1958 *Present:* **T. S. Fernando, J.**

K. RATNASABAPATHY, Appellant, *and* W. ASILIN NONA and others, Respondents

*S.C. 13—Workmen's Compensation C 3/35/54*

*Workmen's Compensation Ordinance (Cap. 117)—"Workman"—"Employment of a casual nature"—Question of fact—Test to be applied by Appeal Court before interfering with finding of Commissioner.*

The phrase "employment of a casual nature" appearing in the definition of "workman" in section 2 of the Workmen's Compensation Ordinance would appear to infer something midway between the regular employment of a workman and a simple engagement for a single day. When the state of facts is midway between these two states, so that the question is really debatable, it is for the Commissioner to decide.

When the Commissioner has made his decision on this question of fact, the test to be applied in determining whether the Appeal Court should interfere with the decision would appear to be whether there was evidence before the Commissioner upon which he could well have reached the decision he did. If there was evidence, and the Commissioner has not misdirected himself in reaching his decision, no appeal would lie.

who had decided to have a residential house built for the use of himself and his family, had reached that stage in the construction of the house when it became necessary to have the structure including the ceiling colour-washed and snowcem and varnish applied. To enable him to get this part of the work done the appellant obtained, through a painter Piyadasa, the services of two men one of whom was the deceased. Piyadasa, the deceased and the other man attended to the work, and these persons were paid by the appellant at the rate of five rupees a day. The appellant was in the habit of making several visits a day to see for himself the progress of the work. The payments were made to the men by the appellant, but when he could not be present himself, the money would be given to Piyadasa to be handed over by him to the other two. The tools, brushes and materials necessary for the work were supplied by the appellant. A scaffolding had been erected to enable the men to attend to the work, but had been removed before the date of the accident when only ladders were being used. The accident, which took place in the fifth week of work, occurred as a result of a ladder upon whi'h the deceased was perched while colour-washing one of the walls slipping, causing the deceased to fall on the concrete floor. He was removed promptly to hospital but died the same day.

It would also appear that the arrangement under which these three persons worked was that they would be allotted work as and when work was available. It would appear that if on a particular day there was work sufficient for two persons only, then the first two to arrive would be given work, while the third would have no work for the day and therefore would not receive any payment. At the same time there was no evidence that the deceased was ever refused work on this account. Piyadasa stated that the deceased and himself worked regularly for four weeks, and that the accident occurred in the fifth week.

In the state of these facts it seems to me that the Deputy Commissioner had evidence before him upon which he could well have reached the conclusion that the deceased's employment was not of a casual nature. Counsel for the appellant however contends that the Deputy Commissioner has misdirected himself in regard to what employment of a casual nature means.

He has referred me to the case of *Hill v. Begg*[1] in which the Court of Appeal was called upon to consider whether a certain window-cleaner employed by the occupier of a private house to clean his windows was a person whose employment was of a casual nature and decided that question in the affirmative. That case is distinguishable on the facts from the case before me. Here the deceased had been regularly employed for four weeks and was in his fifth week of employment at the time of the accident even if he had all along run the risk of losing employment for any particular day in case he had arrived late for work and found that there was work that day for two men only, and not for all three. In *Hill v. Begg*, Buckley L. J. found that the employment of the window-cleaner was of a casual nature because there was no stability of tenure

[1] *(1908) 2 K. B. 802.*

APPEAL preferred under the Workmen's Compensation Ordinance.

*C. Ranganathan*, for the respondent-appellant.

*H. C. Keerthisinghe*, for the applicants-respondents.

*Cur. adv. vult.*

March 10, 1958. T. S. FERNANDO, J.—

This is an appeal preferred under the Workmen's Compensation Ordinance (Cap. 117) against an order made by a Deputy Commissioner holding that the appellant is liable to pay to the dependants of a deceased person named Appuhamy compensation calculated in terms of the Ordinance. An appeal under the Ordinance lies only on a point of law and the substantial question of law is stated to be whether the deceased was a "workman" within the meaning of the Ordinance. A subsidiary question as to whether the accident giving rise to the claim made by the applicants arose out of and in the course of the employment of the deceased was mentioned by appellant's counsel, but was not seriously pressed.

The substantial question would appear to me to be whether the employment of the deceased was of a casual nature. If it was, then the deceased and his dependants were outside the benefits of the Ordinance. The Deputy Commissioner has held by his order that the deceased was a regular worker by which it must be taken he has held that the deceased's employment under the appellant was not of a casual nature. In an appeal in a case—*Hughes v. Walker* [1]—that arose in England where a claim for compensation under the Workmen's Compensation Act of 1906 which contains a definition of "workman" in terms identical with the definition in our Ordinance had been unsuccessfully resisted before the county court judge on the ground that the claimant's employment was of a casual nature, Lord Hanworth, M. R. stated :—"In the course of the many cases which have been decided it appears that the courts have leant more generally to saying that the question of what is casual labour is a matter of fact to be determined by the county court". In dismissing the appeal that learned judge stated that there was evidence before the county court judge which would justify him in holding that the applicant was engaged in an employment that was not of a casual nature. The test to be applied in determining whether the appellate tribunal should interfere would appear to be whether there was evidence before the trial judge upon which he could well have reached the decision he did. If there was such evidence and the trial judge has not misdirected himself in reaching his decision, no appeal would lie.

The facts relevant to the nature of the employment of the deceased as found by the Deputy Commissioner may shortly be summarised as follows :—The appellant, an assessor in the Income Tax Department,

[1] *(1926) 19 B. W. C. C. at 83.*

for that workman. In allowing the appeal he stated, " I think the Act distinctly intended that where employment was not in a trade or business the liability of the employer should be limited to the case of servants whose employment was not casual but stable. The employment was not of that kind, and the case is, in my opinion, not within the Act of Parliament."

More to the point is a case from India to which I was referred by counsel for the respondents, *Ebrahim v. Jain* [1], arising under the Indian Workmen's Compensation Act, No. 8 of 1923, in which " workman " bears the same definition that is to be found in our Ordinance. In that case the applicant claimed compensation in respect of the death of her son who had been employed by the appellant to execute certain repairs to his building and who fell off a scaffolding and died as a result. The Commissioner found that the workman's employment was not of a casual nature, but on the contrary he was regularly employed for an appreciable period of time by the same employer. After referring to certain English decisions, notably *Knight v. Bucknill* [2], the learned judge (Patkar J.) stated as follows :—" There is evidence in this case on which the Commissioner could base his finding that the deceased was regularly employed and that the deceased's employment was not of a casual nature. We think therefore it is difficult to interfere with the finding of fact of the lower court on this point."

In *Knight v. Bucknill* (supra), Hamilton L. J. observed (see page 164) that the phrase " of a casual nature " would appear to infer something midway between the regular employment of a workman and a simple engagement for a single day, and he thought that " casual " is here used not as a term of precision but as a colloquial term. He went on to say that " it may be inferred that when the state of facts is midway between these two states, so that the question is really debatable, it must be for the county court judge to decide."

In addition to the case of *Hughes v. Walker* (supra) already referred to by me, it is useful in this connection to examine the case of *Stoker v. Wortham* [3] in which also the Court of Appeal held that where the question whether the employment was or was not " of a casual nature " was reasonably debatable, it is for the county court judge to decide and his decision could not be interfered with. In the course of his judgment, Swinfen Eady, M. R.—(page 502)—observed :—

" Where a statute is passed providing that a person whose employment is of a casual nature shall not be included in the term 'workman', I do not think it is for the Court to define exhaustively the persons there referred to so as to bind succeeding judges to say that only those persons who come within the definitions so laid down should be within the Act, and that others shall be outside it. The true rule is, I think, that laid down by Hamilton L. J. There is a class of cases where it is quite clear the employment is regular, permanent,

[1] *A. I. R. (1933) Bomb. 270.* [2] *(1913) 6 B. W. C. C. 160.*
[3] *(1919) 1 K. B. 499.*

stable and not casual. There is another class of cases on the other side of the line where manifestly the employment is of a casual nature. Between these two it may become more and more difficult to say on which side of the line the individual case falls. In those cases it is a question of fact to be determined by considering not only the nature of the work but also the way in which the wages are paid, or the amount of the wages, the period of time over which the employment extends, indeed all the facts and circumstances of the case."

I would respectfully follow these observations of the learned Master of the Rolls and, adopting the rule laid down by Hamilton L. J.[1], dismiss this appeal with costs as I have already found that there was evidence before the Deputy Commissioner to warrant his decision in this case and as he has not been shown to have misdirected himself on any point, e.g., by adopting a wrong test, in reaching that decision.

There has been an earlier appeal in this same case, and Sansoni J. who heard that appeal has directed that the costs of that appeal will be in the discretion of the judge who ultimately hears the final appeal. In accordance with that direction, I would now order that the appellant do pay to the respondents the costs of that appeal as well.

*Appeal dismissed.*

[1] *in 6 B. W. C. C. 160.*