[IN THE COURT OF APPEAL OF SRI LANKA]

1973 *Present :* **Fernando, P., Sirimane, J., Samerawickrame, J., Siva Supramaniam, J., and Tennekoon, J.**

CARSON CUMBERBATCH & CO. LTD., Appellant, *and* W. D. NANDASENA (President, Labour Tribunal) and 2 others, Respondents

APPEAL No. 8 OF 1973

S. C. 458/71—Application for Writs of Certiorari and Prohibition

Industrial Disputes Act (Cap. 131)—Sections 8, 14, 19, 21D, 31B, 33 (3), 33 (4), 48—Termination of a workman's services—Application made to Labour Tribunal for relief—Wrong decision made by the Tribunal in limine *as to the identity of the workman's employer—Availability of Writs of* Certiorari *and Prohibition at that stage—Meaning of expressions "employer" and "workman"—A Company acting as the Agents and Secretaries of the workman's employer—Whether relief can be claimed by the workman against such Agents too as the workman's employer.*

The 3rd respondent, a "public" limited liability company (Farms and Retail Markets Ltd.) appointed the appelant-company (Carson Cumberbatch & Co. Ltd.) as its Managers and Secretaries. The 2nd respondent held the post of manager of a farm belonging to the 3rd respondent. He was appointed to that post by a letter sent by the 3rd respondent and the appellant-company jointly, but the appellant was manifestly acting "for and on behalf of" the 3rd respondent. When his services were terminated 2½ years later, he made application under section 31B of the Industrial Disputes Act claiming relief not only from the 3rd respondent, which was admittedly his employer, but also from the appellant-company. He alleged that both companies were his employers. The appellant-company filed answer stating that it was not the employer of the 2nd respondent and that it had, to the knowledge of the 2nd respondent, acted merely as "Managers and Secretaries" of the 3rd respondent-company. After a preliminary inquiry, the Labour Tribunal made order that the inquiry should proceed against both companies. The appellant thereupon applied to the Supreme Court for Writs of *Certiorari* and Prohibition to quash the order of the Labour Tribunal and to restrain the Tribunal from taking any further proceedings against the appellant. The present appeal was from the judgment of the Supreme Court which held—

(i) that Writs of *Certiorari* and Prohibition were not available to the appellant as the question whether the appellant (as well as the 3rd respondent) was the employer of the 2nd respondent was a mixed question of fact and law and that, therefore, the error, if error there was, was one committed within jurisdiction.

(ii) that the appellant and the 3rd respondent were the employers of the 2nd respondent; in coming to this conclusion the Supreme Court took the view that the appellant's acts on behalf of the 3rd respondent constituted "the act of appointment itself" and that although these acts were performed on behalf of the 3rd respondent, the definition of the term employer in the Industrial Disputes Act rendered the principal (the 3rd respondent) and its agent (the appellant) both employers of the appellant.

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Held, by the majority of the Court (SIRIMANE, J., dissenting), that the appellant was entitled to be granted Writs of *Certiorari* for the following reasons :—

(i) A Labour Tribunal cannot, by making a wrong decision as to the identity of the employer, whether by reason of a mistake of fact or by reason of a mistake of law, give itself power or jurisdiction to make orders against a person who is not the particular workman's "employer" within the meaning of the Industrial Disputes Act. A statutory tribunal may step outside its jurisdiction in the course of its inquiry as well as at the outset, and this transgression may result from a mistake of law in the interpretation of the statute by which its jurisdiction is conferred or from an erroneous finding on a jurisdictional fact. In such a case, *Certiorari* lies even at the outset, immediately after jurisdiction is wrongly assumed by a Labour Tribunal.

(ii) The appellant was not an employer of the 2nd respondent within the meaning of the definition of the term "employer" in section 48 of the Industrial Disputes Act. The person referred to as a person employing a workman in each of the three limbs of the definition is intended to refer to a person who is under contractual obligation to the workman. In the present case the appellant company at all times declared that it was acting only as an agent "for and on behalf of" the 3rd respondent company. The contract of service into which the 2nd respondent entered was a contract with the 3rd respondent only.

APPEAL from a judgment of the Supreme Court.

H. L. de Silva, with *Mark Fernando*, for the appellant.

N. Satyendra, with *P. Sundaralingam*, for the 2nd respondent.

1st and 3rd respondents absent and unrepresented.

Cur. adv. vult.

December 31, 1973. TENNEKOON, J.—

The main question that falls to be decided in this appeal is whether the appellant, Carson Cumberbatch and Company Limited was, together with the 3rd respondent Farms and Retail Markets Limited, an "Employer" of the 2nd respondent L. S. C. Canagasingham within the meaning of the expression "Employer" as used in the Industrial Disputes Act.

Farms and Retail Markets Limited (Farms) was incorporated as a "public" limited liability company on the 11th of April, 1966. The Board of Directors of a company known as Carson Cumberbatch & Co. Ltd. (Carsons), with considerable support from other mercantile institutions and persons took great interest in floating this new company (Farms). Shortly after Farms was incorporated its Board of Directors appointed Carsons as Managers and Secretaries of Farms; the new company's activities consisted mainly of large-scale production of vegetables and subsidiary foodstuffs on its two farms—Terra Nova Farm at Mahiyangana and Park Farm at Kandapola—and the retailing of the produce at outlets in the bigger cities. The Terra Nova

Farm was managed by a person holding the post of "Farm Manager". The prospectus issued by Farms on 5th August 1966 shows that this post was then held by one Mr. F. A. de Silva. In the latter part of 1966 the post of Assistant Manager of Terra Nova Farm was advertised and the 2nd Respondent on his application was selected for appointment; he took up duties on the farm on or about 6th May 1967. The contract of service is contained in a document (1R3) which (omitting details of particulars of salary, Provident Fund, hours of work, leave privileges, conditions of termination of appointment, Medical Examination) reads as follows:

Duplicate

FARMS AND RETAIL MARKETS LIMITED

(Telegrams: "Farmfoods" Colombo, Braybrooke Stores, Braybrooke Street, Colombo 2)

1st June, 1967.

L. S. C. Canagasingham, Esqr.,
C/o. The Manager,
Terra Nova,
Weragantota.

Dear Sir,

Post of Assistant Manager

We are pleased to offer you the above post on the following terms and conditions:—

Date of Appointment:—

We shall take the 6th May as the effective date of your appointment.

Salary:————.
Provident Fund:————.
Hours of work:————.
Leave:————.
Termination of employment:————.
Medical examination:————.
General:————.

If the foregoing terms are acceptable to you, will you please sign and return the duplicate copy of this letter together with the attached welfare card duly completed.

Yours faithfully,
For and on behalf of
Farms & Retail Markets Ltd.,
Carson Cumberbatch & Co. Ltd.,
Sgd.: Director,
Managers and Secretaries.

I acknowledge receipt of the original of the above letter, the terms of which I have read and I hereby accept all the terms of my appointment as set out in this letter, this duplicate of which I now wish to return.

Sgd. L. S. C. Canagasingham.

The Manager of the Terra Nova Farm, Mr. F. A. de Silva, resigned his office with effect from 12th November 1967, whereupon Carsons addressed the following letter (1R14) to the 2nd respondent :—

"1R14",
25th November, 1967.

Ref. F/11,
L. S. C. Canagasingham, Esqr.,
Terra Nova Farm,
Mahiyangana.

Dear Sir,

Post of Manager—Terra Nova Farm

We are pleased to advise that the Board have approved your appointment as Manager of Terra Nova at a consolidated salary of Rs. 2,000 per mensem with effect from 1st December, 1967.

The other terms of your appointment subject to your having to contribute 10% of your consolidated salary and the Company contributing an equal amount, which is to be retained in the books of the Company until such time as we make suitable arrangements for you to join the E. P. F., are as set out in our letter of 1st June, 1967.

Please acknowledge receipt of this letter.

Yours faithfully,
For and on behalf of
Farms & Retail Markets Ltd.,
Carson Cumberbatch & Co. Ltd.,
Sgd : Director,
Managers & Secretaries.

c.c. J. M. E. Waring, Esqr.

This letter was in consequence of a decision of the Board of Directors of Farms taken at a meeting of the Board held on the 23rd November, 1967.

Mr. Canagasingham thereafter served as Manager of Terra Nova Farm until his services were terminated with effect from 30th June 1970. Two letters that were addressed to him in that connection read as follows :—

"A 9"

CARSON CUMBERBATCH & CO. LTD.
LEECHMAN & CO. LTD.
(Subsidiary Company)

P. O. Box No. 24,
Colombo,
24th March, 1970.

(Registered Post)

Ref. F/11.
L. S. C. Canagasingham, Esqr.,
Terra Nova Farm,
Mahiyangana.

Dear Sir,

Terra Nova Farm—Mahiyangana

We hereby give you one month's notice with effect from the 1st of April, 1970, under Section 31F (*a*) of the Industrial Disputes Act of our intention to terminate your services on the grounds of redundancy.

A further notice whereby your services will be terminated on 30th June, 1970, is annexed.

Yours faithfully,
for and on behalf of
Farms and Retail Markets Ltd.
Carson Cumberbatch & Co. Ltd.
Sgd. Director, Managers and Secretaries.

REPLY SMY :
Copy to—
The Commissioner of Labour,
Baladaksha Mawatha,
Colombo 3.

"A 8"

CARSON CUMBERBATCH & CO. LTD.
LEECHMAN & CO. LTD.
(Subsidiary Company)

P. O. Box No. 24.
Colombo,
24th March, 1970.

(Registered Post)

Ref. F/11.
L. S. C. Canagasingham, Esqr.,
Terra Nova Farm,
Mahiyangana.

Dear Sir,

Terra Nova Farm—Mahiyangana

We refer to your letter of appointment dated 25th November, 1967, and the notice under Section 31F (*a*) of the Industrial Disputes Act of today's date.

Accordingly we hereby give you three months' notice commencing from 1st April, 1970, of the termination of your services on 30th June, 1970.

Yours faithfully,
for and on behalf of
Farms and Retail Markets Ltd.
Carson Cumberbatch & Co. Ltd.
Sgd. Director, Managers and Secretaries.

REPLY SMY :
Copy to—

The Commissioner of Labour,
Baladaksha Mawatha,
Colombo 3.

During the period the 2nd respondent held office, firstly as Assistant Manager and then as Manager of Terra Nova Farm, Carsons, acting manifestly and to the knowledge of the 2nd respondent Canagasingham for and on behalf of Farms Ltd., exercised control and supervision over the work of the 2nd respondent. Any instructions or directions issued by Carsons in that regard were always stated to be ' for and on behalf of Farms & Retail Markets Ltd. '. The 2nd respondent was paid his salary by cheques drawn on accounts maintained by Farms at the People's Bank at Mahiyangana and at Kandy. After the 2nd respondent ceased to be Manager his Provident Fund entitlement amounting to Rs. 14,436.10 was paid to him by a cheque drawn by Carsons on their own account. But even here it is evident from 1R16 that this amount was charged to Farms by Carsons.

On the 4th of July 1970 the 2nd respondent made application under Section 31B of the Industrial Disputes Act claiming relief in respect of the termination of his services ; relief was claimed from both Carsons (the appellant in these proceedings) and from Farms (the 3rd respondent), both of which companies he alleged were his employers. The appellant filed answer stating that it was not the Employer of the 2nd respondent and that it had, to the knowledge of the 2nd respondent at all relevant times, acted merely as 'Managers and Secretaries' of Farms. Farms admitted that it was the Employer.

At the inquiry before the Labour Tribunal counsel for the appellant and Farms objected to the Tribunal proceeding to enquiry as against the appellant on the ground that the appellant was not an employer of the 2nd respondent. After a preliminary enquiry, the Tribunal, being of the opinion that Carsons was the employer of the 2nd respondent together with Farms, made order (dated 11.7.71) that the enquiry should proceed against both of these companies.

Consequent on this order the appellant applied to the Supreme Court for mandates in the nature of Writs of Certiorari and Prohibition quashing the said order and restraining the tribunal from taking any further proceedings against the appellant on the 2nd respondent's application. The present appeal is from the judgment of the Supreme Court (Rajaratnam, J. with Walgampaya, J. agreeing) by which Carson's application for Writs of Certiorari and Prohibition was refused with costs. The Supreme Court held—

(i) that Writs of Certiorari and Prohibition were not available to the appellant as the question whether Carsons (as well as Farms) was the employer of the 2nd respondent was a mixed question of fact and law and that, therefore, the error, if error there was, was one committed within jurisdiction.

(ii) that Carsons and Farms were the employers of the 2nd respondent ; in coming to this conclusion the Supreme Court took the view that the appellant's acts on behalf of Farms constituted 'the act of appointment itself' and that although these acts were performed on behalf of Farms, the definition of the term employer in the Industrial Disputes Act rendered the principal (Farms) and its agent (Carson) both employers of the appellant.

In regard to the first question, namely, whether the decision of the Labour Tribunal that Carson was an employer of the 2nd respondent was a decision taken within jurisdiction and not on a jurisdictional fact we think that the Supreme Court was clearly in error in the view it took.

The provisions of the Industrial Disputes Act under which the application was made to the Labour Tribunal and under which the Labour Tribunal proceeded to deal with the application clearly indicate that relief or redress may be claimed by a workman only against 'his employer' and that an order made upon such an application can operate only against such employer. It seems to us manifest that the Labour Tribunal cannot, by making a wrong decision as to the identity of the employer, whether by reason of a mistake of fact or by reason of a mistake of law, give itself power or jurisdiction to make orders against a person who is not the particular workman's 'employer' within the meaning of the Industrial Disputes Act. A statutory tribunal may step outside its jurisdiction in the course of its inquiry as well as at the outset, and this transgression may result from a mistake of law in the interpretation of the statute by which its jurisdiction is conferred or from an erroneous finding on a jurisdictional fact. Counsel for the 2nd respondent did not seek to support the view taken by the Supreme Court on this part of the case, having regard to a decision of this Court in *Colombo Paints Ltd. v. W. L. P. de Mel, Commissioner of Labour and three others.*[1] We do not in the circumstances think it necessary to say anything further on this question. We will content ourselves with a quotation from a judgment of Farwell L. J. in *Rex v. Shoreditch Assessment Committee Ex parte Morgan.*[2]

> "No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence of extent of such jurisdiction ; such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction ; for the existence of the limit necessitates an authority to determine and enforce it ; it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratic, not limited and it is

[1] *(1973) 76 N. L. R. 409.*

[2] *1910 K. B. 859 at 880.*

immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact."

We would respectfully agree with this dictum.

We can now turn to a consideration of the 2nd question that was argued before us namely whether the appellant Carsons was an employer of the 2nd respondent.

The term 'employer' is defined in section 48 of the Industrial Disputes Act as follows :—

> '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.

Omitting the portion in parenthesis, this definition can be split up into three limbs thus :—

'employer' means—

(1) any person who employs any workman,

(2) any person on whose behalf any other person employs any workman,

(3) any person who on behalf of any other person employs any workman.

The first limb of the definition, in so far as it gives a meaning to the term 'employer' by applying it to a 'person who employs' is unhelpful in that it says no more than that the term 'employer' is a substantival derivative of the verb 'to employ'; but the definition is significant in that it defines 'employer' as a person who employs *another* who is a workman. The act of 'employing' an inanimate object does not bring two persons into relationship with each other. In such a context 'employ' means only to 'use as a means of instrument or as material'. On the other hand the act of one person employing another brings two persons or legal entities into relationship with each other ; here 'employ' means 'use the services of'; a person cannot be employed by another in the way in which a chattel or an animal is 'employed' by a human being ; slavery was abolished in this country over a century ago by the Abolition of Slavery Ordinance (Cap. 75) ; a person has first to agree to be employed and also to the terms, however bald or fragmentary, of the employment. The relationship that arises thus gives rise to rights and obligations on the part of the employer and the employee. An agent who engages a man for the purposes of his principal cannot himself be said to 'employ' or utilise the services of that man. The conclusion then

that the concept of the person 'employing' another involves within it the existence of a contract between the person employing and the person employed is irresistible. We are accordingly of the opinion that when the first part of the definition of the term 'employer' speaks of 'a person who employs a workman' it contemplates a person who employs another under a contract of service, express or implied, to which the person employing and the person employed are the parties.

The verb 'employs' is used in a similar way in the second and third parts of the definition and can bear only the same meaning as it has in the first limb ; we cannot think of any sufficient reason to construe the second and third 'employs' in the definition to have been used by the legislature in a sense different from the first ; and in any event we find it difficult to contemplate any other sense in which the word can, in its context, be construed. Counsel for the 2nd respondent suggested that 'employs' may be used in the sense of 'utilise the services of' ; we have no doubt that this is the sense in which it is used ; but the attribution of this meaning to the word does not help to dispense with the resultant contractual nexus which is the inevitable outcome of one person utilising the services of another. Having regard to the factual context in which the question of who is or are the employers of the 2nd respondent arises in this case, it must be noted that the definition of the word employer contains no reference to control or supervision or management exercised by one person over another, so that it certainly does not have the effect of including cases in which a person not the contractual employer, may by reason of the control, supervision or management exercised over a workman give only the *appearance* of being the employer.

Counsel for the 2nd respondent submitted to us that in the field of labour law, the legislature has generally given an extended meaning to the word 'employer'. He contended that the managing agent, Superintendent or the person in control is made into a 'statutory' employer over and above the common law employer in many statutes. He referred us to the definition of the term employer in the following enactments :—

(1) Workmen's Compensation Ordinance, Chapter 139 which defines employer to include any managing agent of an employer.

(2) The Shop and Office Employees Act, Chapter 129 which defines employer to include the person having charge or the general management and control of the shop or office.

(3) The Maternity Benefits Ordinance, Chapter 140 which defines employer to include any duly accredited manager, managing agent or other person who for the time being is in charge of the shop, mine or factory and the Superintendent or other person for the time being in charge of an estate.

(4) Indian Immigrant Labour Ordinance, Chapter 132 defines employer to include the Agent, Superintendent or the Manager or the Proprietor of an estate.

(5) The Estate Labour (Indian) Ordinance, Chapter 133, defines employer to include the Superintendent.

These enactments militate against rather than support the submissions of counsel, for the legislature by expressly including Managers, Agents, and Superintendents has enlarged the common law meaning of the term employer. There are numerous other enactments in which the term employer is defined in a manner similar to that employed in the Industrial Disputes Act. (See Employees Provident Fund Act No. 15 of 1958, the Wages Boards Ordinance, Chapter 136, the Employees Holidays Act No. 6 of 1959, and the Employment of Women, Young Persons and Children Act No. 47 of 1956). We must confess that we have found this excursion into the field of labour legislation, unhelpful in trying to ascertain the meaning of the word employer as used in the Industrial Disputes Act. A more legitimate and more profitable exercise would be to examine the Industrial Disputes Act itself for any indication of the legislative intent. We find considerable evidence within the four corners of the Industrial Disputes Act to support the view that an employer, whether he be principal or agent, must have a contract of service with the workman.

We would refer in the first place to the definition of the expression 'workman' as in the Industrial Disputes Act which 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 includes any person whose services have been terminated." (stress added)

It will be observed that the existence of a contract with his employer is the *sine qua non* for identifying a workman. Then there is a group of sections, viz., section 8, section 14, section 19 and section 21 (D), all of which provide, in the case of a collective agreement, a settlement by conciliation, a settlement by arbitration, or a settlement by adjudication, that the terms of the agreement or settlement or award as the case may be, 'shall be implied terms in *the contract of employment* between the employer and the workman' bound by the agreement, settlement or award. It is clear from those provisions that a common law contract of service must subsist between the employer and the workman before the two persons can be regarded as employer and workman. If anything further is required one need only look at subsection 4 of section 33 of the Industrial Disputes Act. This subsection follows upon the provision in subsection 3 to the effect that where an award or order of a Labour Tribunal contains a decision for reinstatement of a workman, then if the employment is in the capacity of a personal secretary, personal clerk, personal attendant or personal chauffeur to the employer, the award or order shall also contain a decision as to the payment of compensation to the workman as an alternative to his reinstatement. Subsection 4 then goes on to say—

> "For the purposes of the application of subsection (3) in any case where the employer is a company, the references therein to the employer shall be deemed to be references to the person (however designated) who is responsible for the general management of the business of the company."

This provision places beyond any doubt that a person who is responsible for the general management of the business of a company is not ordinarily caught up in the term employer.

To return now to the definition of the term 'employer' in the Industrial Disputes Act, we are of opinion that the person referred to as a person *employing* a workman in each of the three limbs of the definition is intended to refer to a person who is under contractual obligation to the workman. Thus the first limb of the definition will catch up a person who himself engages a workman and also one who engages a workman through an agent who is known to the latter to be acting as agent; the second limb will apply to a principal on whose behalf an agent, without disclosing the existence or identity of his principal engages the services of a workman; in such a case the workman on discovering the existence and identity of the principal can hold him to the contract; the 3rd limb would include the type

of *agent* who is referred to under the second limb, because in such a case the agent is at common law regarded as having contracted personally.

In the present case Farms would fall under the first limb and the first limb only. Carsons would not fall under any limb of the definition ; this company at all times declared that it was acting for Farms by using the expression ' for and on behalf of Farms & Retail Markets Ltd.' in all correspondence and more importantly in 1R3 and 1R14 which form the basis of the contract. Here we would like to quote from the judgment of Lord Shaw of Dunfermline in the case of *Universal Steam Navigation Co. v. James McKelvis & Co*[1] 1923 A. C. page 492 at 499 :—

> " But I desire to say that in my opinion the appending of the word ' agents ' to the signature of a party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal or agent. A highly improbable and conjectural case (in which this dominating factor might be overcome by other parts of the contract) may by an effort of the imagination be figured, but, apart from that, the appending of the word ' agent ' to the signature is a conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that twofold sense by the other contracting party. "

There can be no doubt then that the contract, and the only contract, express or implied, into which the 2nd respondent entered into was a contract with Farms.

For the reasons stated above the majority of us (Sirimane, J. dissenting) are of opinion that the Supreme Court was in error in refusing the application of the appellant for a Mandate in the nature of Writs of Certiorari and Prohibition. The appeal succeeds ; the judgment of the Supreme Court is set aside ; the order of the Labour Tribunal dated 11th July, 1971 is quashed, and the Tribunal is directed to discontinue proceedings against the appellant.

The 2nd respondent will pay to the appellant its costs of this appeal which we have decided to fix at Rs. 1,500.

Appeal allowed.

[1] *1923 A. C. 492 at 499.*