PAKISTAN INTERNATIONAL AIRLINES CORPORATION
v.
YASEEN OMAR

COURT OF APPEAL.
B. E. DE SILVA, J. AND BANDARANAYAKE, J.
C.A. 503/75F. C.A. 516/75F – D.C. COLOMBO A/89/Z.
APRIL 29, 30 AND MAY 2, 1985.

Contract of employment – Industrial Disputes Act – Scheduled employment – Sections 2(1), 3(1), 5, 11 and 19 of Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 – Burden of proof – Section 106 of the Evidence Ordinance – Framing of issues – Section 79 and section 146 of the Civil Procedure Code – Shop and Office Employees Act s. 68.

The defendant Corporation employed the plaintiff Yaseen Omar as its District Sales Manager in Colombo but terminated his services with effect from 31.12.1974. The plaintiff claimed the termination was illegal and in violation of section 2(1) of the Termination of Services of Workmen (Special Provisions) Act, No. 45 of 1971, and prayed for an injunction restraining the defendant from interfering with the plaintiff's duties as District Manager. The defendant denied it had a place of business in Colombo and pleaded that defendant was, along with his brother, a General Sales Agent of the defendant in Sri Lanka on a commission basis and further that as the total number of employees in the Airline was less than 15 the Termination of Services of Workmen (Special Provisions) Act, No. 45 of 1971, did not apply and the plaintiff was not in a scheduled employment to which the Act applied. The Trial Judge gave judgment for the plaintiff but refused an injunction. The defendant appealed against the judgment and the plaintiff filed a cross-appeal against the refusal of the injunction.

Held –

(1) The plaintiff was a workman as that term is understood in the Industrial Disputes Act. He was on a contract of service on a monthly salary and not an agent. His employment was that of Sales Manager of a commercial undertaking, to wit, the business of transporting persons or goods for fee or reward and had necessarily to have a place of business which was an office as envisaged in the Shop and Employees Act (S. 68), and within the schedule of employment in Act No. 45 of 1971. This brings the plaintiff's employment within the definition of 'scheduled employment' in section 19 of Act No. 45 of 1971.

(2) The burden was on the defendant to show that it is entitled to invoke the protection of Section 3 (1) (*a*) by proving that the number of employees was less than 15. When plaintiff averred illegal termination of his employment it was implicit that he did not fall within this exception. There was no burden on the plaintiff to plead the inapplicability to him of this exception. Further the facts involved in the exception as a pragmatic

consideration were within the peculiar knowledge of the employer and not of the employee. When new matter is pleaded in an answer by way of defence and there is no replication every material allegation shall be deemed to have been denied by the plaintiff and the burden of proof of such new matter will be, both as a general principle affecting the burden of proof and as a rule of procedure, on the party asserting. The defendant had failed to discharge the burden of proof that lay on it.

(3) No duty was cast on the judge to frame issues on the burden of proof or the matter of the exception under section 3 of Act No. 45 of 1971.

(4) In view of the lapse of time (more than a decade of years) no permanent injunction should be granted in favour of the plaintiff-appellant.

Cases referred to :

(1) *Ratnam v. Perera (1961) 64 NLR 198, 204.*

(2) *Zahir v. David (1959) 61 NLR 357.*

(3) *Punchibanda v. Punchibanda (1941) 42 NLR 382.*

(4) *Diyes Singho v. Herath (1962) 64 NLR 492, 494.*

(5) *Appuhamy v. Kiriheneya (1896) 3 NLR 155.*

(6) *Daniel v. Lewis (1959) 61 NLR 157.*

(7) *Nair v. Saundias (1936) 37 NLR 439.*

(8) *Weerawago v. Bank of Madras (1892) 2 CLR 11.*

(9) *Lokuhamy v. Sirimala (1892) 2 CLR 125.*

(10) *Fernando v. Ceylon Tea Plantations Co. (1894) 3 CLR 51.*

(11) *A. G. v. Smith (1905) 8 NLR 229, 241.*

(12) *Silva v. Obeysekera (1923) 24 NLR 97, 107.*

(13) *The Bank of Ceylon, Jaffna v. Chelliahpillai (1962) 64 NLR 25, 27 (P.C.)*

(14) *Hill v. Parsons & Co. Ltd. [1971] 3 All ER 1345.*

(15) *Ranasinghe v. State Mortgage Bank [1981] 1 SLR 121.*

(16) *Clark v. Thachburn [1985] 1 All ER 211.*

APPEAL and cross-appeal against judgment of the District Court of Colombo.

Mark Fernando, P.C., with *M. A. Bastiansz* for defendant-appellant in 503/75 and for defendant-respondent in 516/75.

H. W. Jayawardena, Q.C., with *H. L. de Silva, P.C.* with *V. Ratnasabapathy* and *Miss Sujatha Mudannayake* for plaintiff-respondent in 503/75 and for plaintiff-appellant in 516/75.

Cur. adv. vult.

July 3, 1985.

BANDARANAYAKE, J.

This concerns an appeal by the defendant from the judgment and decree of the District Court and a cross-appeal by the plaintiff. The defendant-appellant is the Pakistan International Airlines Corporation carrying on business inter alia of transporting persons or goods by aeroplanes. The plaintiff was employed by the defendant as District Sales Manager, P.I.A., Colombo. The defendant terminated the services of the plaintiff with effect from 31.12.74. It was contended by the plaintiff that this purported termination was illegal and in violation of the provisions of s.2 (1) of the Termination of Services of Workmen (Special Provisions) Act, No. 45 of 1971.

The plaintiff filed action in the District Court for a declaration that –

(*a*) the plaintiff's services had not been lawfully terminated,

(*b*) that the plaintiff continues in service with the defendant and holds the office of District Sales Manager of the defendant in Sri Lanka, and

(*c*) for an injunction restraining the defendant from interfering with the plaintiff's duties as District Sales Manager until his services are terminated in accordance with the provisions of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971.

The learned District Judge entered judgment for the plaintiff as prayed for in Clauses (*a*) and (*b*) but refused the prayer for an injunction in Clause (*c*). The plaintiff, as already mentioned, appeals from this refusal to grant an injunction. The defendant has appealed from the judgment upon Clauses (*a*) and (*b*).

In the answer and at the trial it was admitted that –

(i) the defendant is a Corporation carrying on business inter alia of transporting persons and goods by aeroplanes for fee or reward ;

(ii) the District Court of Colombo had jurisdiction to hear and determine the action ;

(iii) that the defendant by his letter X1 appointed the plaintiff as District Sales Manager in Sri Lanka of P.I.A. ;

(iv) that since 23 August 1971 the plaintiff was in the employment of the defendant and functioned as District Sales Manager of P.I.A. in Sri Lanka on a consolidated salary of Rs. 1,250 per month ;

(v) that by letter X2 the defendant purported to terminate the services of the plaintiff as from 31.12.74.

The defendant denied that –

(i) the defendant had a branch office in Colombo at No. 10, Bank of Ceylon Building, Fort, Colombo, as averred in paragraph 2 of the plaint. It was averred in paragraph 2 of the answer that the residence of the defendant had been wrongly stated in the caption. Further answering this paragraph the defendant averred that its business in Sri Lanka was carried on through its employees. More specifically the defendant emphasized that "Partnership business 'Travemars' consisting of the plaintiff and his brother had been at all material times the General Sales Agent of the defendant in Sri Lanka on a commission basis. Premises No. 10, Bank of Ceylon Building, identifiable as the P.I.A. office is the business premises of 'Travemars' as General Sales Agent of the defendant". This point was strenuously taken by Counsel for the appellant at the hearing of this appeal submitting that the Trial Judge was in error in holding in the face of the denial and without framing an issue upon it, that No. 10, Bank of Ceylon Building, Fort, Colombo, was an office of the airline and consequently the plaintiff was in a 'scheduled employment' to which the Act applied ;

(ii) any cause of action has accrued to the plaintiff to sue the defendant ;

(iii) paragraph 9 of the plaint that the termination of services was illegal and in violation of the provisions of s. 2 (1) of Act 45 of 1971 and contended that the Act did not apply to the plaintiff by virtue of s. 3 (1) (*a*) of the said Act which protected the defendant as the total number of employees with the airline at the time was less than 15 in number which had the effect of excluding the defendant from the definition of an 'employee' under the Act.

Objection was also raised to the grant of an injunction as prayed for.

At the trial the plaintiff raised a single issue namely "Is the plaintiff entitled to the relief claimed by him in the plaint ?"

The defendant raised the issues :

"(ii) Should the plaintiff's action be dismissed for want of an issue raised by the plaintiff setting out, if the dismissal was wrongful, why the dismissal was wrongful ?"

"(iii) Should the interim injunction issued by this Court stand dissolved and should a permanent injunction be refused ?"

No evidence was led at the trial by either side. Both parties addressed written submissions to Court. Oral submissions were also made by both parties.

At the hearing of this appeal learned President's Counsel for the appellant urged,

(i) that as set out in paragraph 2 of the answer the office of 'Travemars' at No. 10, Bank of Ceylon Building was the office of that Firm and not of the Airline and referred the Court to an admission by the plaintiff at X3 that that Firm was the General Sales Agent of the defendant on a Commission basis and not an employee of the defendant. It was urged that an agent viewed in a commercial or contractual sense in the circumstances only sells the principal's goods. Counsel referred to *Ratnam v. Perera* (1).

It was also urged that although the defendant denied the averment in paragraph 2 of the plaint no issue was framed by the learned District Judge regarding this but the Judge came to a finding that "in admitting para 1 of the plaint the defendant admitted that it carried on a business or commercial undertaking in such place", and went on to hold that, an employee in such an undertaking is in a 'scheduled employment'. It was submitted that the trial Judge could not have come to this finding on the pleadings and without framing an issue regarding it in the face of the denial by the defendant. In the result it was argued that it was not proved that by operation of B of the schedule to Act 45 of 1971 read with s. 68 (1) (*a*) of the Shop & Office Employees Act, Cap. 129 the plaintiff was in a 'scheduled employment' to which Act 45 of 1971 applied.

(ii) that although the plaintiff was a 'workman' in the sense of the Industrial Disputes Act as required by interpretation section 19 of the Act No. 45 of 1971 the work force in fact was only 3 employees. Hence, as there were less than 15 workmen, by the terms of s. 3 (1) of Act 45 of 1971 the defendant was entitled to the protection of the Section as the Act applied only to situations where there were 15 or more workmen. In the result, in this case the definition of 'employer' and 'workman' did not apply and therefore the special provisions of the law regarding the termination of employment of workmen did not apply. It was argued that there was a duty on the Judge to have raised an issue on this but that was not done. There was no evidence either led at the trial.

It was further submitted that instead, the trial Judge wrongly placed the burden of proving that the defendant was entitled to the protection of s. 3 (1) (*a*) of Act 45 of 1971 on the defendant. In the circumstances the finding of the trial Judge of the relationship of employer-workman was an error. Although the plaintiff relied on the violation of the statute the trial Judge could not have come to such a finding.

(iii) that the findings of the learned District Judge are not supported by the pleadings or admissions and were reached without the framing of relevant issues. Detailed specific references were made to unsatisfactory aspects of the judgment as claimed by Counsel. It was submitted that the Judge treated as admissions items which were not admissions. As regards treatment of admissions Counsel cited the cases of *Zahir v. David Silva* (2), *Punchibanda v. Punchibanda* (3), *Diyes Singho v. Herath* (4) and referred to s. 58 of the Evidence Ordinance. The submission was made that there was a clear duty on the Judge to frame issues on the disputed matters but he failed to do so. Referring to ss. 79 and 146 of the Civil Procedure Code it was argued that whenever averments in the plaint were denied in the answer and that denial raised new matter in the answer and no replication is filed to meet it, it is open to the plaintiff, if he denies the averment to have an issue framed on it and thus put the defendant to the proof of the facts averred. If no issue in that way is settled parties must be held not to have been at issue on those facts and no burden lies on the defendant to

prove them. So Counsel submitted there was a denial of para 9 of the plaint that the termination was illegal an in violation of Act 45 of 1971 and a denial of liability under the Act as the employees were less than 15. As the plaintiff raised no issues and none were framed there was no burden on the defendant to prove them. In support Counsel particularly relied on the decision of 2 Judges of the Supreme Court in the case of *Appuhamy v. Kiriheneya* (5). Reference was also made to s.103 of the Evidence Ordinance, *Daniel v. Lewis* (6), *Nair v. Saundias* (7) etc. on the question of the burden of proof. Counsel also referred the Court to the cases of *Weerawago v. Bank of Madras* (8), *Lokuhamy v. Sirimala* (9), *Fernando v. Ceylon Tea Plantations Co.*(10), *A. G. v. Smith* (11), *Silva v. Obeysekera* (12), *The Bank of Ceylon, Jaffna v. Chelliahpillai* (13) on appropriate procedure in the absence of replication.

(iv) As regards the cross-appeal by the plaintiff asking for a permanent injuction it was argued on behalf of the defendant-appellant that if the termination of employment was null and void and in contravention of the Act then the Commissioner was given power to give orders to the employer with a corresponding duty by the employer to obey them and a failure to comply resulting in the commission of an offence made punishable under the Act.

An injunction granted by the Court would effect the 1974 termination as it then cannot be adjudicated upon by the Commissioner and this would deprive the Commissioner of the exercise of his powers under s. 6 of Act 45 of 1971 and take the matter out of the ambit of the powers given to an administrator under s. 11 of the Act. Furthermore, an injunction granted after the lapse of 11 years would offend social policy of dealing expeditiously with cases.

Learned Queen's Counsel appearing for the plaintiff-respondent submitted that the plaintiff's action was not for wrongful dismissal but an action for a declaration of the plaintiff's rights in that the defendant purported to dismiss the plaintiff illegally in violation of the provisions of a statute viz : s. 2 of Act 45 of 1971. He submitted that this altered common law rights of workmen vis a vis the employer. If the provisions of the Act have been violated it is no termination at all. The defendant-appellant approached the case in the District Court on an

erroneous footing, namely, that of wrongful termination at common law. It was contended that any termination must be in terms of s. 2 (1) (*a*) and (*b*) of Act 45 of 1971. It is convenient to set them down :

Section 2 (1) – No employer shall terminate the scheduled employment of any workman without –

(*a*) the prior consent in writing of the workman ; or

(*b*) the prior written approval of the Commissioner.

Counsel also referred to the provisions of s. 5 which reads as follows :–

"Where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, such termination shall be illegal, null and void and accordingly shall be of no effect whatsoever."

Further s. 11 (1) reads "The Commissioner shall be in charge of the general administration of the Act". Section 19 contains the interpretation of "employer", "scheduled employment" and "workman" and s. 20 states that the provisions of the Act prevail over other written law. This does not mean however that the common law right to enter upon a declaratory action before a competent Court has been taken away, and cited the case of *Hill v. Parsons & Co. Ltd.* (14) in support.

Respondent's Counsel's submission amounted to saying that the plaintiff had been dismissed in violation of the Special Provisions Act No. 45 of 1971 so that such termination was void and illegal and in such circumstances plaintiff is entitled to a declaration that he is still employed. It was submitted that in view of the defendant's admission of paragraph 1 of the plaint it meant that it was admitted that the plaintiff came within the definition of "scheduled employment". The letter of appointment X1 showed that the employment was in an airline which by virtue of s. 68 (1) (*a*) of the Shop and Office Employees Act would come within the definition of a commercial undertaking transporting persons or goods for fee or reward which brings it within the meaning of 'office' in the section. As s. 68 dealt with the 'place' of business it comes within the definition of "scheduled employment" in s. 19 of Act 45 of 1971 for the reason

that an office from which the Sales Manager of the Airline worked must be regarded as an 'office' coming within the definition in Cap. 129 and thus 'scheduled employment' in Act 45 of 1971.

As far as the number of employees was concerned it was submitted on behalf of the plaintiff-respondent that the burden was on the plaintiff to show that he had a contract of employment but that the burden was on the defendant to show that he is entitled to invoke the protection of s. 3 (1) (*a*) by proving that the number of employees was less than 15. Otherwise this Act cannot be invoked. Section 19 repeats the exception in s. 3. As to the burden of proof it was also submitted that it is the employer who would know the number of employees and this being special knowledge he had; s. 106 of the Evidence Ordinance would be the governing section as to burden of proof.

As to issue 2 framed by the defendant at the trial it was submitted by learned Queen's Counsel that it was meaningless as this was not an action for wrongful dismissal. As to the failure to prove issues as complained by the defendant-appellants it was submitted that when new matter is pleaded in the answer (vide paragraph 6 of the answer denying paragraph 9 of the plaint as to the applicability of Act 45 of 1971) by way of defence and there is no replication every material allegation shall be deemed to have been denied and the burden of proof of such new matter will lie on the party asserting. Counsel particularly relied on the decision of 3 Judges in the case of *Lokuhamy v. Sirimala (supra)* which followed the dissenting judgment of Burnside, C. J. in *Weerawago v. Bank of Madras (supra)*. It was submitted that the decision of 2 Judges in that case was not binding and should not be followed. Also cited was the case reported at (1949). All India Law Reports (P.C.) 319 at 320. It was also submitted that in view of paragraph 9 of the plaint averring that the termination was illegal and void and of no effect as it violated s. 2 (11) which was the crux of the case, there was no question of framing issues. The Commissioner administered the Act. Either his permission must be obtained or the workman must consent in writing. A declaratory action could be brought by the plaintiff for a violation of the provisions of the Act. The decision in *Ranasinghe v. State Mortgage Bank* (15) was cited in support.

In regard to the question of an injunction, it was submitted that as this was not a claim in damages but a declaration for violation of a right, for acting illegally and not merely wrongfully an injunction lay. The cases cited in support were *Clark v. Thachburn* (16) and *Hill v. Parsons & Co., Ltd., (supra).*

Conclusions :

The matter requiring the attention of the Court is whether the provisions of Act 45 of 1971 protecting the employment of 'workman' could be invoked by the plaintiff-respondent. The plaintiff must be a 'workman' employed in a 'scheduled employment' governed by the Act and whose employment has been terminated except by the means provided by the Act in order to succeed in this action.

Taking the matter of 'scheduled employment' first, the plaintiff, has averred in paragraph 4 of the plaint that he was appointed District Sales Manager by XI and an admission of this paragraph is in the answer and an admission has also been recorded on 16.6.76 by the Court in the presence of the parties and their Counsel that "it is admitted that the plaintiff was in the employment of the Defendant from 23.8.71." This appointment then, taken in the context of the averment in paragraph 1 of the plaint that the defendent-appellant is a Corporation carrying on the business of an Airline transporting passengers and goods for fee or reward which averment has been specifically admitted in the answer and invokes in my view the provisions of s. 68 (i) (*a*) of the Shop and Office Employees Act, Cap. 129 L.E.C. whereby the plaintiff's employment would be that of Sales Manager of an establishment maintained for the purpose of the transaction of the business of a commercial undertaking, to wit : the business of transporting persons or goods for fee or reward. Such an establishment must necessarily have a place of business. It is not one in the nature of for instance the business of a travelling salesman who may not have a fixed place of business.

Paragraph 5 of the answer admits that plaintiff was on a monthly salary and discharged his duties efficiently. Although his efficiency is now sought to be denied in the submissions of Counsel, there is no doubt that the said paragraph 5 has been specifically admitted and so recorded by Court on 16.6.76 This means that the plaintiff-respondent did do business for the benefit of the

defendant-appellant since his appointment in August 1971 up to the end of 1974. To do so he must have a place of business where he attended to the work of an airline for which are needed several facilities for the business of taking bookings, transporting passengers and goods by air for fee or reward, meeting prospective passengers, selling tickets, accepting money and keeping same in safe custody etc. In my view a place where all of these things happen is the place or establishment where the transaction of this business is located and therefore comes within the definition of 'office' in s. 68 (1) (*a*) of Cap. 129. LEC. This is a reasonable, logical and indeed a legitimate inference arising from the admissions and I adopt it. Appellant's Counsel's submission, as is also averred in paragraph 2 of the answer, that that place is only the place of business of 'Travemars' who were indeed the agents for P.I.A. as admitted is too technical and narrow a view and is unacceptable. So this place of business being an 'office' as envisaged by the Shop Act brings it within the schedule of employments in Act 45 of 1971, and brings the plaintiff's employment within the definition of 'scheduled employment' in section 19 of the Act.

The further question whether the plaintiff is a 'workman' under Act 45 of 1971 would depend on whether the provisions of s. 3 apply to this case.

I have already referred to the definition of 'workman' in s. 19. Viewed purely in the context of the definition of 'workman' in s. 48 of the Industrial Disputes Act, there is no doubt that the plaintiff comes within that definition as X1 which is pleaded and admitted by the defendant-appellant shows that the plaintiff was under a contract of service with the defendant-Corporation and X2 the notice of termination confirms it. Further, issue 2 raised by the defendant adds to the confirmation of a contract of service in that it raises an issue as to whether the dismissal was wrongful. To raise such an issue there must be an acceptance that there was a contract of service in the first instance. This matter is discussed in view of the submission of Counsel that in any event X1 and X2 were not formally led in evidence. It is apparent that their contents have been adopted by a party to the suit so that the documents are in evidence.

Even though the plaintiff is considered as a person who satisfied the definition of 'workman' under the Industrial Disputes Act still the question remains whether the plaintiff is a 'workman' under Act 45 of

1971 or whether the provisions of s. 3 of the Act of 1971 apply to this case which would have the effect of taking the defendent-appellant out of the definition of 'employer' under the Act, or to put it in another way, place the plaintiff outside the definition of 'workman' to which the Act applies. What then is the material before the Court on this aspect of the case ? The plaintiff has averred that he was employed by the defendant and that his subsequent dismissal was illegal in violation of the terms of s. 2 (1) of Act 45 of 1971 – vide paragraphs 4, 5 and 9 of the plaint and thus invokes the protection of the Act. This does not mean that there is a presumption that the plaintiff is a person whose employment is protected under the Act. But it is my view that there need not be a reference in the plaint to exemption from the operation of s. 3 of the Act or specific reference to exemption from any one or more of the cases or circumstances set out in s. 3 (1) (*a*) to which cases or circumstances the other provisions of the Act do not apply. So, when in the instant case, paragraph 9 of the plaint averred that the termination of the plaintiff's employment was illegal, the plaintiff was invoking the general purpose and sense and protection of the Act and it is implicit that he claimed exemption from the operation of s. 3.

In the setting of the Act, s. 3 is an exemption or proviso to the other provisions contained therein. The question therefore of the burden of proof arises. A crucial point is whether the element in question (i.e.) the provisions of s. 3 is part of the general sense and purpose of the Act or whether it pertains to a defence the benefit of which is claimed by a defendant. An examination of the schedule in the Act makes it clear that the Act was intended to apply to employment in the larger organizations such as Trades for which Wages Boards have been established, to shops & offices to which Cap. 129 LEC applied and to Factories. The definitions of 'workman' is related to Industrial Disputes under that Act :– in other words, to private sector employees engaging in commerce and industry on a larger scale, whose workmen are brought under the scrutiny of the Commissioner of Labour and their employment thus protected. The protection of employees of smaller organizations are not envisaged by the Act. The Act applies in a broader context. Now, in the case of the larger organizations it is unreasonable to expect an employee to know for example, either the number of 'workmen' in the institution during a particular period (it may be hundreds) or the source of the Capital or any proportion of the Capital of the Institution. These examples are taken from s. 3. Such

information would be known to the employer and generally not known to a 'workman'. In this situation how is one to construe the statute ? Peculiar knowledge of the employer is a pragmatic consideration in this context when constructing an intelligible principle in this area of the law. So, in interpreting the provisions of the statute (i.e.) s. 3 bearing in mind the scheme of the Act and also bearing in mind the pragmatic consideration of peculiar knowledge it is seen that s. 3 is not integral to such scheme. Protecting employees of smaller industries and trades is not intended by the Act and is not part of its general sense and purpose. Such employees are not entitled to the protection of their employment under the Act. The rule of pleading is also that if no answer is filed the Court will proceed ex parte.

In the result, the exemption clause must be claimed ; resistance to the controls placed on an employer by the Act must be pleaded and s. 3 invoked as a defence under the Act and proved by the employer. Has this been done ? That the number of employees is less than 15 has been pleaded thus attracting the attention of s. 3. This then raised new matter in the pleadings. There was thereafter no replication. The decision of 3 Judges in the case of *Lokuhamy v. Sirimala (supra)* decided that in such event, every material allegation shall be deemed to have been denied and the burden of proof of such new matter shall lie on the party asserting it. I have considered the cases cited and the submissions made on this aspect of the case and in my view the rule of procedure set out above is to be preferred. In the result, both as a general principle affecting the burden of proof and as a rule of procedure the defendant-appellant should have proved the exception. The absence of replication also does not mean admission either – vide *Fernando v. The Ceylon Tea Plantation Co. (supra)* There must be proof of this fact before exemption can be claimed. There is in fact no admission. Hence evidence of this fact, if it were so, should have been led to prove it. This has not been done. The framing of an issue on the burden of proof does not arise. The defendant-appellant has failed to prove exemption and he is therefore not entitled to the reliefs claimed. In the absence of anything to the contrary, the plaintiff would be entitled to the protection of the Act as a 'workman' in a 'scheduled employment'. The plaintiff is entitled to a declaration that his employment with the defendant corporation is protected by Act 45 of 1971 and that the purported termination of his services was illegal, void and of no effect whatsoever and in law has continued uninterruptedly. Issue 2 framed at the trial was wholly irrelevant.

There remains the appeal against the District Judge's order refusing a permanent injunction to be considered. A relevant consideration in this context is the lapse of time which is relevant to the competing interests of social policy and personal rights. It was submitted on behalf of the plaintiff-respondent that an illegal act amounting to the violation of a statute gives one a remedy as of right and not merely in equity and the Court must restore the status quo. But a decade has gone by since the event complained of. An injunction would frustrate the powers of the Commissioner under the Act. The District Judge's refusal to grant an injunction on the ground that it ought not to issue to enforce an agreement of personal service in a contract of master and servant is viewed with approval. I am of the view that the cross-appeal of the plaintiff-respondent seeking a permanent injunction upon the defendant-appellant restraining him as prayed for should not be granted. It is accordingly refused and the cross-appeal of the plaintiff-respondent dismissed without costs.

For the reasons given the appeal of the defendant-appellant against the order of the learned District Judge is dismissed. The plaintiff-respondent is awarded costs of this appeal.

B. E. DE SILVA, J. – I agree.

Appeal dismissed.
Cross-appeal dismissed.