour Tribunal. However it must be mentioned here that the Respondent's contract of employment with Vinter Fashions is not on record and unavailable for perusal. Therefore the exact nature of his employment cannot be discerned except to say that the hours of employment were from 8.00 am to 5.00 pm six days of the week. **If indeed the employment was of permanent nature, which would I think be compelling evidence of animus non revertendi.**

It was submitted to us that the Respondent was compelled to seek such alternate employment due to economic hardship suffered resulting from his suspension and other circumstances of life. This is primarily due to the nonpayment of wages during the first four months of "suspension" and half months salary since then. At this juncture I venture to consider the legality of the decision of the by the employer to suspend the employee without pay.

SR de Silva in his "law of Dismissal" states,

> "*It is settled law that the employer has no right of suspension. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the so called period of suspension.*

WEM Abeysekere in his "Industrial Law and Adjudication" concurs.

> "*The right to suspend, in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant. Such a power can only be created by statute governing the contract, or by express provision in the contract. If a master nevertheless, suspends in the sense of forbidding an employee to work,* ***he will be liable to pay wages for the period of suspension."***

Thus Sri Lankan authorities suggest that a suspended worker is entitled to full wages during suspension.

Learned counsel for the Appellant drew our attention to certain passages from Chakravarti's *Law of Industrial Disputes* which supported the proposition that suspension is allowed as a precursor to a disciplinary inquiry. This is indeed the position in India as a result of the wording in section 33 of the Industrial Disputes Act of that country. In *Management of Hotel Imperial, New Delhi & Ors. Vs. Hotel Workers Union (1959 AIR SC 1342)* it was held by the Indian Supreme Court that section 33 by implication modified the common law rules governing suspension as it stood in India. Our Industrial Disputes Act does not contain any provision similar to section 33 of the Indian act and hence the law in this country is the position held in *Hanley v. Pease (*1915 (1) KB 698).

All authorities refer to the case of Hanley v. Pease & partners to support the proposition that an employer has no right to suspend a worker under the common law. Closer scrutiny of the judgment reveals that the word suspension as referred to by the lordships in that case has somewhat of a narrower meaning than the meaning ascribed to the word generally. For convenience I refer to a portion of Lush J's judgment.

> *"assuming that there has been a* ***breach on the part of the servant*** *entitling the master to dismiss him, he may if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding* ***the misconduct or breach of duty of the servant****, then the contract is for all purposes a continuing contract subject to the masters right to claim damages against the servant for his breach of contract."*

The word "suspension" has at least two distinct meanings. It is sometimes used in a punitive sense. i.e. *punitive suspension*. This is where a workman is prohibited from work and deprived of pay as punishment for some misconduct committed by the workman. Workers are also suspended in a secondary sense. That is where the worker is prohibited from entering the work place as an interim measure pending inquiry to facilitate such inquiry.

The Hanley case refers clearly to suspensions of the first category. Their lordships correctly held that,

> "*After electing to treat the contract as a continuing one the employers took upon themselves to suspend him (worker) for one day ….****thereby assessing their own damages for the servant's misconduct*** *at the sum which would be represented by one day's wages. They have no possible right to do that."*

This is also the position of law in our country. Once an employer suspects a worker of serious misconduct it is incumbent on him to obtain evidence of such misconduct to justify termination. As such some form of inquiry is necessary for the aforementioned purpose. However such inquiries may sometimes be compromised if the alleged offender is permitted to roam free to influence witnesses. If the employee attempts to dismiss the worker summarily his *bonafides* is questioned. Thus the employer would be left with the difficult choice of either dismissing the employee summarily or conducting an inquiry whilst providing continuous work.

Hence In my view it would be within the spirit of the Hanley judgment that employers are granted the opportunity of suspending the employee pending disciplinary inquiry. This is for the purpose of ascertaining whether the worker is guilty of any misconduct in order to decide whether the contract of employment should be terminated. The worker cannot be deprived of his wages during this period. This result is further desirable as it also furthers two policy objectives. It acts as an incentive for employers to dispose of such inquiries expeditiously and also offer the worker an opportunity to vindicate himself.

I now turn to the conclusions reached by the learned High Court Judge. The learned High Court judge had formed an opinion that there was constructive termination of services in light of the delay in conducting the disciplinary inquiry and the deprivation of his salary.

The inquiry was first held on 2003-09-04 and then on 2003-09-17 on which date the Respondent gave evidence. On 2003-09-30 by letter marked “A16” the Appellant informed the Respondent that the Respondent is taken to have repudiated the contract by entering into a contract of employment with another company. On the last day further inquiry was fixed for 2003-10-01 though proceedings of such inquiry have not been placed before us. The Respondent in his evidence before the labour Tribunal stated that he did not take part in and was not summoned to any further proceedings. Presumably this is due to the Respondent being considered as not being an employee any more. Be that as it may the Respondent was found guilty by the inquiring officer.

I am also of the view that the commencement of the inquiry could have been at an earlier date than the date on which it occurred. However I am not inclined to hold that there was constructive dismissal on those grounds alone.

In my opinion termination occurs by the letter dated 26th January 2004 marked “A19” as it expresses the view that the Respondent would have been terminated in any event on the findings of the inquiry if not for the Respondent’s repudiation.

By the said letter the employer in this case has made it abundantly clear that he is not inclined to any further to offer employment to the worker due to the adverse findings made by the board of inquiry.

The Appellant Company drew our attention to the gravity of the charges preferred against the worker, of which the worker has now been found guilty of by the inquiring officer. I am satisfied that the said proceedings were conducted upon the worker been sufficiently informed of the charges against him and that he was provided an adequate opportunity to explain and establish his innocence. Therefore I see no reason to disturb the findings of the inquiring officer. Therefore under the circumstances I find that the dismissal of the Respondent worker as being justified.

The Appellant finally submits that the Respondent had unjustly enriched himself by accepting wages from the Appellant Company whilst taking employment elsewhere. As mentioned previously wages are a natural right of the worker that flows from the contract of employment. The employer may in certain circumstances (as adverted to previously) decide not to provide work to the worker and prohibit him from attending to work. Yet the employer's duty to pay wages remains. In this instance the employee was merely receiving his contractual dues. The fact that he had received other wages during his suspension from a 3rd party is beside the point.

Finally on consideration of all facts relevant in this case I hold that the dismissal was justified in light of the facts revealed at the inquiry as well as at the labour Tribunal. The Respondent is not entitled to any damages for the dismissal. However he is entitled to all wages deprived of him during the period of his suspension and to any statutory dues he may be entitled to.

Chief Justice

P.A. Ratnayake J.

I agree.

Judge of the Supreme Court

C. Ekanayake J.

I agree.

Judge of the Supreme Court