Judgment 5, 1972

IN THE PRIVY COUNCIL No. 8 of 1969

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

THE COLOMBO APOTHECARIES' CO. LTD.

- v -

E.A. WIJESOORIYA and OTHERS

CASE FOR THE APPELLANTS

FARRER & CO.,
66 Lincoln's Inn Fields,
LONDON, W.C.2.

Solicitors for the Appellants

IN THE PRIVY COUNCIL No. 8 of 1969

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

BETWEEN :

THE COLOMBO APOTHECARIES' COMPANY LIMITED
Appellants

- and -

1. E.A. WIJESOORIYA
2. H.T. MARIKAR BAWA
3. THE HONOURABLE M.HANIFFA MOHAMED, Minister of Labour, Employment and Housing
4. N.L. ABEYWIRA, Commissioner of Labour
5. W.E.M. ABEYSEKERA, President, Labour Tribunal II. Respondents

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from a Judgement and Decree of a Bench of seven Judges of the Supreme Court of Ceylon dated the 29th February 1968 whereby the said Court, by a majority of four to three, dismissed the Appellants' application for a Mandate in the nature of a Writ of Prohibition on the 5th Respondent forbidding him from entertaining, hearing or determining or continuing proceedings in a purported reference to him by the 3rd Respondent of an industrial dispute under Section 4 (1) of the Industrial Disputes Act (Nos. 43 of 1950 and 25 of 1956) as amended by the Industrial Disputes (Amendment) Act (Nos. 14 of 1957 and 62 of 1957), the Industrial Disputes (Amendment) Act (No. 4 of 1962) and pp. 19-52

RECORD

the Industrial Disputes (Amendment) Act (No. 27 of 1966), and prohibiting him from exercising any jurisdiction therein.

2. The principal questions that arise in this Appeal are :-

(a) whether the 3rd Respondent had any power under the said Act as so amended to refer the matter which he purported to refer, namely whether the termination of the services of the 2nd Respondent was justified and to what relief he was entitled. The 2nd Respondent was a former employee of the Appellants who was dismissed by them on or about the 5th April 1965. The purported reference to the 5th Respondent was made on the 19th April 1967. The Appellants submit that at the time that any dispute arose the relationship of employer and workman no longer existed between the 2nd Respondent and themselves. The dispute accordingly was not one "between an employer and a workman" and therefore was not an "industrial dispute" as defined in the Act as so amended.

(b) whether the said order made by the 3rd Respondent on the 19th April 1967 purporting to refer an industrial dispute to the 5th Respondent was not in any event a nullity, the 3rd Respondent having already, viz: on the 16th June 1965, purported to refer the same matter under section 4 (1) of the said Act, as amended, to the 1st Respondent for settlement by arbitration and the 1st Respondent having made no award therein. The 3rd Respondent purported to revoke this first reference by an Order dated the 19th April 1967, but it is submitted that he had no power so to do under the Act and, having once referred the matter to an arbitrator

as an industrial dispute, had no further power to deal with it at all.

(c) whether in any event, the 5th Respondent, not having been appointed by the Judicial Service Commission, was properly or validly appointed as President of the Labour Tribunal. It is submitted that a Labour Tribunal performs judicial functions and exercises judicial powers, and is a judicial tribunal. It follows that the President, who is the person constituting the Tribunal, is a judicial officer who is required by section 55 of the Ceylon (Constitution) Order in Council to be appointed by the Judicial Service Commission. In this context the Appellants would respectfully submit that the reasons upon which the majority of their Lordships of the Privy Council founded their decision in The United Engineering Workers Union v. Devanayagam (1968 A.C. 356) (which decision was that the office of President of a Labour Tribunal is not a judicial office within the meaning of those words in the Ceylon (Constitution) Order in Council) should be examined in the present Appeal and the issues further considered.

3. The Industrial Disputes Act (Nos. 43 of 1950 and 25 of 1956) as amended by the Industrial Disputes (Amendment) Act (Nos. 14 of 1957 and 62 of 1957), the Industrial Disputes (Amendment) Act (No.4 of 1962) and the Industrial Disputes (Amendment) Act (No. 27 of 1966), provided as follows :-

4 (1) The Minister may, if he is of the opinion that an industrial dispute is a minor dispute, refer it, by an order in writing, for settlement by arbitration to an arbitrator

RECORD

appointed by the Minister or to a labour tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference.

48 In this Act, unless the context otherwise requires -

"industrial dispute" means any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, of any person, and for the purposes of this definition

"workmen" includes a trade union consisting of workmen.

"employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person who on behalf of any other person employs any workman.

"workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and, for the

purposes of any proceedings under this Act in relation to any industrial dispute, includes any person whose services have been terminated.

4. The 2nd Respondent was formerly employed by the Appellants who dismissed him from their service on or about the 5th April 1965. p. 12, l. 15

5. On the 16th June 1965 the 3rd Respondent wrote to the Appellants informing them that he had by virtue of the powers vested in him by section 4 (1) of the Industrial Disputes Act referred an industrial dispute between the 2nd Respondent and themselves to the 1st Respondent for settlement by arbitration. Enclosed with his letter was a statement of the matter in dispute, dated the 11th June 1965, in which the dispute was said to be whether the termination of the services of the 2nd Respondent was justified and to what relief he was entitled. p. 72 p. 71

6. When the matter came up for hearing before the 1st Respondent, it was submitted on behalf of the Appellants that in view of Judgment of the Supreme Court of Ceylon in British Ceylon Corporation v. Krishnadasan (68 C.N.I.R.212) the 1st Respondent had no jurisdiction to entertain the reference as it related to the termination of the services of an employee. The 1st Respondent accepted this submission, relying also on other Supreme Court decisions prevailing at that time, and holding that he had no jurisdiction to entertain the reference, made no award. pp.75-76

7. By an Order of the 19th April 1967 the 3rd Respondent purported to revoke his former Order referring the dispute to the 1st Respondent and ordered that no proceedings be taken thereon. p. 3

8. By a further Order of the 19th April 1967 the 3rd Respondent purported, by virtue of the powers vested in him by Section 4 (1) of the Industrial Disputes Act, to refer to the 5th p. 2

RECORD

Respondent for settlement by arbitration an Industrial dispute existing between the 2nd Respondent and the Appellants.

p. 1

The Order was accompanied by a statement prepared by the 4th Respondent in which the matter in dispute was stated in the following terms :-

"In the matter of an industrial dispute

between

Mr. M.T.Marikar Bawa, No. 9, Zaleski Place, Colombo 10

and

The Colombo Apothecaries Co.Ltd., P.O.Box No.31, Prince Street, Colombo 1

Statement of Matter in Dispute

The matter in dispute between Mr.M.T.Marikar Bawa, No.9, Zaleski Place, Colombo 10 and the Colombo Apothecaries Co.Ltd., P.O. Box No.31, Prince Street, Colombo is whether the termination of the services of Mr.M.T. Marikar Bawa is justified and to what relief he is entitled.

Dated at the office of the Commissioner of Labour, this 12th day of April, 1967."

pp. 4-9

9. Statements under Regulation 21 of the Industrial Disputes Regulations 1958 were submitted by the 2nd Respondent and the Appellants.

In their Statement dated the 20th May 1967 submitted under Regulation 21(1) the Appellants pleaded inter alia

p.4,l.31 -p.5,l.4

"6. The Respondent states that no industrial dispute exists between the Company and Mr. M.T. Marikar Bawa.

RECORD

7. The Respondent respectfully submits that the Labour Tribunal to which the alleged matter in dispute has been referred for settlement by arbitration has neither the power nor the jurisdiction to entertain, hear or determine the said matter referred to it."

10. By Notice dated the 28th May 1967 the Appellants were notified to appear before the 5th Respondent on the 25th June 1967, the proceeding being described in the Notice as an "Application under Section 31 B." (which Section however does not relate to references but provides for applications to Labour Tribunals by or on behalf of individual workmen). p. 81

11. The Appellants commenced THE PRESENT PROCEEDINGS by Petition to the Supreme Court dated the 20th June 1967. pp. 11-15

They pleaded inter alia as follows :-

The Petitioner is advised and states that -

(a) that the aforesaid purported revocation is ex facie invalid as it purports to be a revocation of an order made under Section 4 (1) of the said Act; p.14, ll.6-21

(b) having made the aforesaid reference dated 16th June 1965 the 3rd Respondent has no further powers and that having exercised his powers under Section 4 (1) of the Industrial Disputes Act has exhausted the power given to him by the said Statute and that the 3rd Respondent is not entitled in law to make the second reference dated 19th April 1967 to the 5th Respondent;

(c) that the aforesaid reference is ex facie invalid;

RECORD

(d) in any event the arbitrator/the 5th Respondent/ has neither the power nor the jurisdiction to deal with the alleged matters in dispute referred to him viz: "Whether the termination of the services of Mr. M.T.Marikar Bawa is justified and to what relief is he entitled".

p.14,l.36 The Appellants prayed the Court "to issue a Mandate in the nature of a Writ of Prohibition on the 5th Respondent forbidding him from entertaining, hearing or determining or continuing the proceedings and prohibiting him from continuing to exercise jurisdiction in the said Case ..... and in the matter of the dispute and referred to him by the 3rd Respondent" and to grant them Costs.

12. The said Petition was heard by a Bench of seven Judges (H.N.G. Fernando, C.J., T.S. Fernando, J., Abeyesundere J., Silva J., Siva Supramaniam, J., Samerawickrame,J., and Tennekoon, J.) on the 23rd, 24th, 25th, 26th, 27th, 30th and 31st July and the 1st August 1967.

pp.19-52 The Court delivered Judgment on the 29th February 1968 finding by a majority of four to three against the Appellants and dismissing the Petitition with costs.

13. The principal Judgment in favour of the
pp.36-40 majority view was delivered by Samerawickrame
p. 26 J., with which Judgment T.S. Fernando J. agreed.

Samerawickrame J. held;

(a) that it was necessary to interpret the words "for the purposes of any proceedings under this Act in relation to any industrial dispute" (which appear in the definition of "workman" contained in Section 48) without reference to the definition of "industrial dispute" also contained in Section 48.

RECORD

(b) that these words meant no more than "for the purposes of any proceedings that may be initiated or commenced either by the Commissioner or by the Minister under Sections 2 (1) or 3(1) or 4 (1) or 4 (2) of this Act".

(c) that therefore for the purposes of proceedings that might be commenced or initiated by the Minister under Section 4 (1) a workman included a person whose services had been terminated, and the Minister should, in forming an opinion whether a dispute is an industrial dispute, consider whether the dispute is between an employer and a workman and/or an employer and a workman whose services had been terminated.

Silva J. and Siva Supramaniam J. delivered concurring Judgments, the latter holding that there was "an industrial dispute" within the meaning of Section 48 of the Act because there was a dispute or difference between the Appellants and the 2nd Respondent which arose before the termination of the 2nd Respondent's services. pp.28-31, pp.32-35

14. Dissenting Judgments were delivered by H.N.G.Fernando C.J., Abeyesundere J. and Tennekoon J. pp.20, 26, 41

H.N.G. Fernando C.J. held, it is submitted correctly, that: pp.20-25

(a) it was impermissible to construe the words "industrial dispute", where they appear in the definition of "workman" in Section 48, otherwise than in accordance with the definition contained in the same Section.

(b) in relation to each other, the parties to the dispute, at the time it arose, were not an employer and a workman,

RECORD

but an employer, or perhaps an ex-employer, and an ex-workman.

(c) the 2nd Respondent clearly therefore did not fall within the first limb or part of the definition of "workman". So far as the second limb of the definition was concerned, it was impossible to hold that this contemplated a workman whose services had been terminated, for so to hold would be to transgress the limitation deliberately stated in the third limb of the definition.
"Indeed, the construction that the second limb of the definition of 'workman' does include a dismissed workman is negatived by the third limb, in which the Legislature assumes that a dismissed workman is not caught up in the earlier parts of the definition."

(d) so far as the third limb of the definition of "workman" was concerned, this, by its express introductory words, applied not for all purposes, but only for the purposes of any proceedings under the Act in relation to an industrial dispute. The Minister could not initiate a proceeding under the Act except in relation to an "industrial dispute" as therein defined. There were not in this case any "proceedings under the Act" at any stage before the Minister made a reference under Section 4. "There is in existence a proceeding under the Act only when, and after, a reference under S.4 is made; and the third limb of the difinition can operate only for the purpose of a proceeding thus in existence. At the stage when the Minister merely considers whether he should make such a reference, he is not exercising any power or function under the Act."

(e) the third limb of the definition of "workman" pre-supposes the existence of an industrial dispute and enacts some provision concerning it. Hence this third limb cannot be used to test whether a case falls within the definition of "industrial dispute", because it pre-supposes that such a test has already been satisfied.

(f) the statement of the matter in dispute in the present case did not indicate that there was a dispute or difference between the Appellants and the 2nd Respondent which arose before the termination of the services of the 2nd Respondent, and there was nothing to show that there was. Although dismissal might in some cases be the culmination of a pre-existing dispute, it was not so in all cases.

15. The Judgments of Abeyesundere J. and Tennekoon J. were likewise in the Appellants' favour. pp.26-8. pp.41-52

Tennekoon J. pointed out that the purpose and object of the Act was the maintenance and promotion of industrial peace rather than the redress of private and personal grievances. A situation capable of endangering industrial peace was treated in the Act as an "industrial dispute". In the definition of this the emphasis was not on the denial or infringement of a right of a workman by his employer but on the existence of a dispute or difference between given parties connected with the rights not merely of a party to the dispute but also of third parties.

The last part of the definition of the word "workman" in the Act ("and, for the purposes of any proceedings under this Act in relation to any industrial dispute, includes any person whose services have been terminated") which was introduced by amendment in 1957 merely made explicit what was implicit before and, whatever else it did,

RECORD

p.49,l.31 -p.50,l.1

"does not import any new meaning to the expression 'industrial dispute' as defined in the Act. The amendment does not say that <u>for the purposes of determining whether an industrial dispute exists or has arisen</u> connected with the termination of the services of any person, the word 'workman' shall include the person whose services have been terminated. There is no need, even were it a proper function of interpretation, to take such liberties with the language used by Parliament when one has regard to the scope and object of the legislation. Indeed, when one bears in mind the fact that Act No.62 of 1957 also brought in Part IVA into the Act enabling a dismissed workman to seek private relief and redress in connection with the termination of his services even in cases where such termination has not given rise to an industrial dispute calling for the intervention of the public authorities, the need for straining the language used by the legislature under a supposed spirit of giving a liberal interpretation to social legislation does not at all arise."

A further indication of the legislative intent was to be found in Section 47C of the Act, also introduced by the same amending Act in 1957, and as to which the learned Judge said:

p.50,l.34 -p.51,l.11

"This section is dealing with a case where the employer-workman relationship between one person and another or others contemplated in the definition of the term 'employer' and in the first part of the definition of the term 'workman', has ceased. It is also evident from the wording of the section that the dispute under contemplation had arisen prior to the cessation of that relationship. It then goes on to provide in sub-paragraph (a) that such a dispute may be referred for settlement to an Industrial Court or

to an arbitrator (which expression includes a Labour Tribunal); and sub-paragraph (b) further provides that if such dispute had been referred while the employer-workman relationship subsisted, proceedings may be commenced and/or continued by the Industrial Court or arbitrator.

This section to my mind completely supports the submission made by Counsel for the petitioner that a dispute connected with the termination of services can be referred to an Industrial Court or a Labour Tribunal for settlement only if the dispute arose while the relationship of employer and workman subsisted; and on the principle inclusio unius exclusio alterius a dispute on such a matter which arises between an ex-employer and an ex-workman after the employer-workman relationship has ceased to exist is not an industrial dispute within the meaning of the Act."

The learned Judge concluded that

"To uphold the contention of Counsel for the 2nd Respondent would be to subscribe to the proposition "once a workman always a workman". If the contention that a person whose contract of employment has been terminated still remains a workman for the purposes of the definition of "industrial dispute" is correct it would mean that such a person could raise an industrial dispute not only in regard to the termination of his own services or the reinstatement of himself but also in regard to the employment, non-employment, terms of employment or condition of labour of any person other than himself, while he himself remains unemployed or has become a servant under the crown or indeed has turned to business and become an employer himself."

p.52,ll. 5-15

RECORD

p. 64

16. On the 22nd May 1968 the Supreme Court granted the Appellants Conditional Leave to Appeal from the said Judgment of the 29th

pp.67-8

February 1968 and on the 15th July 1968 Final Leave to Appeal therefrom.

17. Subsequently to the proceedings hereinbefore referred to the Industrial Disputes (Special Provisions) Act, No.37 of 1968 and the Industrial Disputes (Amendment) Act, No.39 of 1968 were passed.

18. The Industrial Disputes (Special Provisions) Act, No.37 of 1968 was assented to on the 4th September 1968 and provided inter alia as follows :-

2. (1) Every president of a labour tribunal shall be appointed by the Public Service Commission and, subject to the provisions of sub-section (2), every president of a labour tribunal appointed by the Judicial Service Commission prior to the relevant date shall be deemed to have been, and to be, validly appointed by the Public Service Commission.

(2) Nothing in sub-section (1) shall be deemed or construed to validate any order of any labour tribunal which was subsequently quashed by any relevant decision of the Supreme Court on appeal or on application by way of writ: Provided,however, that nothing in the preceding provisions of this sub-section shall be deemed or construed to preclude or prevent such appeal or application by way of writ from being entertained, heard and decided de novo by the Supreme Court, as hereafter provided in this Act.

5. (1) Subject to the provisions of sub-section (3), every arbitrator nominated or appointed under the principal Act, whether before or on or after the

relevant date, shall be deemed to have been, and to be, validly nominated or appointed.

(2) Subject to the provisions of sub-section (3), every reference of any industrial dispute under the principal act, whether before or on or after the relevant date, to any arbitrator referred to in sub-section (1), or to any labour tribunal shall be deemed to have been, and to be, a valid reference, and every arbitrator and labour tribunal shall be deemed to have been, and to be, duly authorized to settle every industrial dispute referred to such arbitrator or labour tribunal under the principal Act.

(3) Nothing in sub-section (1) or sub-section (2) shall be deemed or construed to validate any award of any arbitrator or any labour tribunal where such award was subsequently quashed by a relevant decision of the Supreme Court on application by way of writ:

Provided, however, that nothing in the preceding provisions of this sub-section shall be deemed or construed to preclude or prevent such application by way of writ, from being entertained, heard and decided de novo by the Supreme Court as hereafter provided in this Act.

11. In this Act, unless the context otherwise requires:

"relevant date" means March 9, 1967;

19. The Public Service Commission had purported to appoint the 5th Respondent President of the Labour Tribunal with effect from the 22nd May 1961, the notification of such appointment having appeared in the Ceylon Government Gazette No.12, 739 dated the 3rd November 1961.

RECORD

On the 8th January 1967 the Judicial Service Commission had purported to appoint the 5th Respondent acting President of the Labour Tribunal till the 31st March 1967 or until further Orders, the notification of such appointment having appeared in the Ceylon Government Gazette No.14, 732 dated the 20th January 1967. No such further Order was ever made and accordingly by the time that the Order of reference of the 19th April 1967 (referred to in paragraph 8) was made, any authority which the 5th Respondent may have derived from the Judicial Service Commission to act as President of the Labour Tribunal, had already expired.

20. The Appellants respectfully submit that

(a) the first limb of section 2 of Act No.37 of 1968 is prospective only in its effect.

(b) the second limb of section 2 has no application to the case of the 5th Respondent who was appointed to his office by the Public Service Commission.

(c) the office of President of a Labour Tribunal is a judicial one and the 5th Respondent, not having been appointed to his office by the Judicial Service Commission, was not properly or validly appointed.

(d) Labour Tribunal II is therefore not a properly appointed or constituted Labour Tribunal, and section 5 (2) has no application.

(e) section 5 (2) would in any event have no application, because for the reasons hereinbefore set out in paragraph 2 (b) hereof, the order made by the 3rd Respondent on the 19th April 1967 purporting to refer an industrial dispute to the 5th Respondent was not "a reference . . . under the principal Act" but was a nullity.

21. The Industrial Disputes (Amendment) Act, No.39 of 1968 was assented to on the 12th October 1968 and provided inter alia as follows :-

2. The Industrial Disputes Act (as last amended by Act No.27 of 1966), hereafter referred to as the "principal Act", -

(a) is hereby amended in the manner and to the extent specified in Part I of the Schedule to this Act, and such amendments shall be deemed, for all purposes, to have come into operation on October 11, 1966; and

(b) is hereby further amended in the manner and to the extent specified in Part II of that Schedule, and such further amendments shall be deemed, for all purposes, to have come into operation on December 30, 1957.

SCHEDULE

.....

PART II

Amendments to the principal Act.

1. Section 48 of the principal Act is hereby amended in the definition of "workman" by the substitution for the words "and, for the purposes of any proceedings under this Act in relation to any industrial dispute, includes any person whose services have been terminated", of the words "and includes any person whose services have been terminated".

22. The Appellants submit that the provisions of Acts No.37 and 39 of 1968 are inapplicable to the present proceedings and that this Appeal

RECORD

falls to be determined according to the law as it stood before these Acts were passed. The Acts do not contain the "express provision" which, by section 6 (3) of the Interpretation Ordinance, would be required to make the determination of this Appeal or of any incomplete or pending proceedings subject to the law as thereby amended, or to deprive the Appellants of their right to appeal to the Privy Council on the issues of facts and law which were litigated and decided upon adversely to them in the Court below.

23. The Appellants respectfully submit that this Appeal should be allowed and they should be granted the relief claimed by them in the proceedings and awarded the Costs of this Appeal and in the Court below for the following amongst other

R E A S O N S

1. BECAUSE there was no "industrial dispute", within the meaning of Section 4 (1) of the Act, between the Appellants and the 2nd Respondent.

2. BECAUSE the 3rd Respondent had no power to refer to the 5th Respondent the matter which he purported to refer.

3. BECAUSE the 3rd Respondent had no power to revoke the Order of the 16th June 1965 referring an industrial dispute to the 1st Respondent.

4. BECAUSE the Order of the 19th April 1967 by which the 3rd Respondent purported to refer an industrial dispute to the 5th Respondent was a nullity.

5. BECAUSE the dissenting Judgments of H.N.G. Fernando C.J., Abeyesundere J. and Tennekoon J. were right for the reasons therein stated by them.

6. BECAUSE the 5th Respondent had no jurisdiction to entertain, hear or determine the matter referred to him.

7. BECAUSE Labour Tribunal II was not properly or validly constituted.

8. BECAUSE the 5th Respondent was not appointed to his office by the Judicial Service Commission.

9. BECAUSE if the 5th Respondent ever had jurisdiction to settle an industrial dispute, such jurisdiction ceased on the 31st March 1967.

10. BECAUSE Acts Nos. 37 and 39 of 1968 are inapplicable to the determination of this Appeal.

MONTAGUE SOLOMON.

No. 6 of 1969

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF CEYLON

THE COLOMBO APOTHECARIES' CO.LTD.

- v -

E. A. WIJESOORIYA and OTHERS

CASE FOR THE APPELLANTS

FARRER & CO.,
66 Lincoln's Inn Fields,
LONDON, W.C.2.

Solicitors for the Appellants