1971 *Present :* Weeramantry, J.

N. S. A. GAFFOOR, Appellant, *and* O. DE ALMEIDA, Respondent

S. C. 91/69—Labour Tribunal Case No. 8/16959

Industrial Disputes Act (Cap. 131)—Section 48—Scope of the definition of term "employer"—Partnership as employer—Effect of the introduction of a new partner—Joint liability of partners.

The respondent entered the service of an estate in 1946 as Superintendent on the basis that his employers were carrying on the business of running the estate as partners. The present appellant became a shareholder of the business on 8th November 1960 and informed the respondent that he, the appellant,

[1] *(1952) 54 N. L. R. 282.* [2] *(1916) 19 N. L. R. 289.*

had from that day "taken over the management of the estate" and would be directly responsible to the other shareholders. He also assured the respondent that he would see that his interests as Superintendent were conserved "fairly and squarely" and called upon him to follow his directions on all matters. The services of the respondent as Superintendent were subsequently terminated by the appellant in 1962.

In the present proceedings instituted by the respondent against the appellant alone for the payment of certain sums as compensation in respect of termination of services, gratuity and provident fund benefits—

Held, (i) that where, acting (expressly or impliedly) on behalf of the other partners, one of the partners of a partnership employs a workman, the former falls within the definition of the term "employer" in section 48 of the Industrial Disputes Act. Accordingly, although the appellant owned only a fractional share of the partnership business, the respondent was entitled to look to the appellant alone as his employer.

(ii) that the appellant was liable not only for the period between 1960 and 1963, but also for the period prior to 1960. There was an implied assumption by the new partnership of the liability of the old partnership towards the respondent in regard to the earlier period of service. Moreover the appellant's undertaking to conserve the respondent's rights would appear to be an express assumption of liability in respect of obligations already incurred towards the respondent.

Held further, that under the rule of joint liability of partners the respondent was entitled to choose the appellant alone against whom to enforce his claim.

APPEAL from an order of a Labour Tribunal.

M. Tiruchelvam, Q.C., with *S. Ponnambalam* and *K. Kanag-Iswaran*, for the employer-appellant.

P. Vimalachanthiran, with *Nihal K. M. Perera*, for the applicant-respondent.

Cur. adv. vult.

January 16, 1971. WEERAMANTRY, J.—

This appeal is against an order requiring the appellant to pay to the respondent certain sums as compensation in respect of termination of services, gratuity and provident fund benefits.

The respondent was employed since 1946 as Superintendent of Udukelle Estate, Polgahawela, upon a letter of appointment A3 of 24th March 1946 by which he was promised inter alia a Provident Fund contribution of 15% and, in the event of termination of services as a result of changes of management or otherwise, a payment of two months' salary for every year of service and a reasonable compensation for loss of career. This estate was owned by several persons at the time of his appointment and the correspondence between the employers and the

employee at the time would appear to indicate that the co-owners of the estate represented to the respondent that they were carrying on the business of running the estate as partners. Thus the letter A3 spoke of one of the owners as the Managing Partner and the letter A5 by which this Managing Partner confirmed his appointment on 23rd August 1946 said that all partners had agreed to abide by the conditions and terms laid down in his letter of appointment.

It is clear from these documents that when the respondent entered the service of the estate he did so on the basis that his employers were carrying on the estate as partners.

The present appellant came into the picture on 8th November 1960 consequent upon a purchase by him of a one-third of two-fifths share. By his letter A1 he informed the respondent that he, the appellant, had from that day "taken over the management of this estate". By the same letter he indicated to the respondent that he, the appellant, should be considered for the purpose of management as the one shareholder of the estate who would be directly responsible to the other shareholders. He also went on to assure the respondent that he would see that his interests as Superintendent *were conserved* "fairly and squarely" and called upon him to follow his directions on all matters. The services of the Superintendent were terminated in 1962 and it is from that termination that these proceedings have arisen.

The point is now taken on behalf of the appellant that he is only a co-owner in respect of a small fractional share and that these proceedings cannot be maintained against him alone nor any order made against him alone. It is submitted further that in any event no order can be made against him in respect of the period of service of the respondent prior to 1960.

I would commence by referring to the definition of the term "employer" in section 48 of the Ordinance. As defined in section 48 of the Ordinance "employer" includes "any person who on behalf of any other person employs any workman". If, therefore, the appellant was acting on behalf of the other co-owners or partners, whichever the case may be, in employing or continuing the employment of the respondent, he would fall within the definition of employer as contained in the Act.

It has been stated that it would not be just and equitable to make an order against a person who is a co-owner or a partner inasmuch as the sanctions attaching to the order could not fairly be said to attach to a person who has only such a fractional interest. On this point, however, I would observe that the co-owner or partner who is so rendered liable may have rights of contribution against other co-owners or partners who have so permitted him to act or held him out as their agent whether expressly or impliedly, but that as far as the present Act is concerned the respondent would be entitled to look to the appellant as the employer within the definition contained in the Act.

A distinction must be made between the liability of the appellant for the period prior to 1960 and the period between 1960 and 1963. In regard to the latter period I think that on the principle of implied contract or implied agency the appellant was acting for his co-owners or co-partners and there is no question but that liability must attach to him. In fact so much was in effect conceded by learned Queen's Counsel appearing for him.

On the other hand in regard to the earlier period, we have this difficulty, that the appellant whether co-partner or co-owner, acquired this status only in 1960 and would not ordinarily have incurred liability to pay terminal benefits in respect of the 14 years of service which preceded his acquisition of an interest in the estate. The first circumstance, however, which would appear to support the respondent in attaching liability to the appellant is the appellant's own letter A1 wherein he assures the respondent that he will see that his interests as Superintendent are *conserved* "fairly and squarely". This sentence has been understood by the President to mean that the appellant was thereby assuring the respondent that if he served as suggested in the letter, the rights that had already accrued to him in respect of his previous service would be conserved. It is not possible for me to say that the President has misconstrued this letter and I see no ground to hold that the letter meant otherwise.

Moreover, as the President has observed, the applicant continued as Superintendent without termination of services and payment of terminal benefits, and this assumption of a continuance of services rather than a termination followed by a fresh contract seems to be the basis on which both parties proceeded. Had there in fact been a termination there would have been rights which the respondent could have directly asserted in terms of A3.

It has been urged again that where there is a partnership and there is a change in the composition of the partnership by the introduction of a new member, the old partnership comes to an end and a new partnership arises in law. It has been submitted on behalf of the appellant that this new partnership would not be responsible for the liabilities of the old partnership unless such liabilities have been taken over. Such taking over of liabilities may however be express or implied and the circumstances of the present case, having regard to the continuance of the services of the respondent without termination of his services under the old partnership and without payment of any retirement benefits at such time, would appear to be suggestive of an implied assumption by the new partnership of the liability of the old partnership towards the respondent in regard to his earlier period of service[1]. Moreover the appellant's letter A1 wherein he undertakes responsibility for conserving the respondent's rights would appear to be an express assumption of liability in respect of obligations already incurred towards the respondent.

[1] *Lindley, 12th ed. p. 323.*

If in fact the business were not a partnership business but was a co-ownership in regard to the estate, then by one person becoming a co-owner he does not take over the liability of the former owners in regard to the entire property. However, having regard to the documents to which I have already referred wherein the basis on which the respondent was employed was that he was serving a partnership and having regard to the fact that at the time the appellant acquired an interest in this estate no contrary intimation was given to the respondent, I think it would be a reasonable inference that it was as an employee of a partnership that the appellant continued his services after the appellant acquired his interests in the business. The decision whether the business in question is carried on in partnership or co-ownership is a mixed question of fact and law. In so far as questions of fact are concerned the President's findings have been reached after very careful consideration and even if such questions were appealable, I would see no reason to interfere with them, and in so far as questions of law are involved the President has guided himself by correct legal principles regarding the differences between co-ownership and partnership. I do not consider therefore that any sufficient reason has been made out to justify this court in departing from the President's findings.

It has been urged on behalf of the respondent that there is on the part of partners a joint liability and therefore that in the case of partnership it would be permissible for an employee having claims against all the partners to choose anyone of them against whom to enforce his claim. In support of this contention he has cited Charlesworth on Mercantile Law[1]. On an application of this principle in any event if the respondent had a claim against all the partners, he could decide to make that claim against the appellant alone as one of them. This is in consequence of the notion of joint liability in English law by which each of the persons jointly liable is liable to the entire extent of the claim.

Had the relationship between the owners been one of co-ownership, there may have been substance in the submission of learned counsel for the appellant that the claim would be exigible against one co-owner only *pro rata* and that one co-owner could not be sued in regard to the entirety, in consequence of the difference between the Roman-Dutch concept of joint liability and the English concept. However, it is not necessary to go into this matter further in view of the finding of the President, which I accept, that the relationship here was one of partnership rather than co-ownership.

For these reasons I consider that no ground has been made out for any interference with the order of the President, and I dismiss this appeal with costs.

Appeal dismissed.

[1] *9th ed. p. 249.*