1937

Present : **Soertsz J.**

In re AN APPLICATLON UNDER SECTION 39 OF THE WORKMEN'S COMPENSATION ORDINANCE

ELONONA *v.* FERNANDO.

Workmen's Compensation Ordinance—Workmen injured while unloading machinery—Engaged previously in demolishing building—Not entitled to compensation—Ordinance No. 19 of 1934, s. 39.

A workman, who was injured while he was engaged in loading into a cart some dismantled machinery, which was being removed from an old building, which he was employed in demolishing the day previous to the accident, is not entitled to compensation under the Workmen's Compensation Ordinance.

CASE submitted for the decision of the Supreme Court under section 39 of the Workmen's Compensation Ordinance, No. 19 of 1934.

J. E. M. Obeyasekera, C.C. (Amicus curiae).

Cur. adv. vult.

March 10, 1937. SOERTSZ J.—

This is a matter submitted for the decision of this Court by the Commissioner for Workmen's Compensation under section 39 of Ordinance No. 19 of 1934.

The question is whether the deceased who was injured while he was engaged in loading some dismantled machinery into a cart on April 8, 1936, and who died in consequence of that injury on April 21, 1936, can be said to have been employed " in the demolition of a building " when the accident took place, having regard to the facts (1) that the machinery he was loading into the cart was machinery which had been installed in an old building and was being removed to be set up in another building

in Bingiriya, (2) that the deceased had been employed before the day of the accident in demolishing the walls of that old building in which the machinery that was being removed, stood.

This question arises because only " workmen " who conform to the definition of " workman " in the Ordinance and their dependants are entitled to compensation. The definition of " workman " in the Ordinance appears to have been evolved by (*a*) a general stipulation that his wages shall not exceed Rs. 300 per mensem, (*b*) by an enumeration of certain categories of employment, (*c*) by an express exclusion of three classes of workmen.

It is, therefore, essential that a workman who claims or on whose behalf a claim is made for compensation should bring himself within one of the categories of employment enumerated in the schedule.

I have no doubt it must have been the intention of the legislature to provide for a case like that of the workman with whom we are concerned in this case, for I can conceive no equitable ground on which he could have been deliberately excluded, but unfortunately the enumeration in the schedule is not exhaustive, and the plight in which this workman's dependants find themselves is due to the fact that this is a *casus omissus* from the enumeration.

The only possible category, upon the evidence that can be said to be at all relevant to this case is the one referred to by the Commissioner. It is No. 7 (*a*) in the schedule. It reads as follows :—" Any person who is . . . . employed in the construction, repair or demolition of any building which is designed to be or is or has been more than one storey in height above the ground or twenty feet or more from the ground level to the apex of the roof . . . . "

Now the evidence in this case is that the workman *had been engaged* in the demolition of a building *before* the day of the accident. He does not, therefore appear to come within the ambit of section 3 of the Ordinance which provides " if personal injury is caused to a workman by accident arising out of, *and in the course of his employment* his employer shall be liable to pay compensation " et cetera. The words " in the course of his employment " clearly means in the context " in the course of his employment in one of the classes of work enumerated in the schedule ".

This view is supported by the fact that in the case of workmen employed on buildings, repairing or demolishing, it is insisted that the building should be of a certain type or certain dimensions, most probably because of the risk that attends upon workmen engaged on such buildings. It would have been of no consequence to insist upon the type or dimensions of a building, if it was intended to provide compensation for workmen who *had been* engaged upon a building, but who were not so engaged, but were engaged in some other kind of work, at the time the accident occurred.

In my opinion, it is therefore clear that in order to make an employer liable for compensation, the accident should have happened while the workman was in the course of working in one of the enumerated classes of work.

The workman in this case was injured not while he was engaged in demolishing the building but while he was loading machinery into a cart. The answer to the question is in the negative.