1965 *Present :* **T. S. Fernando, J.**

M. SINNATHAMBY, Appellant, *and* M. D. S. RATNAWEERA (Labour Officer), Respondent

S. C. 383 of 1965—M. C. Colombo, 36238/A

Employees' Provident Fund Act, No. 15 of 1958—Sections 8 and 15—Regulations made under s. 46, Regulations 1, 3, 4, 60 (3)—Prosecution for failure of employer to pay contributions due from employees—" Covered employment "—Burden of proof—Evidence Ordinance, s. 105.

Regulation 3 of the regulations of October 29, 1958, made by the Minister under secton 46 of the Employees' Provident Fund Act is as follows :—

" Any employment on any work which is usually performed by the day or by the job or by the journey shall not be a covered employment. "

Held, that, when an employer is charged with having failed, in contravention of section 15 of the Employees' Provident Fund Act, to pay a contribution on behalf of an employee, and when the sole question is whether or not the employment of the employee is a covered employment within the meaning of section 8 of the Act, read with regulation 3, section 105 of the Evidence Ordinance imposes the burden of proof on the employer to establish that the employment of the employee is on some work which is excepted by regulation 3.

Held further, that, by regulation 60 (3) of the regulations of October 29, 1958, persons in covered employments may include persons paid according to a piece rate.

APPEAL from a judgment of the Magistrate's Court, Colombo.

H. V. Perera, Q.C., with *M. Radhakrishnan*, for the accused-appellant.

R. Abeysuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 27, 1965. T. S. FERNANDO, J.—

The appellant has been convicted by the Colombo Magistrate of three contraventions of section 15 of the Employees' Provident Fund Act, No. 15 of 1958, in that he, being the employer of the persons named in the three charges, failed to pay for the month of September 1960 the contributions of the employees so named. Upon conviction he has been sentenced to pay a fine of Rs. 25, in default 2 months' simple imprisonment in respect of each charge, and has further been ordered in terms of section 38 of the Act to pay a sum of Rs. 1,326·57.

The sole question arising on this appeal is whether the persons named in the charges are persons to whom the Act applies, i.e., whether they are persons in any employment which has by regulation been declared to be a covered employment—see section 8. By regulation 1 of the regulations

of October 29, 1958, made by the Minister under section 46 of the Act—(see *Government Gazette* No. 11,573 of October 31, 1958)—every employment specified in the First Schedule to thoee regulations has been declared to be a covered employment, save as provided in regulations 3 and 4. The employments specified in the First Schedule embrace "every employment other than employment under the Government of Ceylon, under any local authority or under the Local Government Service Commission". Therefore, every employment other than those under these excluded authorities is a covered employment unless such employment can be shown to be excepted by regulations 3 and 4. Of these two last-mentioned regulations it becomes necessary on this appeal to notice only regulation 3 which is in the following terms :—" Any employment on any work which is usually performed by the day or by the job or by the journey shall not be a covered employment".

Is there here a burden on the defence to establish that the employment is on some work which is excepted by regulation 3 ? On this incidental question of the burden of proof the discharging of which will take the employment outside the category of covered employments, I would follow the decision of the Divisional Bench in *The Mudaliyar, Pitigal Korale North v. Kiri Banda* [1]. The words " save as hereinafter provided in regulations 3 and 4 " are in the nature of an exception within the meaning of section 105 of the Evidence Ordinance. I do not consider that this view in regard to the burden of proof imposes any hardship upon the employer as he is the person best situated to adduce before the Court evidence as to the nature of the work performed by the persons alleged to be his employees. The prosecution in many cases of this kind will be at a disadvantage in satisfying the Court of the real nature of the particular work performed. The evidence in the case from which the present appeal has arisen itself illustrates the reluctance of employees for whose benefit the Act has been enacted to take advantage of its provisions or to co-operate in its working. This reluctance, I trust, will be overcome in time by means of suitable propaganda among and education of the employees themselves in regard to the benefits to be gained by an observance of the provisions of the Act on the part of all concerned.

Has then the defence discharged on a balance of the evidence the burden that lay on it to satisfy the Court that the work performed by the three persons named in the charges fell within the description given in regulation 3 ?

Neither the prosecution nor the defence called any of the workers. A witness called for the defence, the Secretary of the Organisation of Cigar Manufacturers, gave some indication in the course of his evidence that it is difficult to get the workers to make their own contributions to the Provident Fund and that they declare that they do not want the benefits of the Fund. The appellant himself, it should be mentioned, complied with section 15 of the Act for the period November 1959 to

[1] *(1903) 12 N. L. R. 364.*

August 1960. The prosecution, to which the present appeal is the sequel, was concerned with contraventions of section 15 on the part of the appellant in respect of the month of September 1960.

On the evidence led before him, the learned Magistrate was invited to hold that the persons named in the charges framed against the appellant were not working in a covered employment. It was argued before him, as indeed also before me, that they were employed on work usually performed by the job. It would appear that the appellant maintains an establishment for he manufacture of tobacco products, mainly cigars, and most of the employees are engaged for the work of rolling the cigars. In relevant documents they have been described as cigar rollers. In the month immediately preceding that with which we are concerned on this appeal, viz., August 1960, he had on his roll some 107 persons of whom all but 6 were cigar rollers. The Magistrate has accepted the evidence that these cigar rollers have no regular hours of work and that they are free to come and go as they like. The rolling of cigars takes place in the employer's establishment where sheds have been erected for the purpose. The employees are not free to take out of the employer's premises the tobacco given over to them for rolling into cigars. The rolled cigars and any unused tobacco have to be given over to the employer before the employee can leave. Payment is regulated by output, i.e. according to the number of cigars rolled. The current minimum rate of payment is said to be Rs. 10 for every 1,000 cigars rolled. Many of the persons employed in the work of rolling cigars appear to be villagers who occupy themselves generally in the cultivation of their lands and turn up in their spare time to supplement their income by engaging in cigar rolling at one of the many cigar manufactories in the area we are concerned with here. While there is no legal obligation on these workers to turn up for work at any particular time or turn up at all, the return furnished in respect of August 1960 is ample testimony that the workers are generally constant in their attendance for work. The sums earned by them at the rate specified above for the month of August 1960 are not inconsiderable, and vary from Rs 41 60 to Rs. 245 60. Each of 38 of the 101 cigar rollers earned a sum in excess of Rs. 100 during that month.

The circumstance that persons engaged for the purpose of rolling cigars are paid at a piece rate does not assist in determining whether they are employed in work th ıt is usually performed by the job. Indeed, regul .tion 60(3) of the regulations of October 29, 1958 declares that earnings of an employee (in a covered employment) shall include remu: eration paid to him at piece rates. The law therefore recognises that persons in covered employments may include persons paid according to a piece rate. Mr. Perera, for the appellant, suggested that, in the case of these cigar rollers, the true position is that there is not a continuous employment but a series of employments or engagements by the employer. Crown Counsel submitted that these men are not engaged in isolated jobs of work each of which is complete at that hour of the day on which he chooses to leave the factory and go home, but in work of a continuous nature, viz., the

turning out of cigars. The learned Magistrate himself took the view that regulation 3 was intended to exempt work of a casual nature. As examples he has mentioned the case of the work of an odd-job gardener or a person who undertakes to wash and polish a car. These examples could be multiplied. In this case he was inclined to think that there was nothing casual in the nature of the work of cigar rolling itself. Any element of casualness was not a characteristic of the work itself, but rather to be attributed to the worker himself. On the question before him he has in my opinion reached a correct finding and I see no reason for interference with the conviction or sentence.

I would dismiss the appeal.

Appeal dismissed.