1960 *Present :* **T. S. Fernando, J.**

THE TIMES OF CEYLON LTD., Appellant, *and* THE NIDAHAS KARMIKA SAHA VELANDA SEVAKA VURTHIYA SAMITIYA, Respondent

S. C. 6—LABOUR TRIBUNAL CASE 155 OF 1959

In the matter of an appeal under Section 31 D (2) of the Industrial Disputes Act, No. 43 of 1950

Industrial Disputes Act No. 43 of 1950, as amended by Act No. 62 of 1957—" Workman "—Distinction between workman and independent contractor—Section 47.

The definition of " workman " in section 47 of the Industrial Disputes Act does not cover an independent contractor.

Z was a delivery peon who was under contract with a newspaper company to deliver copies of that company's newspapers to certain subscribers in Colombo who had paid subscriptions to the company for the newspapers (including the delivery thereof). The contract imposed on Z the terms to be found in the following clauses :—

" (1) You will be paid a commission of -/02½ cents for every copy delivered.

(2) Failure to deliver a paper will result in your having to pay the value of the paper.

[1] *(1947) 48 N. L. R. 337.* [2] *(1948) 50 N. L. R. 221.*

(3) In case you are unable to call for your papers this office must be notified or a substitute sent.

(4) You will be held responsible for all delivery errors.

(5) You will collect your papers at the times stipulated by the Circulation Manager.

(6) Your Commission will be paid once a month.

(7) Failure to call for copies for distribution, without due notice, or non-delivery of copies taken will result in the termination of your contract."

Held, that, as the true relationship between Z and the company was one approximating that between a hirer and an independent contractor, Z was not a workman within the meaning of the Industrial Disputes Act.

APPEAL under section 31 of the Industrial Disputes Act, No. 43 of 1950.

H. V. Perera, Q.C., with *L. E. J. Fernando*, for the appellant.

S. P. Amarasingham, with *F. X. J. Rasanayagam*, for the applicant-respondent.

Cur. adv. vult.

August 31, 1960. T. S. FERNANDO, J.—

The sole question that arises on this appeal is whether a person who has been described in the proceedings as a delivery peon who was under contract with a newspaper company to deliver copies of that company's newspapers to certain subscribers in Colombo who had paid subscriptions to the company for the newspapers (including delivery thereof) is a workman within the meaning of the Industrial Disputes Act, No. 43 of 1950. The determination of this seemingly simple question has caused me a great deal of anxiety and the only consolation I can seek in the situation in which I have found myself is the discovery that in the past judges who have had to decide whether a person is a workman or employee or servant as defined in various statutes as distinguished from an independent contractor have experienced difficulty and similar anxiety.

The question before me arises in the following circumstances. The Industrial Disputes (Amendment) Act, No. 62 of 1957, provides for the establishment, for the purposes of the Industrial Disputes Act, No. 43 of 1950, of Labour Tribunals, each such Tribunal consisting of one person. Applications to a Labour Tribunal for relief or redress in respect, inter alia, of the termination by an employer of a workman's services were provided for by the Amendment Act which empowered the Tribunal, after inquiry, to make such order as may appear to the Tribunal to be just and equitable. Subject to a right of appeal to the Supreme Court on a question of law, the order of a Labour Tribunal is declared to be final and one that shall not be questioned in any court.—(see new sections 31A, 31B, 31C, and 31D.)

Section 47 of the Industrial Disputes Act, No. 43 of 1950, as amended by Act No. 62 of 1957, defines *workman* as meaning "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, as including any person whose services have been terminated."

I have not been able to discover whether this definition has been taken over from legislation on a similar subject in any other country, but it may be mentioned that learned counsel appearing for both parties to this appeal have addressed me on the footing that, according to the definition quoted above, a person who is an independent contractor falls outside the category of *workman*. The Tribunal itself dealt with the application on the assumption that it would have had no jurisdiction to inquire into the complaint if the person concerned was an independent contractor. In the circumstances it is permissible to seek some guidance on the question I have here to decide from decisions both in India and in England as to the test or tests to be applied in determining whether a person is to be regarded as a workman or employee or servant as distinguished from an independent contractor. The distinction between the two classes has been broadly stated to be that, while in the case of the former there is a *contract of service*, in the case of the latter what comes into existence is a *contract for services*. In the case of *Simmons v. Heath Laundry Co.*,[1] Buckley L.J., discussing the meaning of the expression "*contract of service*", stated :—

> "A servant", said Bramwell L.J. in *Yewens v. Noakes*[2], "is a person subject to the command of his master as to the manner in which he shall do his work". To distinguish between an independent contractor and a servant the test is, says Crompton J. in *Sadler v. Henlock*[3], whether the employer retains the power of controlling his work.

Again, in the case of *Performing Right Society Ltd. v. Mitchell and Booker*[4] Mc Cardie J., dealing with a similar question, observed that "it seems reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered, but it is usually of vital mportance".

The question of the distinction between a workman as defined in the Industrial Disputes Act 1947 (of India) and an independent contractor came up recently for consideration by the Supreme Court of India in

[1] *(1910) 1 K. B. 543 at 552.*
[2] *(1880) 6 Q. B. D. at 532.*
[3] *4 E. & B. at 578.*
[4] *(1924) 1 K. B. at 767.*

D. C. Works Ltd. v. State of Saurashtra[1], a case which was well in the mind of the Tribunal whose decision is now canvassed before me. In that case, the Supreme Court of India after considering many decisions, principally of the English Courts, stated that " the principle which emerges from the authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or, to borrow the words of Lord Uthwatt in *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.*[2], the proper test is whether or not the hirer had authority to control the manner and execution of the act in question ". The Court also expressed the opinion that the correct method of approach in determining the question would be to consider whether having regard to the nature of the work there was due control and supervision by the employer and adopted in this connection the observations of Fletcher-Moulton L.J. in *Simmons v. Heath Laundry Co.* (*supra*) quoted below :—

> " The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service."

With these observations as to the nature of the crucial test to be applied serving as a guide, the task for the Tribunal was to apply the test to the facts as found by it in order to determine whether the person concerned was or was not a *workman* within the meaning of the Act.

Let me now state the facts as found by the Tribunal :—

The delivery peon concerned (whom I shall hereinafter refer to as Zubair, which is his name) was employed by the Times of Ceylon Ltd., a company publishing newspapers, from about August 1954 till 21st May 1956 as a temporary monthly paid employee. His work during that period was to deliver the evening edition of the Times on week days and the Sunday edition of the same newspaper on Sundays to a section of the company's subscribers who had contracted with the company for delivery to them of these newspapers. He was paid a monthly salary during this period. On the 21st May 1956 Zubair's period of temporary employment as a delivery peon on a monthly salary was terminated and

[1] *(1957) A. I. R. (S. C.) at 264.* [2] *(1947) 1 A. C. at 23.*

his connection with the company came from that day to be governed by a contract the terms of which are to be found in document R1, the text of which is reproduced below :—

21st May 1956

Mr. M. I. M. Zubair
Delivery Peon

Dear Sir,

Please acknowledge receipt of this letter confirming your acceptance of our terms for the contract to distribute our subscribers' copies in Colombo.

The terms are :—

(1) You will be paid a commission of -/02½ cents for every copy delivered.

(2) Failure to deliver a paper will result in your having to pay the value of the paper.

(3) In case you are unable to call for your papers this office must be notified or a substitute sent.

(4) You will be held responsible for all delivery errors.

(5) You will collect your papers at the times stipulated by the Circulation Manager.

(6) Your commission will be paid once a month.

(7) Failure to call for copies for distribution, without due notice, or non-delivery of copies taken will result in the termination of your contract.

Yours faithfully
(Signed)
Circulation Manager.

The section of Colombo to be served by Zubair under this contract covered a distance approximately of two miles and the number of subscribers involved in that section at the time Zubair's services were terminated were 84 for the Evening Times and 94 for the Sunday Times. The times stipulated for collection of the papers were 2.30 p.m. on week days (for the Evening Times) and 4 a.m. on Sundays (for the Sunday Times).

Apart from the distribution of the Evening Times and the Sunday Times as provided for in the contract R1, Zubair also undertook the distribution to subscribers of a magazine called *Rasavahini* for which work he was paid at the rate of 2½ cents per copy delivered and also worked on Saturdays on the job of packing newspapers and loading the packages into the company's vans. For this latter work he was paid by the company at the rate of 44 cents an hour.

Zubair had been unable to call for papers on certain days, but he appears to have notified the company in time of his inability to attend with the result that the company was able to effect delivery of the newspapers through the aid of certain persons who were in their employment as monthly paid servants and who were described as reserve peons. On Sunday, 31st May 1959, however, Zubair failed to turn up to collect the copies of the Sunday Times for distribution to the company's subscribers and failed also to notify his inability to attend or to send a substitute. The Company thereupon terminated his contract on the very next day and claimed to be entitled to do so under clause 7 of R1.

Zubair submitted to the Tribunal that his inability to turn up at the office on 31st May 1959 to collect the papers or to send a substitute to attend to the delivery of the papers was due to the fact that his wife quite unexpectedly developed labour pains on the night of the 30th/31st May 1959 and gave birth to a child at 3.25 a.m. that day. The Tribunal accepted Zubair's explanation for his lapse as being true.

On these facts the Tribunal has found that the company varied the terms of employment of Zubair as a monthly paid employee to that of an employee on a commission basis and, bearing in mind the test to be applied in determining whether Zubair is a workman, that the manner in which he was to perform his duties was within the control of the company. Observing that Zubair's duties were not confined to those set out in R1, but that it was within the company's rights to stipulate the time, the number of houses to which the papers were to be delivered, what was to be distributed apart from the newspapers and what work was to be done on certain nights for which payments were made by the hour, the Tribunal went on to hold that *Zubair was under contract personally to execute work or labour and therefore was a workman and not an independent contractor.* Holding the termination of his contract unjustified, the Tribunal ordered his reinstatement in employment with payment of back-wages.

Learned counsel for the trade union that made the application to the Tribunal for relief on behalf of Zubair submitted that the decision of the Tribunal was a question of fact which is based upon sufficient evidence and that in the circumstances no question of law arises. The point of law is formulated by the appellant in this way :—The tribunal is authorised by law to grant relief or redress only in respect of the termination by an employer of the services of a *workman,* and it cannot by wrongly determining that a person is a *workman* exercise a jurisdiction which it does not possess. The question of law has, in my opinion, been correctly formulated in this case. The distinction between a workman and an independent contractor can often be very fine and, if the Tribunal (the judge of fact) has reached a finding one way or the other and has not misdirected itself in so doing, the finding is not one which can be made the subject of appeal.

Although the learned judge who constituted the Tribunal in this case has given sufficient indication in his order that he was aware of the test or tests to be applied in determining whether Zubair was a workman, I am satisfied for the reasons I shall indicate below that in reaching the decision appealed from he has misdirected himself in the application of the test or tests.

Bearing in mind that the ultimate test to be applied is whether the hirer had authority to control the manner and execution of the act in question or, to put it in the words to be found in the judgment of the Supreme Court of India, whether there exists in the master a right to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, it is undeniable that the act in question in this case or the work Zubair undertook to do was the distribution of the copies of the two newspapers. That was the essence of the work he had agreed to do or, I should add, to get done. Attendance at the office at a time to be stipulated by the company was merely incidental to this essential part of the contract although here again, it seems to me, the Tribunal was in error when it held that the stipulation of the time of collection was outside the terms of the contract—see clause 5 of R1.

The conclusion reached by the Tribunal that according to the terms of the contract R1 it is a contract personally to execute work or labour is opposed, in my opinion, to the ordinary interpretation of its terms. The essential purpose of the contract was to ensure the distribution of the newspapers to the subscribers, and the necessary inference from its terms is that the essential work of distribution could have been effected through agents or substitutes, at the option of Zubair himself. This inference is made clearer by the clause which permits Zubair to have the copies of the newspapers even collected by an agent or substitute. There is nothing in this contract to prevent Zubair getting all the necessary work done by an agent or substitute. Such a feature, it seems almost superfluous to add, is quite inconsistent with the relationship between master and servant or between workman and employer. Although there is no specific mention of it in the order of the Tribunal, the uncontradicted evidence on behalf of the company was that Zubair was free to distribute the newspapers through a substitute and that once the newspapers are removed from the office, the company knows nothing about the distributor's movements and does not require a report from him in regard to the distribution. Not only in the terms of the written contract but even in such practices as had grown up in relation to it there is nothing which would justify the finding that the company had authority to control the manner of distribution. The circumstance that some control may be said to have been retained by the company to vary from time to time the actual number of subscribers to whom delivery was to be effected was merely incidental and did not have the effect of vesting any control, much less detailed control, over the manner

in which the most important and necessary part of the work, viz. the distribution, was to be executed. It seems difficult to resist the conclusion that the true relationship between Zubair and the company was one approximating that between a hirer and an independent contractor.

There is one other matter which might usefully be mentioned at this stage. The learned judge in his order states that part of the duties of Zubair included the distribution of the magazine *Rasavahini* when called upon to do so as well as to undertake the packing of newspapers and the loading of vans on Saturday nights. While, no doubt, Zubair performed these services, it is relevant to bear in mind that these things were being done not in pursuance of any obligations under the contract R1, but purely on a voluntary basis as Zubair's time was his own, and he was free to accept or refuse that work unlike in the case of the delivery of the copies of the Evening Times and the Sunday Times.

The conclusion I have come to on the evidence accepted by the Tribunal in this case is that Zubair was not obliged under the contract to come personally to the company's office to accept delivery or to effect delivery himself. The whole and not merely a part of the essential work under the contract could have been done by an agent or substitute of Zubair. In view of this conclusion, I am compelled to hold that the question whether Zubair was a workman within the meaning of the Industrial Disputes Act should have been answered by the Tribunal in the negative. If so, the Tribunal would have had no jurisdiction to make the order relating to reinstatement and payment of back wages.

Before disposing of this appeal I wish to observe that I cannot help feeling that, in drafting the contract in the terms contained in document R1, the company had deliberately set out to transform the character of a workman which Zubair appears to have held up to 21st May 1956 to that of an independent contractor. Zubair is hardly likely to have realised the significance of the change effected, but my duty here is to interpret the contract that existed on 31st May 1959 according to the relevant law, and the company becomes thereby entitled to the decision I have reached on this appeal. At the same time, is it too much to hope that, as no doubt is being entertained that the immediate lapse that brought about the termination of Zubair's contract was occasioned by his wife giving birth to a baby at a time when his presence and assistance was vital at his home, the company may find it possible, notwithstanding this litigation, to renew its contract with this unfortunate man at an early date ?

I allow the appeal and quash the order of the Tribunal. The respondent trade union must pay the costs of this appeal which, having regard to the apparent capacity to pay of the respective parties, I limit to a sum of Rs. 105/-.

Appeal allowed.