RUBBERITE COMPANY LTD.
v.
LABOUR OFFICER, NEGOMBO

COURT OF APPEAL.
S. N. SILVA, J..
C. A. 104/86 - M. C. NEGOMBO No. 12492.
MARCH 12, 1990 & JUNE 11,1990.

Industrial Dispute - Termination of employment - Strike - Invitation to report to work before final date - Refusal of admission to work place on workers reporting on a later date — Lock-out — Prosecution under s. 40 (1) (i) of Industrial Disputes Act — Mens rea.

A branch union of a workers union was formed by a number of workmen of the appellant Company. The formation of the union was notified to the management and about the same time the Company terminated the services of 10 of its workers, including some office bearers of the union. The union alleged that the dismissals were acts of victimisation directed at its formation but the Company insisted that it was solely due to the bad attendance of the workmen concerned. The dispute remained unsolved and the union staged a strike. The company gave an ultimatum to the workmen to return to work by a certain date informing that if they failed to do so they would be as having ceased to be employees. The workmen failed to return. The matter was then referred for arbitration under section 4 (1) of the Industrial Disputes Act. The union later informed the management that pursuant to the order made by the Minister the members of the union will report for work. When they returned to work accordingly they were refused entry. Thereafter a prosecution was instituted in the Magistrate's Court for an offence committed under section 40 (1) (1) of the Industrial Disputes Act which makes it an offence for an employer to cause a lock-out in

any industry after a dispute has been referred for settlement but before an award in respect of such dispute is made. The Company was found guilty and fined Rs. 500 00. The Company appealed against the conviction.

Held :

Section 40 (1) (1) prohibits the commission of certain acts in any industry committed during a specific period of time.

The term lock-out covers the following acts done in consequence of a dispute :

(i) the closing of a place of employment ;
(ii) suspension of work ;
(iii) the refusal by a employer to continue to employ any number of persons employed by him.

The person perpetrating the lock-out should be the employer and the person or persons against whom it is levelled should be employees.

To constitute an offence under the section it is essential that there be an employer-employee relationship between the person accused of the offence and the person or persons who are alleged to have been locked-out at the time of the commission of the offence.

The term "strike" generally denotes collective action resorted to by a body of employees to express their grievences and to win their demands from an employer. As defined in section 2 of the Trade Unions Ordinance it involves the cessation of work by a body of employees or a concerted refusal or a refusal under a common understanding to continue to work or to accept employment. Although generally a strike is a means used against an employer, there could be situations when a strike is resorted to by employees with other objectives.

The Industrial Disputes Act recognises a basic right of workmen to commence and to participate in a strike to expess their grievances and to win their demands subject to the restrictions and prohibitions that are specifically laid down.

The employer could not validly issue an ultimatum to workmen on a lawful strike requiring them to report to work before a specified date or in the alternative be considered as having ceased to be employees or as having abandoned their employment.

The underlying basis of a strike by workmen is an absence on their part of an intention to terminate their contracts of employment.

An employer cannot validly issue an ultimatum to a workman engaged in a lawful strike to report for work before a specified date or in the alternative be considered as having ceased to be an employee. Therefore the letter V 3 which falls into the category normally described as a notice of vacation of post cannot be considered as valid or as being capable of producing any legal effect.

The employer-employee relationship between the parties continued and was subsisting as at 07.01.1985 being the date of the offence.

The contention that there was no *mens rea* because there was no work to offer as export orders had been lost is untenable because there were other persons continuing in employment.

Cases referred to :

(1) *Vine v. National Dock Labour Board 1956 3 all ER 938, 948*
(2) *University Council of Vidyodaya v. Linus Silva 66 NLR 505, 507*
(3) *The Ceylon Hotels Corporation v. Jayatunga 74 NLR 442, 445*
(4) *Morgan v. Fry 1968 3 WLR 506, 513*
(5) *Express News Papers v. Mark AIR 1963 SC 1141*

APPEAL from conviction entered by the Magistrate of Negombo.

Chula de Silva, P. C. with *R. Develigoda* and *C. Liyanapatabendi* for accused-appellant.
B. Aluvihare, S.C.C. for complainant - respondent.

Cur. adv. vult.

July 6, 1990.

S. N. SILVA, J.

The Appellant Company was at the time material to this case engaged in the manufacture of certain rubber based items, for export. On 23.08.1984 the Industrial Transport and General Workers Union formed one of its branches at the Company comprising of a number of its workmen. The formation of the branch Union was notified to the management of the Company on 24.08.1984 and at about the same time the Company terminated the services of ten of its workmen including some office bearers of the Union. The Union alleged that the dismissals were acts of victimisation directed at its formation but the management insisted that the dismissals were unrelated to the formation of the Union and were based solely on the bad attendance at work of the workmen concerned. The dispute remained unresolved and the Union gave notice by letter dated 1.9.1984 of a token strike that was held on 4.9.1984. Thereafter the Union gave further notice and staged a strike proper from 7.9.1984.

The officers of the Department of Labour arranged several discussions between the parties but the dispute with regard to the dismissal of the 10 workmen remained unresolved and the workmen continued their strike.

On 20.9.1984, the Company sent letter marked 'V3' notifying the workmen who had kept away from work that they should report for work by 27.9.1984 and if not they "will be treated as having ceased to be employees". The letter also states that the Company will thereafter recruit other labour. It appears that none of the workmen on strike responded to the ultimatum contained in the said letter.

By order dated 21.12.1984 published in the Government Gazette of 4.1.1984 (P7) the then Minister of Labour acting in terms of section 4 (1) of the Industrial Disputes Act referred the dispute between the Union and the Company for settlement by arbitration to the arbitrator named in the order. The statement of the matters in dispute shows that it relates to the termination of services of the 10 workmen referred above. It appears from the contents of letter marked P1 that by letter dated 4.1.1985 the Union informed the management of the Company that pursuant to the order made by the Minister, the members of the Union will report for work on 7.1.1985.

The workman W. P. Hemapla, in his evidence, gave a complete account of what took place on 7.1.1985. According to his evidence, which was not challenged regarding this aspect, all the workmen on strike reported for work on 7.1.1985. They were stopped at the gate by a security officer employed by the Company. They requested the security officer to inform the Personnel Officer that they have come to report for work. They were in turn informed that the Personnel Officer could not make a decision on the matter and that they should settle the matter with the Department of Labour and the Union. The workmen immediately sent a letter to the Personnel Officer (P 4) stating what was communicated to them and also complaining that they could not report for work because they were prevented from entering the premises. It appears that the Union also addressed prompt complaints regarding this matter to the Company and the Labour Department (P1 and P2). The Assistant Commissioner of Labour, Negombo wrote letters dated 31.1.1985 (P 5) and 15.2.1985 (P 6) requesting that the workmen who had been on strike be given work in view of the order made by the Minister referring the dispute to arbitration. In letter marked P 6 it is specifically stated that if the Company failed to comply it would be prosecuted for committing an offence under section 40(1) (*l*) of the industrial Disputes Act. The Company did not respond to any of these letters sent by the Union and the Assistant Commissioner of Labour. Even the defence did not produce any copy of letter sent by the Company stating the reason for not permitting the workmen who were hitherto on strike to report for work on 7.1.1985.

On 20.9.1985 the Labour Officer instituted a prosecution against the Company for committing an offence under section 40(1) (*l*) of the Industrial Disputes Act which is punishable under section 43(1) of that Act. After trial the learned Magistrate by his order dated 20.3.1986 found the Company guilty of the offence and imposed a fine of Rs. 500/=. The appeal has been filed against this conviction and the sentence imposed.

At the hearing of this appeal, learned President's Counsel appearing for the Appellant Company did not seek to canvass any of the facts as stated above. The main submission of Counsel was that as at 7.1.1985, the Company had ceased to be the employer of the workman W. P. Somapala named in the charge and of the other workmen who continued to be on strike. That, when the workmen failed to report for work on 27.9.1984 as required by notice marked V3, they were treated as having ceased to be employees and there was a termination of the contract of employment. Learned State Counsel submitted that the workmen were on strike and as such they could not be considered as having abandoned their employment when they defied the ultimatum of the Company as contained in the notice marked V 3. Therefore the employer - employee relationship subsisted as at 7.1.1985.

Section 40 (1) (l) of the Industrial Disputes Act states the offence with which the Company was charged as follows :—

> " (1) being an employer, commences, continues, or participates in, or does any act in furtherance of, a lock - out in any industry after an industrial dispute in that industry has been referred for settlement to an industrial court, or for settlement by arbitration to an arbitrator, or for settlement by adjudication to a labour tribunal but before an award in respect of such dispute has been made ; ".

It is seen that the section prohibits the commission of certain acts in any industry committed during a specific period of time. The acts prohibited relate to a lock-out in any industry. It covers the commencement or continuance of or the participation in or the doing of any act in furtherance of a lock - out. The prohibition becomes operative after the Minister by order refers an industrial dispute in that industry for settlement, by arbitration to an arbitrator (section 4 (1)), to an Industrial Court (section 4 (2)) or by adjudication to a labour tribunal (section 4 A).

In terms of section 48 of the Act the term " lock-out" has the same meaning as in the Trade Unions Ordinance. Section 2 of the Trade Unions Ordinance defines the term "lock - out" as follows :-

> " Lock - out" means the closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with a view to compelling these persons, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.

According to this definition, the term lock - out covers the following acts done in consequence of a dispute :—

(i) the closing of a place of employment ;
(ii) the suspension of work ;
(iii) the refusal by an employer to continue to employ any number of persons employed by him.

The words, "place of employment", "suspension of work" and "refusal ..... to continue to employ" found in relation to all three sets of acts clearly show that a lock - out can take place only in the background of a continuing employer - employee relationship. The person perpetrating the lock - out should be an employer and the person or persons against whom it is levelled at should be employees. Considering this basic feature of a lock - out and the opening words of section 40 (1) (l), referred above, I am of the view that to constitute an offence under that section it is essential that there be an employer - employee relationship between the person accused of the offence and the person or persons who are alleged to have been locked - out, at the time of the commission of the offence. I find no difficulty in agreeing with the submission of learned President's Counsel upto this point.

The next aspect to be considered is whether there was an employer - employee relationship between the Company and the workman named in the charge as at 7.1.1985. Counsel submitted that when the workman kept away on 27.09.1984 defying the ultimatum in letter V3, he ceased to be an employee and that he was so treated by the company. That a termination of a contract of employment even if it be unjustified could not be considered null and void unless it is so declared by statute. In this regard he relied upon the dictum of Lord Keith in the case of *Vine v. National Dock Labour Board* (1) which is as follows :—

> " Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

This dictum of Lord Keith has been followed in the cases of *University Council of Vidyodaya v. Linus Silva* (2) and in the case of *The Ceylon Hotels Corporation v . Jayatunga,* (3)

The dictum of Lord Keith is a general statement which is 'normally' applicable to contracts of service. It could however not be applied as a rule of thumb to all situations that may arise in master and servant relations. To my mind two matters have to be specially considered before the dictum is applied to the facts of this case. They are :-

(i) In this case the alleged termination is not an act of the employer but resulted from certain negative conduct on the part of the workman in not reporting for work. In other words, the alleged termination rests on an abandonment of the contract by the workman ; and

(ii) Whether a workman who is admittedly on strike pursuant to a demand made by him on the employer could be considered as having abandoned his contract if he defied an ultimatum issued by the employer whilst he was on strike.

Both matters are interconnected and could be conveniently dealt with together.

The term strike generally denotes the collective action resorted to by a body of employees to express their grievances and to win their demands from an employer. According to the definition of the term in section 2 of the Trade Unions Ordinance it involves the cessation of work by a body of employees or a concerted refusal or a refusal under a common understanding to continue to work or to accept employment. Although generally a strike is a means used against an employer there could be situations where a strike is resorted to by employees with other objectives. It would not be necessary for the purpose of this judgment to consider the implications of such other species of strikes. The main feature of a strike is the cessation of work devoid of an intention on the part of those engaged in the strike to terminate their employment.

Section 32(2) of the Industrial Disputes act requires that at least 21 days written notice be given, in the prescribed manner before the commencement of a strike in any essential industry. Any workman who contravenes the provisions of section 32(2) and any person who incites a workman to commence, continue or participate in or do any act in furtherance of a strike in contravention of section 32(2), is guilty of offences as specified in section 40(1) *(d)* and *(n)* respectively. Section 40(1) *(f)* prohibits a workman who is bound by a collective agreement, a

settlement under the Act or by an award of an arbitrator of an industrial Court or of a Labour Tribunal from taking part in a strike with a view to procuring an alteration of any of the terms and conditions of that agreement, settlement or award. Similarly, it would be an offence in terms of section 40(1)(fff) to take part in a strike with a view to procuring the alteration of any order made by a labour tribunal in an application under section 31B. Section 40(1) (m) prohibits a strike after a dispute has been referred for settlement, by arbitration to an arbitrator to an industrial court or by adjudication to a labour tribunal. These provisions demonstrate that the Industrial Disputes Act recognises a basic right of workmen to commence and to participate in a strike to express their grievances and to win their demands subject to the restrictions and prohibitions that are specifically laid down. In England, this basic right to strike subject to limitations has been recognised and upheld over a long period of time. In the case of *Morgan v Fry* (4), Lord Denning M. R. stated as follows:—

> "It has been held for over 60 years that workmen have a right to strike (including therein a right to say that they will not work with non-unionists) provided that they give sufficient notice beforehand: and a notice is sufficient if it is at least as long as the notice required to terminate the contract."

In India too the basic right of workmen to engage in strikes to express their grievances and to win their demands is well entrenched. Malhotra in his work titled Dismissal, Discharge, Termination of Service and Punishment (1984/85, 7th Edition, p.344) has stated as follows:—

> " the workers in any democratic State have the right to resort to strike whenever they are so pleased in order to express their grievances or to make certain demands. A strike in the circumstances is a necessary safety valve in industrial relations when properly resorted to".

Later he states:—

> "While the right to strike remains, the Industrial Disputes Act of 1947 imposes certain restrictions".

Section 22 of the Act requires that prior notice be given of a strike and section 23 contains certain general prohibitions in relation to strikes. The

scheme appears similar to that of our Industrial Disputes Act of 1950. However, it has to be noted that on a comparison of the provisions the Indian Act appears to be more restrictive of the right to strike.

The basic right to strike has also received international recognition. The International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16.12.1966 which was acceded to by the Government of Sri Lanka on 27.5.1980 specifically states, in dealing with the right to form trade unions, in Article 8.1 (*d*) that —

" The State Parties to the present Covenant undertake to ensure :

The right to strike, provided that it is exercised in conformity with the laws of the particular country ".

Similarly, the European Social Charter of the Council of Europe in Article 6 under the heading of the " Right to Bargain Collectively " recognises the right of workers to collective action in cases of conflicts of interest, including the right to strike subject to obligations that might arise out of collective agreements previously entered into.

Thus it is seen that the view stated by me upon an analysis of the provisions of the Industrial Disputes Act with regard to the basic right of workmen to strike to express their grievances and to win their demands, is not only consistant with the international obligations undertaken by the Government of Sri Lanka in ratifying the Covenant on Economic, Social and Cultural Rights but also consistent with the accepted standards in other national and regional jurisdictions. Therefore, I hold that under our law workmen have a basic right to strike as a measure of collective action directed against the employer to express their grievances and to win their demands. It is described as a basic right because it is not absolute in its terms and is subject to restrictions and prohibitions imposed by law. Section 32(2) requires that at least 21 days prior notice be given of a strike in an essential industry. In terms of the definition contained in section 48 of the Act an essential industry is one that is declared by the Minister by order as an industry essential to the life of the community. Section 40 (1) contains specific prohibitions as referred above. These provisions prohibit workmen from engaging in strikes that are intended to procure the alteration of any of the terms and conditions contained in collective

agreements, settlements entered under the Act or awards or orders made by an arbitrator, industrial Court, or a Labour Tribunal.

It has not been contended in this case that the industry of the company has been declared an essential industry. Similarly, it has not been contended that the strike launched by the workmen on 7.9.84 is covered by any of the prohibitions referred to. In these circumstances it has to be concluded that the strike itself was lawful.

The next matter to be considered is whether an employer could issue an ultimatum to workmen on a lawful strike requiring them to report for work before a specified date or in the alternative be considered as having ceased to be employees. In my view such an act on the part of an employer would be totally inconsistent with the basic right of the workmen to engage in a lawful strike to express their grievances and to win their demands. The right itself would be empty and devoid of any content if it is subject to the over-riding authority of an employer as stated above. Therefore I hold that an employer could not validly issue an ultimatum to a workman engaged in a lawful strike to report for work before a specified date or in the alternative be considered as having ceased to be an employee. In the circumstances the letter marked V3 which falls into the category normally described as notice of vacation of post could not be considered as valid or as being capable of producing any legal effect. If this same matter is viewed from another perspective a question would arise as to whether workmen on a lawful strike could be considered as having abandoned their employment if they defy an ultimatum to report for work issued by the employer. As noted above, the underlying basis of a strike by workmen is an absence on their part of an intention to terminate their contracts of employment. In these circumstances their failure to comply with such an ultimatum as referred to could not constitute an abandonment of employment. The Supreme Court of India in the leading case of *Express News Papers v. Mark (5)* considered a similar question and held that there would be no abandonment of employment in such circumstances. Mudholkar, J. stated in his judgment (at page 1143) as follows :—

> "All that we want to say is that where the employees absent themselves from work because they have gone on strike with the specific object of enforcing the acceptance of their demands they cannot be deemed to have abandoned their employment".

It appears that the same matter has been considered in several arbitration awards in this country (*Industrial and General Workers Union v. H. W. Pathinayake*, I. D. /L. T./ G 19 published in the Government Gazette 14,490 of 27.08.65; *United Engineering Workers Union v. Ocean Food and Trades Ltd.*, I. D./L. T./2/212 published in the Government Gazette of 14,789 of 16.02.68). It has been consistently held in these awards that where workmen stay away pursuant to a demand advanced by them they could not be considered as having vacated post or abandoned their employment. Therefore, when the workmen named in the charge and the other workmen engaged in the strike failed to report for work on 27.09.84 pursuant to the purported vacation post notice V3, in my view they did not by such conduct abandon their employment because at the material time they were engaged in a lawful strike pursuant to a demand they had made of the Company. The employer-employee relationship between the parties continued and was subsisting as at 07.01.1985 being the date of the offence.

The other submission made by learned President's Counsel is that the prosecution has failed to establish the element of *mens rea* of the offence under section 40 (1) (i). It was submitted that when the words of section 40 (1) (i) are read together with the definition of the term "lock-out" in the Trade Unions Ordinance, it is incumbent on the prosecution to establish that the accused committed the acts constituting a lock-out against the workman "with a view to compelling those persons..... to accept terms or conditions of an affecting employment". It was contended that as a result of the strike the Company lost its export orders and had no work to offer to the workmen concerned. That, they were kept away from work for that reason alone and not for the reason of compelling them to accept any terms or conditions of or affecting employment. Learned State Counsel urged several matters that militate against this inference.

They are —

(1) That in the letter marked V3 it is stated that if the workmen do not report for work the Company will "recruit other labour". This shows that the Company had geared itself to continue with their work in the absence of the workmen concerned;

(2) The evidence of witness Wijedasa Silva, Assistant Commissioner of Labour that when he visited the factory of the Company in March, 1985 (two months after the commission of the offence) he

found persons working in the factory which suggests that the industry was functional long after the day the Company claimed that it had to close business.

(3) The E. P. F. declaration forms that have been produced without challenge show that the Company had sent in declarations in respect of a number of workmen for the first six months in 1985;

(4) When the workmen reported for work on 07.01. 85 the Company did not adduce as a reason for keeping them away the fact that they had no work to offer. Further the Company had not adduced this excuse in response to the letters sent by the Union and the Assistant Commissioner of Labour;

(5) That even if the Company had no work to offer the proper course would have been to make an appropriate application in terms of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 and not to contravene the specific provisions of section 40 (1) (i) of the Industrial Disputes Act, which in effect requires an employer to offer work to workmen when the dispute by employer had with the workmen is referred for settlement by an order of the Minister made in terms of section 4 of the Act.

These matters in my view negative the contention of the Company that it refused to employ the workmen who returned to work after the strike because it had no work to offer them.

On the other hand it is clear from the evidence that the persistent stand of the Company was that the workmen on strike should return to work without insisting on their demand for the reinstatement of the 10 fellow workmen who had been dismissed. In these circumstances it has to necessarily be inferred that the Company locked-out the workmen concerned with a view to compelling them to accept certain conditions affecting employment namely that they should drop their demand for the reinstatement of the fellow workmen.

For the reasons stated above I see no merit in the two grounds urged by learned President's Counsel for the Appellant Company. I accordingly uphold the conviction and the sentence that has been imposed. The appeal is dismissed.

Appeal dismissed.