

# Panagoda V. Budinis Singho

490/1966

**Present: H. N. G. Fernando, S. P. J., Sri Skanda Rajah, J., and G. P. A. Silva, J.**

**E. M. P. PANAGODA, Appellant, and T. G. BUDINIS SINGHO, Respondent**

**S. C. 3/63—Workmen's Compensation Application, C 30/8664/61**

*Constitutional law—“Judicial office”—Administrative tribunal set up under a statute in force prior to the enactment of the Constitution—Exercise of judicial power by such tribunal—Validity—Workmen's Compensation Ordinance (Cap. 139)—Offices of Commissioner, Deputy Commissioner and Assistant Commissioner—Appointment by Judicial Service Commission not necessary—Ceylon (Constitution) Order in Council, 1946, ss. 55, 60, 88.*

The committal of judicial powers and functions to a tribunal does not *per se* constitute the tribunal a "judicial office" within the meaning of Section 55 of the Ceylon (Constitution) Order in Council, 1946. The provision in Section 55 relating to appointments which are required to be made by the Judicial Service Commission applies only to what were in the contemplation of that Section judicial offices.

An administrative tribunal established under a statute in force prior to the enactment of the Constitution, and appointed by the Executive, may lawfully exercise such judicial power as is conferred on it for the purpose of effectively securing the administrative purposes for which it is mainly established. Such a tribunal does not hold a "judicial office" within the meaning of Section 55 of the Constitution.

The offices of Commissioner of Workmen's Compensation, and of Deputy and Assistant Commissioner of Workman's Compensation,

which were created under the Workmen's Compensation Ordinance in 1934, are not judicial offices which require appointment by the Judicial Service Commission in terms of Section 55 of the Constitution. Although the holders of these offices have, for certain purposes, to decide disputed facts in the same manner as an ordinary court would do, such tribunals, which were established mainly for administrative purposes and which had functioned prior to the enactment of the Constitution, cannot be regarded as "judicial offices" in the sense of that expression in Section 55 of the Constitution. Accordingly, the exercise by a Commissioner, or Deputy or Assistant Commissioner, of the powers conferred by the Workmen's Compensation Ordinance does not conflict with any of the provisions of the Constitution.

*Liyanage and others v. The Queen* (68 N. L. R. 265) and *Moosajee Ltd. v. P. O. Fernando* (68 N. L. R. 414) distinguished.

**APPEAL** under Section 48 of the Workmen's Compensation Ordinance.

*L. Kadirgamar*, with *Ananda Paranavitane*, for the Respondent-Appellant.

*N. R. M. Daluwatte*, for the Applicant-Respondent.

*H. L. de Silva*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

July 22, 1966. **H. N. G. FERNANDO, S.P.J.**—

The first question raised in this case is whether the offices of Commissioner of Workmen's Compensation, and of Deputy and Assistant Commissioner of Workmen's Compensation, are offices to which appointments may lawfully be made only by the Judicial Service Commission on the ground that each such office is a paid judicial office, appointment to which is provided for by Section 55 of the Constitution.

It cannot reasonably be denied that the Workmen's Compensation Ordinance (Cap. 139) does entrust judicial functions and powers to the holders of these offices. But I must adhere (as I am bound to do) to the majority decision of a Bench of five Judges of this Court in *Walker Sons and Co., Ltd. v. Fry* [1 (1966) 68 N. L. R 73.] that the committal of judicial powers and functions to a tribunal does not *per se* constitute a tribunal a "judicial office" within the meaning of Section 55 of the Constitution. On this point even the minority opinion expressed in that case (Sanson C. J., T. S. Fernando, J. agreeing) was not that the office of the Industrial Court, or an arbitrator, is a judicial office; the opinion was that the Court or arbitrator had power only to make what was referred to in that case as a purely "arbitral award", and therefore acted in excess of its functions in purporting to exercise judicial power. The majority opinion in Walker's Case holding that an Industrial Court had jurisdiction to adjudicate upon a dispute between an employer and a workmen on questions such as whether a contract of employment had been lawfully terminated, and whether relief should be allowed to a workman in such an event, was reversed by the subsequent decision of a Bench of five Judges in *Moosajees Ltd. v. P. O. Fernando* [- (1966) 68 N. L. R. 414.]. This latter decision will receive consideration at a later stage of the present judgment.

But it is important to note that the latter decision was not based upon the ground that the office of the Industrial Court, or the office of an arbitrator under the Industrial Disputes Act, was a "judicial office" for the purposes of Section 55 of the Constitution by reason of the committal of judicial power to that Court or such an arbitrator. In my opinion, therefore, it must be taken as settled that the provision in Section 55 for the appointments to be made by the Judicial Service Commission applies only to what were in the contemplation of that Section judicial offices.

I should remember also that the latest decision of the Bench of five Judges was not concerned with the questions whether or to what extent an office constituted prior to the enactment of Section 55 of the Constitution is a "judicial office" within the meaning of Section

55. This new question is precisely that which has now to be answered.

The Workmen's Compensation Ordinance was enacted in 1934 in order to provide " for the payment of compensation to workmen who are injured in the course of their employment ". Under the Common Law a workman who sustained an injury in the course of his employment might be able to recover damages for the injury so sustained by recourse to the Courts but such damages could only be recoverable if the workman could establish a cause of action either in Delict or for the breach of a contractual liability. But the liability created by the Workmen's Compensation Ordinance is not based either on Delict or breach of contract, but is a new liability arising simply by reason of injury sustained out of and in the course of employment. For example, the liability of an employer to pay compensation to a workman employed by him may arise in a case where the injury sustained by a workman is caused by a third party having no relationship whatever to the employer, or is caused even through the negligence of the workman himself. This new liability, though designed for the laudable object of compensating workmen for injury, is arbitrary in the sense that it can arise irrespective of the question whether an employer acts negligently or in breach of any contractual obligation.

No doubt a Commissioner of Workmen's Compensation may have to determine disputed questions of fact, such as whether a workman was or was not employed by a person alleged to have been his employer, or whether a workman had received injury out of and in the course of his employment. But the decision of such disputes forms only a small part of the duties and functions entrusted to a Commissioner by the Ordinance. Among those duties and functions are the duty to supervise the payment and distribution of compensation payable under the Ordinance, to record agreements between employers and workmen for the payment of such compensation, to authorise persons to undertake Insurance against liabilities which may be incurred under the Ordinance, to inspect the accounts of the business of persons so authorised, and to receive notices of accidents from employers or workmen. At the

time therefore of the enactment of the Ordinance, it seems clear that the intention was not to set up a new Court and to vest in it judicial power previously exercised by ordinary civil courts, but instead to set up an administrative tribunal which for certain purposes has to decide disputed facts in the same manner as an ordinary court would do. Such a tribunal, which had functioned for about fifteen years prior to the enactment of the Constitution, was not in my opinion regarded as a judicial office in the sense of that expression as used in Section 55 of the Constitution.

The purpose and effect of the Workmen's Compensation Ordinance is not comparable to the purpose and effect of the Muslim Marriage and Divorce Ordinance (Chapter 99 of the 1938 Edition), which was "to take away from the ordinary courts a jurisdiction previously enjoyed by those courts, and to confer that jurisdiction on Quazis (*Jailabdeen v. Danina Umma*)[1 (1962) 64 N. L. R. 419.]. In other words a Commissioner of Workmen's Compensation was not entrusted by the Ordinance with a jurisdiction previously conferred on the civil courts.

I hold for these reasons that the offices of Commissioner, Deputy Commissioner and Assistant Commissioner of Workmen's Compensation are not judicial offices, and that appointments to such offices are not required to be made in terms of Section 55 of the Constitution.

The second question argued in this case can be precisely formulated only after some discussion of a judgment of the Privy Council and of a recent decision of a Bench of five Judges of this Court.

In *Liyanage and others v. The Queen*[2 (1965) 68 N. L. R. 265.], the Privy Council held that the principle of the Separation of Powers is recognised in our Constitution and that there exists a separate power in the Judicature which cannot be usurped or abrogated by the Legislature or the Executive. On this ground Their Lordships approved of an earlier Ceylon decision in *The Queen v. Liyanage and others* [3 (1962) 64 N. L. R. 313.] holding to be *ultra vires* an Act of the Ceylon Parliament empowering a Minister to nominate



particular Supreme Court Judges to hear a particular pending case. But the question which here arises, namely whether an administrative tribunal established under a statute in force prior to the enactment of the Constitution and appointed by the Executive, may lawfully exercise judicial power, did not require consideration by the Privy Council. On the other hand the reference in the Privy Council judgment, as also in an earlier judgment (*Bribery Commissioner v. Ranasinghe*[4 (1964) 66 N. L. R. 73.]) to the danger that Act of Parliament would result in an erosion of judicial power if it was lawful for such Acts to confer judicial power on any authority not forming part of the Judicature duly constituted under the Constitution, is an indication that their Lordships were concerned primarily with the validity of legislation enacted subsequently to the Constitution itself.

I have now to refer to a recent decision of a Bench of five Judges in the cases of *Moosajee Ltd. v. P. O. Fernando*[5 (1966) 68 N. L. R. 414.] and *Rockland Distilleries Ltd. v. S. A. Wijayatilake*[ 6 *ibid.*]. The judgments of the majority of the Bench, particularly those of My Lord the Chief Justice and my brother Fernando (G. P. A. Silva, J. and myself concurring) upheld the view previously stated by the Chief Justice in *Walker Sons and Co. Ltd. v. Fry* that Industrial courts and an Arbitrator appointed under the Industrial

Disputes Act were not intended to exercise judicial power, and that the actual exercise of judicial power by the Industrial Courts or such an Arbitrator was in excess of their statutory powers. This view of the position of an Industrial Court or Arbitrator was properly taken in that context because in fact the Industrial Disputes Act did not purport expressly to authorise an Industrial Court or an Arbitrator to entertain a reference under the Act involving an adjudication on existing rights ; and even if the Act had purported expressly to confer such a jurisdiction on some authority not appointed by the Judicial Service Commission, the judgment in Liyanage's case decided by the Privy Council would clearly have justified a decision that the principle of the Separation of Powers prevented Parliament from validly conferring such jurisdiction upon a person or body not appointed by the Judicial Service Commission.

What has been claimed in the present case is that the decisions of the Privy Council and of the Bench of five Judges of this Court in the two recent cases are applicable also in regard to the exercise of judicial power by administrative tribunals established prior to the Constitution and that such tribunals cannot lawfully exercise judicial power unless they are appointed by the Judicial Service Commission.

In the context of the present case there is no question of the Parliament or Executive encroaching upon the powers separately committed to the Judicature by the Constitution. The exercise of judicial power by a Commissioner for Workmen's Compensation is not a consequence of any legislation enacted by Parliament in excess of its powers. Nor can it be said that there is any erosion of the power of the Judicature, for the Judicature did not have, at the time of the enactment of the Constitution, the powers and functions of a Commissioner of Workmen's Compensation which fall within the category of judicial powers.

If (as was the case before the enactment of the Constitution), appointment to the offices of District Judge, Magistrate, Commissioner of Requests and of Rural Courts had continued to be made by the Executive, there would have arisen a direct conflict with Section 55 of the Constitution. Similarly, if my own decision in *Jailabdeen v. Danina Umma* [1 (1962) 64 N. L. R. 419.] is correct, an appointment by the Executive of a Quazi again contravened the provision of Section 55 of the Constitution, because the office of Quazi is a judicial office. But those instances are distinguishable from the present case.

The Workmen's Compensation Ordinance is only one instance of Legislation in force prior to the Constitution whereby in the public interest the holder of some office established mainly for administrative purposes was entrusted also with judicial power necessary for effectively securing the purpose of the establishment of the office. If it were now to be decided that such an officer cannot validly exercise judicial power, the purpose of legislation of that nature would be set at naught. I am unable to find in the

Constitution itself or in the recent judgments to which I have referred any ground which compels me to reach such a decision.

Let me suppose for the while that it was in fact the intention of the Constitution that such judicial powers as were formerly exercised by a Commissioner of Workmen's Compensation must in future be exercised by some person appointed by the Judicial Service Commission. If so, it became the duty of the Governor, under Article 88 of the Ceylon Constitution Order in Council 1946, to make adaptations of the Workmen's Compensation Ordinance in order to bring that Ordinance in conformity with the Constitution. What then were the adaptations which could have been made ? The adaptation of providing that the Commissioner must be appointed by the Judicial Service Commission would itself have contravened the Constitution (Section 60) if it purported to authorise the Judicial Service Commission to appoint to an office which having regard to its functions is by and large a public office and not a judicial office. The adaptation that a Commissioner must be appointed by the Judicial Service Commission and the Public Service Commission, would have meant that the Commissioner became the servant of two masters, each responsible for promotions and disciplinary control, and could well have led to chaos or deadlock. The only reasonable adaptation would have been to delete the judicial powers of the Commissioner, and to entrust them instead to some officer appointed by the Judicial Service Commission. But that adaptation would have altered in principle the scheme of the Ordinance, and perhaps impeded its successful administration. Article 88 was not in my opinion intended to authorise or require such extensive and radical amendment of written law.

For these reasons I hold that the exercise by a Commissioner, or Deputy or Assistant Commissioner, of the powers conferred by the Ordinance, does not conflict with any of the provisions of the Constitution.

The appeal is dismissed with costs fixed at Rs. 157-50.

**SRI SKANDA RAJAH, J.**—I agree.



**G. P. A. SILVA, J.**—I agree.

*Appeal dismissed.*