[FULL BENCH.] 1913.

Present: Wood Renton A.C.J. and Pereira and Ennis JJ.

WINTHROP *v.* MADASAMY.

494—P. C. Ratnapura, 22,784.

Disobedience of the orders of the employer—Order given by conductor—Does definition of term "employer" in Ordinance of 1889 apply to Ordinance of 1865 ?

A superintendent who was in charge of two estates resided on one. The conductor of the other estate, on the express instructions of the superintendent, directed the kangany to order his coolies to carry chests of tea from that estate to the other. The kangany refused to obey the orders.

Held, by WOOD RENTON A.C.J. and ENNIS J. (PEREIRA J. *dissentiente*), that the kangany was guilty of wilful disobedience to the orders of his employer under section 11 of Ordinance No. 11 of 1865.

WOOD RENTON A.C.J. and ENNIS J.—The evidence shows that the conductor was the chief person for the time being in charge of the estate at the time the order was given by him, and as such he came within the definition of the term "employer" in Ordinance No. 13 of 1889, which by section 2 has to be read and construed as one with Ordinance No. 11 of 1865.

WOOD RENTON J.—To constitute the offence of wilful disobedience to orders in the service of an employer within the meaning of section 11 of Ordinance No. 11 of 1865, it is not necessary that the order must be given by the employer; it is sufficient if the order is given in the employer's service, and is one which, under the usual routine of the work of the estate, it is the duty of the servant to obey.

[1] *(1911) 14 N. L. R. 177.*

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PEREIRA J.—The interpretation of the term "employer" in Ordinance No. 13 of 1889 does not apply to Ordinance No. 11 of 1865.

PEREIRA J.—A cooly is not bound to obey the orders of the conductor, unless the superintendent had delegated his powers to him. Delegation can only be effected with the assent or consent of the servant.

If it is established by evidence that a certain system acquiesced in by the servant for the carrying on of the work of the estate has always existed, a part of which was the giving of orders by the conductor, delegation and assent thereto might thereby be inferred, but there is a lack of evidence in the case either of such a system or of express delegation.

THIS case was reserved for argument before a Full Bench by Pereira J. The facts appear from the judgment of Wood Renton A.C.J.

H. J. C. Pereira, for the accused, appellant.—The accused cannot be punished for disobeying the orders of the conductor. The employer was the superintendent. The accused is not bound to obey the orders of the conductor unless there was a delegation of the right to give orders with the consent of the cooly.

Power v. Rengasami [1] is a binding authority. [Wood Renton A.C.J. referred counsel to *Murray v. Velaiden.*[2]]

J. W. de Silva (with him *R. L. Pereira*), for the complainant, respondent.—The conductor is the person in authority on the estate in question. His orders are obeyed by the coolies without any question. The evidence shows that the order in question was given on the express instructions of the superintendent.

If delegation is to be with the consent of the cooly, then every time a new superintendent is appointed there should be express consent of the cooly to serve his new employer. Delegation of authority and consent of the cooly might be inferred from the circumstances.

The orders of the superintendent are passed in this way as a rule, and we might infer delegation and consent of the cooly from the fact that the orders were usually obeyed.

An "employer" is a person in authority for the time being on the estate. The Ordinance No. 13 of 1889 has to be read with Ordinance No. 11 of 1865.

Cur. adv. vult.

October 15, 1913. WOOD RENTON A.C.J.—

The argument of the point of law referred by my brother Pereira in this case to a Bench of three Judges has unfortunately, but unavoidably, been delayed by the absence of my brother Ennis and myself on circuit. The accused-appellant was prosecuted

[1] *(1891) 9 S. C. C. 149.*

[2] *1 Tam. 32.*

by the complainant-respondent, Mr. Winthrop, Superintendent of Palamcotta and Nahaveena estates, for " wilful disobedience of orders " and misconduct, offences punishable under section 11 of Ordinance No. 11 of 1865. The learned Police Magistrate after trial convicted the appellant, and sentenced him to one month's rigorous imprisonment, and, in addition, to a fine of Rs. 50, or, in default of payment, to rigorous imprisonment for another month. We are not here concerned with the question whether the appellant has been properly convicted on the ground of misconduct. The only point referred to us is whether on the evidence, as recorded and accepted by the Police Magistrate, the conviction of wilful disobedience to orders is good.

The material facts are these. The appellant is the head kangany of Nahaveena estate. The complainant, Mr. Winthrop, although he is superintendent both of that estate and of Palamcotta, resides generally on the latter, and his orders to the appellant and to the coolies working under him on the former are usually given through Calnaid, his conductor there. " The conductor," said Mr. Winthrop in his evidence, " is my agent on Nahaveena." On May 22 last Calnaid, by Mr. Winthrop's express instructions, directed the appellant to order his coolies to carry chests of tea from Nahaveena to Palamcotta. The appellant, although Calnaid told him that these instructions proceeded from Mr. Winthrop himself, refused to obey them wilfully and without reasonable cause.

The question is whether, in these circumstances, he has been guilty of disobedience to orders within the meaning of section 11 of Ordinance No. 11 of 1865. Considering the matter apart from authority, I should have thought that the answer to this question admitted of no doubt. The offence is defined in the section itself as " wilful disobedience of orders ..... in the service of his employer." The section does not say that the order must be given by the employer. It is sufficient if the order is given in the employer's service, and is one which, under the usual routine of the work of the estate, it is the duty of the servant to obey. If this be the correct interpretation of the law, the commission of the offence charged against the appellant is established by the evidence beyond all doubt. We have the unchallenged statement of Mr. Winthrop that the conductor was his agent on Nahaveena estate. The evidence both of Mr. Winthrop and of the conductor shows that it was the practice of the former to issue orders on the appellant and his coolies through the latter, which the latter carried out; that the removal of the tea chests from Nahaveena to Palamcotta was an ordinary branch of work on Nahaveena estate; that the coolies were engaged in it, at their ordinary rate of wages, often for days at a time; that they received extra pay if chests had to be carried on a Sunday; and that the appellant was well aware of all these circumstances. He gave evidence on his own behalf at the trial,

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and called other witnesses in his defence. Neither he nor any of his witnesses suggested that the order for the removal of the tea chests was one which the superintendent had no right to give. Their case was that the order had been sent, not through the conductor, but through the watcher; that the appellant had done his best to induce the coolies to obey it; that the coolies had refused; and that thereupon the conductor himself had told the appellant to put them to pruning work. On the evidence in the case taken as a whole, and as interpreted by the learned Police Magistrate, the Police Magistrate was, in my opinion, amply justified, in the absence of any judicial decision compelling him to give effect to a different view of the law, in holding that the appellant had been guilty of wilful disobedience to orders in the service of his employer. It is suggested, however, that the decision of the Full Court in *Power v. Rengasami* [1] is an authority of this character. It was held in that case by Burnside C.J. and Dias J. (Clarence J. dissenting) that the mere fact that a person is the assistant superintendent of an estate raises no legal presumption *per se* that he is invested with any particular authority to give the servants on the estate any orders so as to make the disobedience to orders a criminal offence on their part. I confess that I sympathize somewhat strongly with the following passage in the dissenting judgment of Clarence J. in *Power v. Rengasami* [1]:—

> "It is a notorious fact, within common knowledge and not requiring proof, that tea estates are cultivated by the aid of coolies working under paid 'superintendents,' to whom is entrusted the responsibility of dealing out to the coolies all usual and lawful orders necessary to the cultivation of tea estates, and any such paid 'superintendent' or 'assistant superintendent' has *primâ facie* authority to give such orders, and disobedience to such orders is *primâ facie* disobedience of orders in the service of the employer."

But be that as it may, the case of *Power v. Rengasami* [1] has, in my opinion, no application to the circumstances with which we have here to deal. It must be noted that there the prosecution was instituted, not by the superintendent of the estate, who was the actual employer of the labourers, but in the name of the assistant superintendent himself. In the present case the superintendent is the prosecutor. Moreover the majority of the Court in *Power v. Rengasami* [1] did not dispute, on the contrary they affirmed, the proposition that if there was *primâ facie* evidence that an assistant superintendent was vested with power to give orders to the servants, wilful disobedience to such orders would constitute the statutory offence. There is here, I think, ample evidence of a delegation by Mr. Winthrop to his conductor on Nahaveena estate of authority to

[1] *(1891) 9 S. C. C. 149.*

convey or to make such an order as the appellant took upon himself to disobey. All doubt upon the matter seems to be set at rest by the definition of the term " employer " in section 3 of Ordinance No. 13 of 1889, which is not affected by the interpretation clause (section 2) in the Indian Coolies Ordinance, 1909 (No. 9 of 1909), that the term " employer " in the Labour Ordinances means " the chief person for the time being in charge of an estate." According to the uncontradicted evidence in the case, Calnaid answered to that description at the time when he issued the order which the appellant disobeyed. The law does not require, in such cases as the present, proof of any express delegation of authority by the superintendent, or express assent to such delegation by the servant. Nothing more is necessary than that the person giving the order should in fact be, and should be understood by the labourer to be, in a position which justifies it.

In my opinion the appellant has been rightly convicted of wilful disobedience to orders in the service of his employer within the meaning of section 11 of Ordinance No. 11 of 1865. The case must go back to be finally disposed of by Pereira J. after the appellant has had the opportunity, if he desires to avail himself of it, of presenting any arguments to the Court on the question of misconduct with which, sitting as a Bench of three Judges, we have nothing to do. The conviction, on the point before us, should be amended, so as to bring it into accordance with the language of the Ordinance, into one of " wilful disobedience of orders in the service of his employer."

ENNIS J.—

I agree with my brother the Acting Chief Justice. The evidence shows that the conductor was the chief person for the time being in charge of the estate at the time the order was given by him, and as such he came within the definition of the term " employer " in Ordinance No. 13 of 1889, which, by section 2, has to be read and construed as one with Ordinance No. 11 of 1865.

PEREIRA J.—

My difficulty in agreeing with the rest of the Court is that the question before us appears to me to be covered by the authority of the decision of the Full Court in the case of *Power v. Rengasami*.[1] Before I comment upon that fact I should like to say that, in my opinion, the contention of the respondent's counsel that the interpretation of the term " employer " in Ordinance No. 13 of 1889 applies to Ordinance No. 11 of 1865 as well cannot by any means be sustained. In Ordinance No. 13 of 1889 certain terms are given special meanings for, as it is expressly stated in the Ordinance itself, the purposes of that Ordinance. True, section 2 provides that the Ordinance so far as is consistent with the term

[1] *(1891) 9 S. C. C. 149.*

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thereof shall be read and construed as one with Ordinance No. 11 of 1865, which is termed " the principal Ordinance." That provision may have the effect of rendering the special meanings given in the Ordinance of 1865 to words used in it applicable to the Ordinance of 1889, but I am aware of no authority to support the converse proposition. The Ordinance of 1889, which is only subsidiary to that of 1865, with its provisions to be read in the light of special definitions given in it, stands by itself, and although it is made one with the principal Ordinance, it cannot be allowed to control or affect in any way the provisions of the principal Ordinance. The reason for the special meaning given to the term " employer " in the Ordinance of 1889 is not altogether independent of the reason for the special meaning given in the same Ordinance to the term " labourer." But in section 11 of Ordinance No. 11 of 1865 the term " employer " is used in relation, not to " labourer," but to " servant " (a term with a much wider signification) and " journeyman artificer "; and to give the term " employer," where that term and " servant " or " journeyman artificer " are used in correlation to each other, the interpretation placed on the term in the Ordinance of 1889 for its own purposes will, I am afraid, lead, to say the least, to embarrassing results. But, however that may be, an effectual answer to the learned counsel's contention is that the case for the prosecution is that Mr. Winthrop was the employer. The formal charge against the accused is that he disobeyed the orders of his employer, the superintendent of the estate, and in the formal conviction it is stated that the accused misconducted himself while in the service of his employer, Mr. W. H. Winthrop, superintendent of the estate, and disobeyed the lawful orders of his employer, meaning Mr. Winthrop. How, then, can this Court take upon itself to say that the conductor Calnaid was the employer, and that the orders disobeyed were orders given by him as employer? There is, moreover, no evidence that Calnaid was the chief person in charge of the estate.

Now, as regards the case of *Power v. Rengasami*,[1] it will be seen that what was held there by a majority of the Full Bench was that a cooly was not bound to obey the orders of an assistant superintendent, unless the superintendent (the employer) had delegated his power to him. As to how the delegation can be effected the case is silent. It is, however, clear that it can only be effected with the assent or consent of the servant who is a party to the contract to be affected. Of course, if it is established by evidence that a certain system, acquiesced in by the servant, for the carrying on of the work of the estate has always existed, a part of which was the giving of orders by the conductor, delegation and assent thereto might thereby be inferred, but there is a lack of evidence in the case either of such a system or of express delegation. The mere

[1] *(1891) 9 S. C. C. 149.*

fact that the conductor was the agent of the employer is insufficient to vest him with the authority of the employer so as to bind the servant. In this connection all that Mr. Winthrop says is: " I give orders to Calnaid, who shows them to the accused," and all that Calnaid says is: " My master sends me orders, which I carry out," and " The superintendent sometimes personally and sometimes in writing conveys orders." This evidence is clearly insufficient to establish delegation of authority.

For the reasons given above the conductor was not, in my opinion, the employer of the accused, and he had no right to give him orders.

PERERA J.—This case was referred by me to a Bench of three Judges for the decision of the question whether it was competent to Mr. Calnaid, the conductor of Nahaveena estate, to give orders to the accused (the kangany) or the coolies who are employed on the estate. My Lord the Chief Justice and my brother Ennis have answered the question in the affirmative, the common ground of their decisions being that the interpretation of the term " employer " in Ordinance No. 13 of 1889 applied to Ordinance No. 11 of 1865 as well, and that the conductor was accordingly " employer " of the kangany and coolies at the time he gave the orders said to have been disobeyed by the accused. When the judgment of the Collective Court was delivered, counsel for the accused desired that it should be made clear that he was still entitled to argue that no orders were in fact given by the conductor or the superintendent to the accused, and it was understood that he might do so. I may mention that my reason for referring the question mentioned above to the Collective Court was that it had a bearing on the charge of misconduct against the accused. The accused was said to have incited the coolies to disobey orders given to them, and it was in this connection that the question arose whether it was competent to the conductor to give any orders at all. On the argument of the case before me accused's counsel raised again the question whether any orders at all had been given to the accused by the conductor Calnaid. On this point I had already questioned the Magistrate, so as to ascertain the particular order relied on by him as having been disobeyed. His reply (filed of record) was as follows: " I have the honour to state that the particular order the accused disobeyed was to refuse to allow the coolies to carry tea chests from Nahaveena to Palamcotta." I am not sure that the Magistrate meant what he has stated. I cannot bring myself to believe that the accused was in all seriousness asked to " refuse to allow the coolies to carry tea chests." If the Magistrate meant that the order was " to allow the coolies to carry the tea chests," all that I can say is there is no evidence that such an order was given. Counsel for the respondent has, however, invited my attention to the statement of the conductor in his evidence that he ordered the accused to send the men to transport tea chests from Nahaveena to Palamcotta. There is certainly a specific order here, but the record does not show that there was a direct refusal by the accused to obey this order. Having, however, read the evidence carefully, I am inclined to agree with the respondent's counsel that an omission on the part of the accused to carry out the order may fairly be inferred. As regards the charge of misconduct, there is, I think, sufficient evidence to support it.

I affirm the conviction, amending it, as suggested by the Acting Chief Justice, by striking out therefrom the following :—" Mr. W. H. Winthrop, Superintendent of the said estate." As regards the sentence, I think that a fine, in addition to imprisonment, is not called for in all the circumstances of the case, and I therefore remit the fine, while retaining the sentence of rigorous imprisonment for one month.