

1973 Present: H. N. G. Fernando, C.J., and Wimalaratne, J.

CEYLON MERCANTILE UNION, Petitioner, and
W. L. P. DE MEL and 2 others, Respondents

S. C. 506/72—Application for a Writ of Certiorari and
Mandamus

Emergency (Miscellaneous Provisions and Powers) Regulations No. 5 of 1972—Regulation 38 (1)—Essential Services Order 1972—Paragraph 11—“Mercantile or commercial undertaking”—Applicability of the expression to a newspaper business—Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971—Section 6—Limits of its applicability to employees in an “essential service”.

Employees in an “essential service” who are deemed to have vacated their employment by virtue of the operation of the Emergency Regulations read with the Essential Services Order 1972 made hereunder are not entitled, when their employer refuses to offer them work thereafter, to seek re-employment through the intervention of the Commissioner of Labour under section 6 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971.

The purpose of paragraph 11 of the Essential Services Order of 1972, in referring to a mercantile or commercial undertaking, was to include within the meaning of “Essential Services” the services of any business undertaking which carries on for profit the sale, supply or distribution of any goods whatsoever. Accordingly a Company, whose principal business consists in the publication of newspapers, is a mercantile or commercial undertaking within the meaning of paragraph 11.

APPPLICATION for a Writ of *Certiorari* and *Mandamus*.

K. *Shanmugalingam*, for the petitioner.

S. *Sivarasa*, State Counsel, with A. de Z. *Goonewardena*, State Counsel, for the 1st and 2nd respondents.

N. *Satyendra*, with D. C. *Amerasinghe*, for the 3rd respondent.

Cur. adv. vult.

June 27, 1973. H. N. G. FERNANDO, C.J.—

The Petitioner, the Ceylon Mercantile Union, complained to the Commissioner of Labour against the alleged termination of employment of some 300 employees of the Times of Ceylon Ltd., and sought the intervention of the Commissioner under Section 6 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971.

The Commissioner thereupon held an inquiry after which he decided that according to the facts placed before him the services of these employees were not terminated, but that instead the employees are deemed to have vacated their employment by virtue of the operation of the Emergency Regulations read with the Essential Services Order 1972 made thereunder. On this ground, the Commissioner decided that the provisions of the Act cannot be applied in the case of these employees.

The present application to this Court is for an order quashing the decision of the Commissioner and requiring him to commence and proceed with the inquiry under the Act.

Regulation 38 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 5 of 1972 provides as follows:—

“38 (1) Where any service is declared by order made by the Governor-General, under regulation 2 to be an essential service, any person who, on or after May 15, 1972, was engaged or employed, on any work in connection with that service, fails or refuses, after the lapse of one day from the date of such order, to attend at his place of work or employment or such other place as may from time to time be designated by his employer or a person acting under the authority of his employer, or who fails or refuses, after the lapse of one day from the date of such order, to perform such work as he may be directed, by his employer or a person acting under the authority of his employer to perform, he shall, notwithstanding that he has failed or refused to so work in furtherance of a strike—

- (a) be deemed for all purposes to have forthwith terminated or vacated his employment notwithstanding anything to the contrary in any other law or the terms or conditions of any contract governing his employment ; and
- (b) in addition, be guilty of an offence.”

The Petitioner has admitted that the employees went on strike on 3rd February 1972 in connection with a dispute concerning the termination of the services of the President of the Times of Ceylon Branch of the petitioner Union, and that the employees were on strike until 3rd March 1972. It is also common ground that when the employees reported for work on 4th March, the respondent Company refused to offer them work on the score that they were deemed to have vacated their employment.

There is no doubt that if these employees had, before they went on strike, been employed on any work in connection with an Essential Service, then they must be deemed to have terminated or vacated their employment by failing to attend at their place of work on several days in the period between 4th February and 3rd March 1972. Accordingly the only question for our determination is whether they were so employed in an Essential Service. In order to appreciate the arguments which were addressed to us, it is necessary to set out fully the greater part of the Essential Services Order of 1972 :—

“(1) This order may be cited as the Essential Services Order, 1972.

(2) For the purposes of the definition of the expression “essential service” in regulation 2 of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 2 of 1972, the following services are hereby declared to be of public utility or to be essential to the life of the community :—

- (1) The supply, preservation and distribution of articles of food or drink.
- (2) The supply or distribution of fuel, including petroleum products and gas.
- (3) The supply of electricity.
- (4) Public transport services for passengers or goods.
- (5) Water supply.
- (6) Postal, telephone, telegraph and broadcasting services.
- (7) All service, work or labour, of any description whatsoever, necessary or required to be done in connection with—
 - (a) the discharge, carriage, landing, storage, delivery and removal of articles of food or drink, or of coal, oil or fuel, from vessels within any port as defined for the purposes of the Customs Ordinance (Cap. 235) ;
 - (b) the planting, manufacturing, production, sale, shipping or storage for shipping of tea, rubber or coconut, or the produce thereof ;

- (c) the maintenance, and the reception, care, feeding and treatment, of patients in hospitals, nursing homes, dispensaries, and other similar institutions, whether, maintained by the Government or otherwise ;
 - (d) undertakings maintained by any local authority for water supply, electricity, drainage and sewerage, fire and ambulance services, conservancy and scavenging (including the removal and disposal of night-soil) ;
 - (e) the provision and maintenance of facilities for transport services by road, rail or air, including roads, bridges, culverts, airports, ports and railway lines.
- (8) The services provided by any Government or branch thereof.
- (9) The services provided by any Government Corporation or branch thereof.
- (10) The services provided by the Central Bank of Ceylon, the Bank of Ceylon and any other bank engaged in the transaction of commercial or financial business.
- (11) The services provided by any mercantile or commercial undertaking engaged in the importation, exportation, sale, supply or distribution of goods of any description whatsoever.
- (12) The services provided by all Co-operative Societies and Unions."

It was submitted on behalf of the Petitioner that this does not fall within any of the twelve paragraphs of the Order which have been set out above, whereas Counsel for the respondent Company argued that the case does fall within paragraph (11) of that Order.

The argument on behalf of the petitioner was that the respondent Company, whose principal business consists in the publication of newspapers, is not a "mercantile or commercial undertaking". Counsel for the petitioner relied very heavily on the Dictionary definition of "commerce" :—"Exchange between

men of the products of nature and art ; buying and selling together ; exchange of merchandise, esp. on a large scale between different countries or districts.”

It was submitted that there is no evidence that the Company is an undertaking engaged in buying and selling goods, and that no undertaking is a mercantile or commercial undertaking unless its business includes the buying and selling of goods. It was also submitted that an undertaking which does not buy goods for re-sale, but only produces or manufactures goods for sale or supply, is not a mercantile or commercial undertaking contemplated in paragraph (11) of the Order.

I must of course agree that if the Dictionary meaning of the word “commerce” strictly applies to the construction of paragraph (11) of the Order, then the respondent Company is not engaged in a commercial undertaking. But there are in my opinion many reasons why such a construction would conflict with the intention with which the Essential Services Order was enacted.

The first six paragraphs of the Order declared to be essential the supply and distribution of food and drink, of fuel, of electricity, of transport services, of water, and of communication services. The seventh paragraph *inter alia* then declares to be essential port operations relating to food, drinks, coal, oil and fuel. Thereafter, paragraphs (8) and (9) declare to be essential all the services provided by any Government Department or Corporation ; and paragraph (12) declares essential all services provided by all Co-operative Societies and Unions.

It is apparent that in this way the Order declares to be essential practically every single service provided by the Government, by Government Corporations, by Local Authorities and by Co-operative Societies. In other words, the effect of the Order is that nearly every single Government or Local Government employee or Co-operative Society employee is required to report daily for work on pain of his employment being vacated, and that it was intended by the Order that the numerous services referred to should remain continuously available for the benefit of the public during the existing Emergency.

It is in such a context that one has to consider whether the restricted Dictionary meaning of the word “commerce” must be applied in determining whether any non-Government undertaking is to be regarded as a mercantile or commercial undertaking within the meaning of paragraph (11) of the Order.

Let me now consider the second submission made on behalf of the petitioner, which was that an undertaking is

not a commercial undertaking, if it only supplies its own products to the public, but does not supply goods which the undertaking acquires by purchase, and I take for example the case of textiles and footwear, which might undoubtedly be essential for the community. According to Counsel's submission, an undertaking which buys textiles or footwear for the purpose of re-sale, is a commercial undertaking ; but an undertaking which manufactures textiles or shoes and supplies them to the community is not a commercial undertaking. If this be correct, then the intention of the Order to ensure to the public a full supply of textiles and footwear would be implemented only by ensuring that undertakings engaged in the business of buying and selling these goods will remain open for business ; but there would be no assurance that manufacturing concerns, which may be the principal and at times perhaps the only reliable source for the supply of textiles or footwear will remain open. If one is compelled to accept such a construction, the Order will fail to ensure a proper supply of textiles and footwear for the public.

The National Textile Corporation and the Leather Corporation are Government Corporations, and paragraph (9) of the Order ensures the supply of textiles and foot-wear manufactured by them, despite the fact that they do not purchase the goods which they supply. Thus the supply of goods by these Corporations is declared to be essential irrespective of the fact that they are purely manufacturing or producing concerns. A construction that the Order was not intended to include private undertakings which similarly manufacture and produce goods for supply to the public would therefore be contrary to common sense. Equally so would be a construction that while the Order does compel the attendance at work of the few employees in a small retail textile or footwear shop, there is no such compulsion in the case of workers employed in large and important manufacturing undertakings. Indeed, supplies would not be available in retail shops if the employees of the large undertakings are free to keep away from work.

There is yet another important consideration in this context, namely that the Essential Services Order was not intended to regulate employer-employee relations, but instead to ensure the maintenance of supplies essential for the life of the community by requiring both employer and employee to continue their

normal functions in the economy. Hence the fact that the present dispute is one between an employer in the private sector and the workers in that undertaking is of no significance in construing the Order.

In view of the considerations to which I have adverted above, a Court must strive to avoid a construction of the Order which will gravely restrict its operation ; and there are in my opinion sufficient reasons for avoiding such a construction.

While terms such as “mercantile”, “commerce”, “trade”, “industry” each had an original narrow meaning, neither ordinary usage nor even legislation has adhered to their narrow meanings. For example, the petitioner, which is “the Ceylon *Mercantile Union*”, includes in its membership the employees of the Respondent Company ; and the Ceylon Chamber of *Commerce* has (as stated to us by the Respondent’s Counsel) admitted to membership the Respondent Company. The term “*Mercantile Establishment*” does not according to current usage include only concerns which buy and sell goods. Over a hundred years ago, a Ceylon Ordinance (of 1852) had a marginal reference to “commercial matters” for a Section dealing with the law relating to the subjects of partnerships, agency, and insurance in which subjects the elements of purchase and sale are not involved. An Act of 1954 (Chapter 129) brought a Newspaper Office within its scope by regarding it as the office of a commercial undertaking.

Again, the Industrial Disputes Act gives to the term “industry” a very much wider meaning than the Dictionary would allow. I think therefore that the language “mercantile or commercial” in the context of the Essential Services Order, must not be construed narrowly.

We hold that the purpose of paragraph 11 of the Essential Services Order of 1972, in referring to a mercantile or commercial undertaking, was to include within the meaning of “Essential Services” the services of any business undertaking which carries on for profit the sale, supply or distribution of any goods whatsoever, and that accordingly the 3rd respondent Company is a mercantile or commercial undertaking within the meaning of paragraph 11. It was not suggested during the argument that newspapers are not “goods” within the meaning of paragraph 11.

The application of the petitioner is dismissed. I would make no order for costs.

WIMALARATNE, J.—I agree.

Application dismissed.