

1932

Present : Driberg and Akbar JJ.

WEERASINGHE v. WANIGASINGHE.

158—D. C. Kandy, 40,357.

Public servant—Unregistered overseer—Benefit of Public Servants' Liability Ordinance—Ordinance No. 2 of 1889, s. 2.

An unregistered overseer is a public servant entitled to the protection of the Public Servants' Liabilities Ordinance.

THE plaintiff sued the defendant to recover money due on two promissory notes.

The defendant, who was an unregistered overseer employed in the Public Works Department, pleaded the benefit of the Public Servants' Liabilities Ordinance. The learned District Judge upheld the plea.

H. V. Perera, for plaintiff-appellant. Defendant is an unregistered overseer.

A registered overseer is under a contract of employment and cannot be dismissed without notice. An unregistered overseer is daily paid and there is no contract of employment. He can be dismissed without notice. Defendant's job is not pensionable.

[DRIEBERG J.—Is pension a test ?]

Yes, although not a conclusive one. In pensionable posts the appointment is fixed although the salary is fluctuating. The word "Employed" in the Ordinance connotes definite and continuous employment. The test is not the doing of the work but the employment by Government. The Ordinance must be strictly construed because it, in effect, helps a debtor to evade payment of his debt. Reported cases indicate that the appointment must be fixed.

[AKBAR J.—Is not sub-section (2) wide enough to include people only temporarily employed ?]

The limitation is contained in section 2 by the use of the word "Employed".

[DRIEBERG J.—The object of the Ordinance is merely to prevent members of the public service being embarrassed by writs.]

The Ordinance only affects liabilities incurred by public servants while they are public servants. Immunity from liability continues even after a person ceases to be a public servant. The object is not to prevent the public service being embarrassed. The test is whether or not a person can be discharged without notice.

[AKBAR J.—But every Government Servant holds office only during His Majesty's pleasure. There is no contract.]

In that case the Ordinance would protect every casual labourer employed by Government.

[DRIEBERG J.—Is there not a difference between employment by Government and employment in the service of Government?]

A casual labourer may be employed by Government but not employed in the service of Government. There must be a contract with mutual obligations of some kind. Employment during his Majesty's pleasure means only that the termination of the contract will give rise to no liability. But there is a contract. The Crown as employer has a right to the services. That is the test. In the case of an unregistered overseer, for example, the Crown has no right to his services.

[AKBAR J.—That is a very vague test. Suppose the Crown has the right to a man's services for a day.]

Time is not the test. The idea of a public servant must be associated with the particular work to be done (1 A. C. R. 28; 15 N. L. R. 117). The continuity contemplated is no *de facto* continuity but continuity by virtue of the contract. A person employed on a special contract, for example, would not be in the service of the Government. In the case of a Government servant Government has an exclusive right to his services. He cannot engage in any trade, for example, without permission. The test employed by *de Sampayo J.* in 18 N. L. R. 249 is that there should be a fixed appointment. A fixed appointment means a continuing contract with mutual legal rights and obligations.

[AKBAR J. referred to Ordinance No. 11 of 1865. Is not a month to month contract implied from the circumstances? Section 8 brings in the Crown.]

Even if an overseer is employed from month to month he is not in the service of the Government. There must be a fixed appointment.

Ranawake, for defendant-respondent. The purpose of the Ordinance does not require a contract of continuing service. Its object is to prevent embarrassment of the public service by litigation against public servants (18 N. L. R. at 251). That judgment goes to the length of saying that no salary even is necessary. Immunity does not continue when the public servant ceases to be so (3 Bal. 243; 2 A. C. R. 165). Immunity must be considered with reference to the period during which embarrassment would be caused to the public service. The facts of this case show that the defendant has got a fixed appointment. He is paid on a monthly basis. He cannot leave his station without permission. This is not a case on a par with that of a tidewaiter. He belongs to a class of persons, litigation against whom would embarrass the public service and therefore the protection of the Ordinance would extend to him.

H. V. Perera, in reply.—One must adopt a legal test. The test is not the embarrassment of the public service. That is far too inexact.

July 4, 1932. DRIEBERG J.—

The appellant sued the respondent on two promissory notes made in his favour by the respondent. When these notes were made both parties were unregistered overseers in the Public Works Department. The respondent pleaded the benefit of the Public Servants' Liabilities

Ordinance of 1889. The learned District Judge upheld the plea and ordered the stay of further proceedings in the action. The appellant appeals from this order.

As is not unusual in cases where the Ordinance is pleaded, neither party has called the best evidence to prove the status of the officer concerned. It would be an advantage to have the evidence of a superior officer of the respondent, the District or the Provincial Engineer. The question however has to be decided on the only evidence before us which is that of the parties and they are substantially in agreement.

An unregistered overseer differs from a registered one mainly, if not only, in the fact that he is not entitled to a pension and does not contribute to the Government Provident Fund for the benefit of his widow and children. He is not entitled to the benefit of holiday warrants.

He is paid monthly, but on the basis of a daily wage, and his name appears on the check-roll. He receives no payment for days on which he does not work. There is no evidence that the mode of payment is otherwise in the case of registered overseers.

The work, though paid for by the day, needs service over an extended period. He has charge of stores and tools for which he is accountable and a deduction is made monthly from his salary to form a fund to be held by Government as a security for this purpose.

The evidence shows that the employment of these officers is ordinarily expected to be permanent; they begin as sub-overseers and are later promoted to the higher grade of overseers. The respondent began as a sub-overseer fourteen years ago at Veyangoda; he was later appointed to Kadugannawa and again to Veyangoda.

The appellant was an unregistered overseer and was recently discontinued as a result of retrenchment; he was given the option of continuing as a sub-overseer, but was not willing to do so. He says an unregistered overseer can be discontinued without notice, but the respondent says that this is not so, and that he could not be dismissed without an inquiry and an opportunity given him of explanation. The conclusion to be drawn from this evidence is that an unregistered overseer would ordinarily continue in the service of the Government just as a registered overseer would. His services could be discontinued, if that be necessary, for such a reason as retrenchment, but so can the services of any public officer; but otherwise he would look to continuing service, and the Government would not terminate his services so long as he was satisfactory.

The Ordinance defines a public servant as a person employed in the service of the Government of the Colony or of certain local authorities. Sub-section 3 (2) enacts that the Ordinance does not apply to a public servant who is "in receipt of a salary in regard to his fixed appointment of more than Rs. 300 a month"; this provision is for the purpose only of defining those to whom the Ordinance does not apply and does not necessarily imply that those who are protected by it should have a fixed appointment or a salary: *Saibo v. Punchirala*¹; that was a case of a person holding the office of Arachchi and Police Headman.

¹ (1916) 18 N. L. R. 249.

The words "employed in the service of the Government of the Colony" themselves call for a definition and in the absence of one they must be construed according to their ordinary meaning and in the light of the purpose for which the Ordinance was introduced. The object of the Ordinance is to prevent the obstruction of public business as a consequence of legal proceedings against public servants; it is for the protection of the public and not of the individual servant. *Narayanan Chetty v. Samarasinghe*¹; *Nagamuttu v. Kathiramen*².

Considered from this point of view, the respondent is in my opinion a public servant who is entitled to the protection of the Ordinance. We were referred to *Palaniappa Chetty v. Fernando*³ which was a case of an extra tidewaiter at the Customs paid by the day. He was paid by the day; was at liberty to keep away if he liked, and there was not as in this case the obligation of rendering continued service to his employers.

The appeal is dismissed with costs.

AKBAR J.—I agree.

Appeal dismissed.
