1947 *Present :* **Soertsz S.P.J., Keuneman J. and Canekeratne, J.**

LIPTONS, LTD., Petitioner, *and* GUNASEKERA, Respondent.

S. C. 619—IN THE MATTER OF AN APPLICATION FOR A MANDATE IN THE NATURE OF A WRIT OF CERTIORARI AGAINST S. S. J. GUNASEKERA, A TRIBUNAL APPOINTED UNDER THE PROVISIONS OF THE ESSENTIAL SERVICES (AVOIDANCE OF STRIKES AND LOCKOUTS) ORDER, 1942.

Writ of certiorari—*Essential Services (Avoidance of Strikes and Lockouts) Order, 1942, rules 6, 7—Trade dispute referred by Commissioner of Labour to District Judge for settlement—Duty of District Judge to be satisfied in his own mind that the dispute is a trade dispute.*

A District Judge to whom a petition for the settlement of a trade dispute is referred by the Commissioner of Labour under rule 6 of the Essential Services (Avoidance of Strikes and Lockouts) Order, 1942, must, if objection is taken that the matter referred for investigation does not relate to a trade dispute, be satisfied in his own mind that a trade dispute and not any other kind of dispute has been referred to him. He is not bound to accept as conclusive the opinion of the Commissioner of Labour that the dispute in question is a trade dispute.

APPLICATION for a writ of *certiorari*. This application was referred by Soertsz A.C.J. to a Bench of Three Judges.

The Commissioner of Labour was satisfied that a petition presented to him under rule 6 of the Essential Services (Avoidance of Strikes and Lockouts) Order, 1942, related to a trade dispute, and referred the petition to the District Judge. When the matter came up before the District Judge, preliminary objection was taken that the question raised in the petition did not disclose a "trade dispute" within the meaning of the definition of that term in the Essential Services (Avoidance of Strikes and Lockouts) Order, 1942. The District Judge took the view that he

could not challenge the judgement of the Commissioner of Labour once the latter had exercised his judgment and found that the matter in the petition referred to a trade dispute. He, accordingly inquired into the matter and made an award.

This application for a writ of *certiorari* was made to quash the order of the District Judge.

H. V. Perera, K.C. (with him *E. G. Wickramanayake*), for the petitioner.—The Essential Services (Avoidance of Strikes and Lockouts) Order, 1942, was made under rule 43 (c) of the Defence Regulations. The Order defines various terms. The definitions of "workman" and "trade dispute" must be carefully considered.

Under section 6 where a trade dispute arises between the employer and his workmen the workmen or the employer may petition the Controller to settle the dispute. The Controller, if he is satisfied that the petition relates to a trade dispute, shall transmit the petition to the District Judge.

[SOERTSZ S.P.J.—Can the District Judge canvass the finding of the Controller that there is a trade dispute and can even this court interfere with such a finding ?]

The Controller is merely the transmitting officer. He does not and cannot make an order affecting the rights of parties and, further, the Controller acts *ex parte* without any notice to and without hearing the other side. Acting in this way the Controller cannot be said to be exercising judicial functions. The fact that the transmission by the Controller is necessary before the District Judge can inquire into the matter does not preclude the District Judge from deciding whether or not a trade dispute exists, if the issue is raised before the District Judge.

Section 8 of the Order states that the award of the District Judge shall be final and shall not be called in question in a court of law. That only means that such award is not subject to appeal or revision but such award can certainly be quashed by this Court if it was made outside jurisdiction. Such an award would clearly be in excess of jurisdiction if the District Judge makes an award in a matter which would not be a trade dispute according to the definition in the Order. Thus the Writ of *Certiorari* will lie against the District Judge but not against the Controller who is merely the transmitting officer.

The definition in the Order involves two essential elements in a trade dispute. Firstly there must be a dispute between an employer and workmen who remain as workmen at the time the dispute arose, and secondly the dispute must be "in or in connexion with or incidental to the performance of essential services." A safeguard against unfair advantage to an employer by dismissal of workmen during a trade dispute is provided by including in the category of workmen workmen discharged during a trade dispute. But a workman dismissed before the dispute originated does not and cannot come in under the definition of workman in the Order. The word "performance" in that context is important.

The question naturally arises "performance by whom ?" and it is obvious it cannot mean performance by anybody at all. The most reasonable construction seems to be that it is performance—as far as employees are concerned—by workmen who remain as workmen and not by dismissed

workmen. It will thus be clearly seen that the reinstatement of a dismissed workman cannot be a trade dispute between the employer and remaining workmen. The dismissal of a workman and his reinstatement are matters personal to him but such matters may give occasion for a trade dispute, but of themselves can never be a trade dispute according to the definition in the Order.

The reasonable construction to be placed on the meaning of trade dispute in the context seems to be that it refers only to the terms and conditions of employment. Sections 8, 9, 10 and 11 of the Order seem to support this view. The decision in *Brown and Company v. Roberts*[1] cannot be justified in so far as trade dispute has been given an extended meaning and as it held that the Tribunal could not canvass the finding of the Controller that there was a trade dispute.

S. Nadesan (with him *G. Thomas*), for the respondent (the President of the Ceylon Mercantile Union).—The Avoidance of Strikes and Lockouts Order was made for the purpose of preventing interruption of work in the Essential Services by strikes and lockouts. Workmen going out on strike to get other workmen unfairly dismissed reinstated was a common occurrence before the Order was made, and after the Order was made many workmen have been sentenced to terms of imprisonment on the footing that such strikes were for and in futherance of trade disputes.

The definition of Trade Dispute in the Order (Avoidance of Strikes and Lockouts) is at least as wide as the definition of Trade Dispute in Trade Unions Ordinance (Cap. 116, Legislative Enactments). English Courts, considering a definition identical in terms with definition of Trade dispute in Chap. 116, have held that a strike to get a dismissed workman reinstated was a trade dispute. See *Rex v. National Arbitration Tribunal Ex parte Keble Press, Ltd*[2]. The definition of trade dispute in the Order is very wide and the words "to . . . performance of Essential Services" were put in merely to distinguish disputes of workmen in their employment from disputes other than those in their employment. The restricted meaning of trade dispute suggested by the petitioner would not even cover terms and conditions of employment.

Walter Jayawardane, C.C., as *amicus curiae*.—On the question whether the Controller's finding that there is a trade dispute can be canvassed, it depends on whether the Controller was exercising judicial functions or merely executive or administrative functions. If he was acting judicially and within jurisdiction the finding cannot be canvassed but if he acted outside his jurisdiction his finding can be canvassed. But if he was exercising executive functions or merely acting ministerially his finding cannot be canvassed. The question is what powers are given to the Controller by the particular words "if he is satisfied". In arriving at a decision on this matter the following cases may prove useful: *Liversidge v. Anderson and another*[3]; *Point of Ayr Collieries, Ltd. v. Lloyd George*[4]; *Carltona, Ltd. v. Commissioner of Works and Others*[5]; *Wijesekera v. Festing*[6]; *Ramasamy Chettiar v. Attorney-General*[7]; *The Attorney-General v. Valliyamma Atchie*[8].

[1] *(1946) 47 N. L. R. 529.*
[2] *(1943) 2 A. E. R. 633.*
[3] *(1942) 1 A. C. 206.*
[4] *(1943) 2 A. E. R. 546.*
[5] *(1943) 2 A. E. R. 560.*
[6] *L. R. 1919 A. C. (P. C.) 646.*
[7] *(1937) 38 N. L. R. 313.*
[8] *(1944) 45 N. L. R. 230.*

On the question whether *Certiorari* would lie against the District Judge who is the Tribunal, the District Judge is merely *persona designata* and does not act under an extended jurisdiction of the ordinary District Court.

As regards trade dispute the definition in the Order (Avoidance of Strikes and Lockouts) is wider than the definitions in Chap. 116 and in the various English Orders. The language itself is clear and therefore construction becomes unnecessary. If the definition is wider than, or even as wide as, the definitions in the English Orders then English Cases would be relevant. *National Association of Local Government Offices v. Bolton Corporation* [1], *Rex. v. National Arbitration Tribunal Ex parte Keble Press, Ltd.* [2], *Furns Shipbuilding Co. v. London and North Eastern Railway* [3] are some of the cases in which the meaning of trade dispute has been considered. *Conway v. Stocks* [4] may be considered as authority for the proposition that the finding of such an officer as the Controller cannot be canvassed.

H. V. Perera, K.C., in reply.—The principle in *Conway v. Stocks* (*supra*) is not applicable in the circumstances of this case. The decision in that case means only that the jurisdiction of a tribunal legally constituted cannot be challenged by parties.

March 7, 1947. SOERTSZ S.P.J.—

This is an application for a writ of *Certiorari* to quash the award made by a District Judge to whom the Controller of Labour referred a petition that had been presentd to him, admittedly, by a competent person, for the settlement of the matters raised in the petition, the Controller stating in his letter which accompanied the petition that he was satisfied that the petition disclosed a trade dispute and that he was, therefore, referring it for necessary action.

When the matter came up before the District Judge to whom it had been thus referred, Counsel appearing on behalf of the respondent took the objection that the question raised in the petitioner's petition did not disclose a "trade dispute" within the meaning of the definition of that term in the Essential Services (Avoidance of Strikes and Lockouts) Order, 1942, and Counsel invited the Tribunal to consider his objection by way of a preliminary issue, but the District Judge took the view that his jurisdiction had been determined for him when the Controller of Labour referred the petition to him on the footing that he, the Controller, was satisfied that it disclosed a trade dispute. The District Judge dealt with this objection to his jurisdiction as follows :—

> "In an earlier trade dispute which was referred to this Tribunal a similar preliminary objection was taken and I held there that once the Commissioner of Labour had exercised his judgment and found that the matter in the petition referred to a trade dispute, such decision *ipso facto* conferred jurisdiction on this Tribunal to inquire into the matter and make an award and that this Tribunal could not challenge the judgment of the Commissioner of Labour."

[1] *(1942) 2 A. E. R. 425.*
[2] *(1943) 2 A. E. R. 633.*
[3] *(1934) 103 L. J. (K.B.) 180 at 182.*
[4] *(1943) 2 A. E. R. 226.*

In my opinion, this is a grave misconception on the part of the District Judge of his powers and functions in a matter of this kind. If that view were to prevail, it would mean that the important question whether there is a trade dispute or not can be decided without the party respondent being heard in regard to that question, and that would be subversive of the fundamental rule that enjoins that the party concerned be heard—"*Audi alteram partem.*" The definition of trade dispute in the order is of such a nature that it is hardly to be expected that to all minds it will convey the same meaning. Rather it may be said in regard to it that "*Quot homines tot sententiae,*" and, therefore, parties to a dispute are entitled to have the benefit of the view of all the persons that are empowered by law to reach a view as to whether the dispute is a trade dispute. The rule under which the Controller referred the petition to the Tribunal is rule 6 (2). That rule says that—

> "On receipt of any such petition, the Controller shall if he is satisfied that the petition relates to a trade dispute transmit the petition to the District Judge."

Rule 7 goes on to say :

> "A District Judge may hear such evidence as he may deem necessary for the investigation of any *trade dispute* referred to him for settlement under the preceding paragraph of this order but shall not be bound by the rules of evidence."

A District Judge is required to investigate "any *trade dispute* referred to him." that is to say a trade dispute so defined in the order and any dispute that to the mind of the Controller appears to be a trade dispute. In other words, the District Judge has to be satisfied in his own mind that it is a trade dispute within the meaning of the definition, that comes up for investigation. It may, no doubt, happen that a dispute which the Controller erroneously considers to be a trade dispute appears to the District Judge himself to be a trade dispute. That is not to the point, for the power to decide a question does not mean the power to decide it rightly but the power to decide it in a judicial manner, that is to say, without surrendering his judgment to the view of some other party. In the case of *Brown & Co., Ltd. v. Roberts*[1], Dias J. observed as follows :—

> "Once the Controller has satisfied himself under section 6 (2) that a trade dispute in an Essential Service existed and transmits the dispute to the Tribunal for settlement, I do not think Mr. T. W. Roberts (that is to say the Tribunal in that instance) had any option but to proceed."

With due deference, I do not agree with that view at all for the reasons I have already given. In my view, when the respondent took the objection that the matter referred for investigation did not relate to a trade dispute, it became the duty of the District Judge to consider the question whether there was a trade dispute and to give his decision thereon, for his power to proceed further depended on his finding that there was a trade dispute and not upon the declaration of the Controller that he

[1] *(1946) 47 N. L. R. 529.*

was satisfied that there is a trade dispute. To put in other words, a necessary condition for the Controller to derive the power necessary for his transmitting the petition to a District Judge is that he should be satisfied that it disclosed a "trade dispute", and for the District Judge to invest himself with the necessary power to investigate and settle the matter he, in turn, must be satisfied that there is a trade dispute and not any other kind of dispute that has been referred to him.

The District Judge, having refused to deal with the question in that way, was not competent to make the award he made. In this view of the matter, it is not necessary to consider the other questions that were raised and discussed at the hearing. I would quash the proceedings and award.

KEUNEMAN J.—I agree.

CANEKERATNE J.—I agree.

Proceedings and award quashed.