[HIGH COURT OF AUSTRALIA.]

THE MERCHANT SERVICE GUILD OF AUSTRALASIA . . . . . } CLAIMANT;

AND

THE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION AND OTHERS } RESPONDENTS.

[No. 3.]

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SYDNEY, *Aug.* 11.

MELBOURNE, *Nov.* 1.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Industrial Arbitration—Industrial dispute—Service on ships—Work done outside Australia—Contract made in Australia—Dispute as to terms of contract—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Commonwealth of Australia Constitution Act (63 & 64 *Vict. c.* 12), *sec.* V.—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.).

Held, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* and *Gavan Duffy* JJ. dissenting), that, apart from sec. V. of the *Commonwealth of Australia Constitution Act*, the jurisdiction conferred by sec. 51 (xxxv.) of the Constitution extends only to disputes as to the terms and conditions of industrial operations carried on within the territorial limits of the Commonwealth.

Held, therefore, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* and *Gavan Duffy* JJ. dissenting), that the Commonwealth Court of Conciliation and Arbitration had no jurisdiction with regard to a dispute between parties in Australia as to the terms of contracts to be entered into there for employment beyond the territorial limits of Australia upon British ships whose ports of clearance and final ports of destination are not in Australia.

Merchant Service Guild of Australasia v. *Archibald Currie & Co. Proprietary Ltd.*, 5 C.L.R., 737, applied.

CASE STATED.

On the hearing of an application under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* in respect of an alleged

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dispute in which the Merchant Service Guild of Australasia was claimant and the Commonwealth Steamship Owners' Association and a large number of other employers were respondents, *Higgins* J. stated for the opinion of the Full Court a case which was substantially as follows :—

1. An alleged industrial dispute has been referred to the Court of Conciliation and Arbitration on 17th April 1920 under sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act*.

2. An application has been made to me as a Justice of the High Court sitting in Chambers for a decision on the question whether the alleged dispute or any part thereof exists or is threatened, impending or probable as an industrial dispute extending beyond the limits of any one State between the claimant and the respondents named in the order of reference as to the matters set out in the second schedule to that order.

3. Objection has been taken by three respondents, namely, Lever's Pacific Plantations Ltd., the Samoa Shipping and Trading Co. Ltd. and the Eastern and Australian Steamship Co. Ltd., to being included in the decision as being parties to the dispute.

4. I am prepared to find, on the evidence, that the said three respondents are parties to the dispute in fact subject to the answers to the questions hereinafter asked.

5. The members of the organization are masters, officers and engineers on steam vessels, and on all the vessels of the three respondents the claimant has a member or members so employed.

6. The respondent Lever's Pacific Plantations Ltd. is a company registered in England under the English law, having its principal office at Port Sunlight in Cheshire, and having in Sydney an office for the administration of its business in and around the Solomon Islands.

7. The said respondent has five vessels engaged in the said business. None of the vessels exceeds 750 tons gross register. The home port of the vessels is Tulagi in the said Islands.

8. Of the five vessels only three have visited Australia, and these three only for repairs or overhaul. Except the *Kobiloko* none of these has visited Australia for five years. The Tulagi authorities give permits to the vessels to proceed to Sydney and to return.

9. None of the vessels carries cargo or passengers to or from Australia, and all are solely engaged in the inter-island trade of the said Islands. None has its first port of clearance or final port of destination in Australia.

10. All the masters and officers of the said vessels are engaged in Sydney under contracts in a certain form, and on reaching the Islands sign the vessel's articles of agreement in a certain form. A copy of the articles is filed with the shipping authority at Tulagi.

11. The Samoa Shipping and Trading Co. Ltd. is a company registered in New South Wales, and having its principal office in Sydney.

12. The said respondent has two vessels engaged in trading in the Ellice, Union, Phœnix and Samoan Islands and in New Caledonia only, and do not trade to or from Australia.

13. Neither of the vessels has its first port of clearance or final port of destination in Australia.

14. None of the masters or officers of either of the two vessels has signed the vessel's articles in Australia, and the crew consists mainly of Chinese and natives of the said Islands.

15. The engagements of the masters and officers are for a definite period of service and provide that on completion of the service the employee shall be entitled to be returned to the port of engagement in Australia. The terms of the engagement are substantially as appear in the contract with one Romanoff.

16. The Eastern and Australian Steamship Co. Ltd. is a company registered in England under the English law, and having its principal office in London.

17. The said Company is also registered in New South Wales under the provisions relating to foreign companies in the New South Wales Companies Acts.

18. The said Company has two vessels which are registered in London under the Merchant Shipping Acts.

19. The said vessels clear from Melbourne at regular dates for a voyage to Sandakan, Manila, Hong Kong and Japanese ports via Sydney, Brisbane, Townsville, Cairns and Thursday Island, and they clear from Japanese and Chinese ports and Sandakan at regular

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dates for a voyage to Melbourne via Thursday Island, Cairns, Townsville, Brisbane and Sydney.

20. The said vessels on the voyage to Melbourne carry cargo and sometimes passengers to and from the said Australian ports and sometimes from Port Darwin. They seldom take in cargo at any Australian port except at Thursday Island.

21. The said vessels are empty at Melbourne on voyage southwards, and at Kobe or the last Eastern port of call on the voyage northwards.

22. Most of the masters and officers of the said vessels reside in Sydney and are actually engaged and discharged there by the Company, but the articles are signed in Hong Kong.

23. The said articles provide for a voyage or voyages from Hong Kong to any port or ports within the limits of 60° north latitude and 60° south latitude and back to Hong Kong.

24. A contract between the claimant organization and the said Company was made on 28th July 1916. The recitals therein are true. The contract was not registered under the *Commonwealth Conciliation and Arbitration Act.*

The question submitted for the consideration of the Full Court as amended at the hearing was :—

> Is it proper for me as a Justice of the High Court to include the said respondents respectively, namely, (*a*) Lever's Pacific Plantations Ltd., (*b*) the Samoa Shipping and Trading Co. Ltd., and (*c*) the Eastern and Australian Steamship Co. Ltd., or any and which of them, in any decision as being parties to an industrial dispute within the meaning of sec. 51 (xxxv.) of the Constitution ?

The second schedule to the order of reference referred to in par. 2 was a claim made by the claimant as to wages and conditions of labour of masters, officers and engineers of steamships.

The form of contract referred to in par. 10 and the contract with Romanoff referred to in par. 15 are set out at length in the judgment of *Higgins* J. hereunder.

One of the recitals of the contract referred to in par. 24 was " Whereas the Eastern and Australian Steamship Co. Ltd. are the

owners of steamships trading between Australian and Asiatic ports." The contract provided (*inter alia*) that it should be a contract at common law and should be subject to the statute law regarding contracts in force in New South Wales; that it should be an agreement pursuant to sec. 24 of the *Commonwealth Conciliation and Arbitration Act*, and should be deemed to be an agreement in settlement of a certain specified dispute submitted to the Commonwealth Court of Conciliation and Arbitration; and that the agreement should come into force on 28th July 1916 and remain in force for a period of three years, and should thereafter be determinable or variable in accordance with the provisions of the *Commonwealth Conciliation and Arbitration Act*.

Bavin and *Robert Menzies* (with them *Hooton*), for the claimant. In the case of the two respondents with whom agreements of employment are made in Australia there is jurisdiction under sec. 51 (xxxv.) of the Constitution and under the *Commonwealth Conciliation and Arbitration Act*. A dispute as to the terms of the contracts which are entered into in Australia is an industrial dispute within the meaning of sec. 51 (xxxv.). The claimant is here, the employer is here, and, independently of the work which is contracted for being done abroad, the dispute extends beyond one State. The signing of the agreement here founds the jurisdiction of the Commonwealth Court of Conciliation and Arbitration to determine what shall be the conditions of employment of any employee whose engagement is made in Australia. In *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (1) this Court decided that the Commonwealth Court of Conciliation and Arbitration had jurisdiction in respect of a dispute notwithstanding that some of the work as to which the dispute related was performed outside Australia. That is equally the case where the contract of employment is made in Australia and the work is done abroad. The fact that by an award the conduct of persons abroad might be affected does not show that there was no jurisdiction to make it (*Peninsular and Oriental Steam Navigation Co.* v. *Kingston* (2); *Robtelmes* v. *Brenan* (3)). As to the Eastern and Australian Steamship Co., the case of

(1) 16 C.L.R., 664. (2) (1903) A.C., 471. (3) 4 C.L.R., 395.

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Merchant Service Guild of Australasia v. *Archibald Currie & Co. Proprietary Ltd.* (1) is distinguishable, for in that case there was no engagement of the officers in Australia whereas there is in this case although the formal contract is entered into abroad.

E. M. Mitchell, for Lever's Pacific Plantations Ltd. and the Samoa Shipping and Trading Co. Ltd. The only thing which in the case of these Companies can be styled an operation in Australia is the making of the agreements. But the relation of employer and employee never exists while the parties are in Australia. In order to satisfy sec. 51 (xxxv.) the employee must be an employee in a particular industry, and the industry must be in Australia.

Milner Stephen, for the Eastern and Australian Steamship Co. Ltd. The ships of this Company have not their first port of clearance and port of destination in Australia, so that Sec. V. of the *Constitution Act* does not apply, and this respondent is covered by the decision in *Merchant Service Guild of Australasia* v. *Archibald Currie & Co. Proprietary Ltd.* (1). [Counsel also referred to *Clarke* v. *Union Steamship Co. of New Zealand* (2).]

Cur. adv. vult.

Nov. 1.

The following written judgments were delivered :—

KNOX C.J., ISAACS, RICH and STARKE JJ. This is a case stated under the *Judiciary Act* by a Justice of this Court acting under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1918. An application was made to *Higgins* J. under that section as to an alleged industrial dispute. Three of the respondents, namely, Lever's Pacific Plantations Ltd., the Samoa Shipping and Trading Co. Ltd. and the Eastern and Australian Steamship Co. Ltd., objected that the Court of Arbitration had no jurisdiction so far as they were concerned. The question we have to consider is whether that objection is sound as regards the several respondents mentioned. The case, it may be taken, finds all the

(1) 5 C.L.R., 737. (2) 18 C.L.R., 142.

necessary elements of jurisdiction subject to certain specific circumstances now to be mentioned.

1. *As to Lever's Company.*—The ships do not carry cargo or passengers to or from Australia, and are solely engaged in the inter-island trade of the Solomon Islands. None of them has its first port of clearance or final port of destination in Australia. But all the masters and officers of the vessels enter into agreements in Sydney in a stated form, by which they agree to enter into the Company's service on specified terms in the Solomon Islands, and in which there are some mutual promises. On reaching the Islands the masters and officers sign the vessels' articles, a copy of the articles being filed with the shipping authority at Tulagi.

2. *As to the Samoa Company.*—The vessels do not trade to or from Australia, and trade only in the Ellice, Union, Phœnix and Samoan Islands and in New Caledonia. None of the vessels has its first port of clearance or final port of destination in Australia. Articles are never signed in Australia, and the crew consists mainly of Chinese and natives of the said Islands. The master and officers assent in writing to proceed to Noumea, there to enter into an agreement on certain terms and conditions mentioned in the Company's letter.

3. *As to the Eastern and Australian Company.*—The ships clear from Melbourne for voyages to Sandakan, Manila, Hong Kong, and Japan, via various Australian ports, and they clear from Japanese and Chinese ports and Sandakan for voyages to Melbourne via certain Australian ports. On their voyages to Melbourne they carry cargo and sometimes passengers to and from Australian ports. Most of the masters and officers reside in Sydney, and are actually engaged and discharged there by the Company, but the articles are signed in Hong Kong. The articles provide for a voyage from Hong Kong to any port or ports within the limits of 60° north latitude and 60° south latitude and back to Hong Kong. An agreement, dated 28th July 1916, was made between this Company and the claimant organization. It purported to be in settlement of an industrial dispute, and to be a contract at common law regulating terms and conditions of employment. In the view we

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take, it is unnecessary to specify any further details of that agreement.

In our opinion there is no jurisdiction in the Commonwealth Arbitration Court to make an award as to any of the three respondents in respect of the industrial conditions to be observed on the ships referred to.

Sec. 51 gives power to the Commonwealth Parliament to make laws "for the peace, order, and good government of the Commonwealth with respect to" (xxxv.) "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." Covering sec. V. enacts that all laws made by the Parliament of the Commonwealth "shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth." As none of the ships now under consideration come within the description given by the last-mentioned section, that provision may be disregarded, and the only question is how far does sec. 51 (xxxv.) on its own construction, unextended by the covering sec. V., apply to the industrial disputes with which the three above-named respondents are concerned. We construe that sub-section for the purposes of this case on the same principles as were recently applied in the case of *Amalgamated Society of Engineers* v. *Adelaide Steamship Co* (1). That is to say, we interpret the enactment according to the well recognized standards of interpretation. One of those principles is that, *primâ facie*, jurisdiction is territorial; and covering sec. V. strengthens the view, in relation to the present case, that the language itself of sub-sec. xxxv. would support. But, being territorial, it means that the "industrial disputes extending beyond the limits of any one State," so far as they are to be settled or prevented under Commonwealth law, must be confined to the Commonwealth. The expression "industrial dispute" in sub-sec. xxxv. does not mean simply a dispute as to an agreement to perform work anywhere in the world. It does not, for instance, mean a dispute in Australia between shipowners of various nations and their crews of their respective nationalities as to the terms on which

(1) 28 C.L.R., 129.

employment should proceed in the various countries represented. If so, there is no jurisdiction in the present case. If, however, there is jurisdiction in the present case, there would equally be jurisdiction supposing a Chinese crew of a Chinese ship in one State, a French crew of a French ship in another State, an American crew of an American ship in a third and a Japanese crew of a Japanese ship in a fourth were to take concerted action as to the terms of agreements to be made here, but applying respectively to service in the various countries mentioned. We think that sub-sec. XXXV. of sec. 51, on its proper judicial construction, is intended to secure, so far as is possible by conciliation and arbitration, uninterrupted industrial services to the people of the Commonwealth, and therefore the term " industrial disputes " in that sub-section, unextended by covering sec. V., means disputes as to the terms and conditions of industrial operations in Australia only. *Currie's Case* (1) was decided in conformity with the opinions we have expressed, and in some respects was an *à fortiori* case.

Applying the construction stated to the three respondents mentioned, we are of opinion that the objection taken was well founded.

HIGGINS J. On the authority of *Currie's Case* (1) I concur in the view that the Court of Conciliation has no jurisdiction to deal with this dispute so far as regards the Eastern and Australian Steamship Co. Ltd. Neither as to this Company, nor as to the other two Companies mentioned in the case stated, can the claimant Guild invoke the assistance of covering sec. V. of the *Commonwealth of Australia Constitution Act*; the first port of clearance and the port of destination not being both within the Commonwealth. Moreover, the only contract made between the employee and the Eastern and Australian Steamship Co. is made in Hong Kong; as in *Currie's Case* it was made in Calcutta. But I cannot concur with the view that *Currie's Case* binds us as to the other two Companies: for the contract with these two Companies is made in Australia.

In Lever's case there is a contract made in Australia binding the officer to proceed to the Islands at his own expense and there to

(1) 5 C.L.R., 737.

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sign articles on certain terms as to wages, and to conform to all the regulations of the Company respecting hours of working, &c. This is the form of contract :—" Agreement made this day of one thousand nine hundred and Between Lever's Pacific Plantations Limited hereinafter called ' the Company ' of the one part and hereinafter called the ' employee ' of the other part. 1. The employee agrees to enter the service of the Company in the Solomon Islands as a on a monthly engagement, commencing on the date of his reaching subject to termination at any time on either side by one month's notice, and the employee agrees to proceed to the Islands. 2. The Company shall pay the employee, during the continuance of the service, a salary of or at the rate of pounds per month and find him with quarters, the paying his mess expenses. 3. The employee shall bear the cost of his own passage to and from the Solomon Islands, but in the event of his continuing for a period of years, the Company will refund the passage money to the employee. If the employee is dismissed for any reason, he shall bear the cost of his own passage to and from the Islands. 4. The employee shall carry out to the satisfaction of the Company's representatives all duties assigned to him, and shall conform to all the regulations of the Company respecting hours of working, &c. 5. The employee shall not trade privately with any other trader or person other than Lever's Pacific Plantations Limited or their representative without the consent of the said Company in writing."

It seems to be overlooked that the " disputes " referred to in sec. 51 (XXXV.) relate to the question what contracts should be made, on what terms ; and that the place where the contract is made is the place where the dispute occurs. Has the Australian Parliament no power to allow the Court of Conciliation to deal with disputes which take place in Australia ? The fact that the operations under the contract do not all take place in Australia does not oust the jurisdiction of the Court ; for, as was laid down by this Court in 1913 (*Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (1)), a " dispute is not the less a dispute

(1) 16 C.L.R., at p. 704.

extending beyond the limits of any one State merely because some of the operations in respect of which the dispute exists are performed beyond the territorial limits of the Commonwealth." As my brothers *Gavan Duffy* and *Rich* said in that case (1): "We think it" (a dispute) "exists within the Commonwealth when the disputants reside, the demands and the refusal are made, and the dissidence, dissatisfaction and unrest prevail, within the Commonwealth, although the dispute itself may have relation, as in this case, to labour to be performed outside the territorial limits by the employees who are parties to the dispute."

There can be no doubt, I presume, that if the ship's articles were signed in Australia, the Court of Conciliation could take cognizance of the composite dispute so far as regards Lever's Company as well as the numerous other disputants: does the fact that the contract here is executory, like an agreement for a lease instead of a lease, compel us to an opposite conclusion?

In the case of the Samoa Shipping and Trading Co. Ltd. the contract is in a different form of words; but, in my opinion, it binds the officer to proceed to Noumea by the *Saint Antoine*, and there to serve on certain specified terms. The words are:—"Dear Sir,—With regard to the position of second mate for our s.s. *Dawn* for which you have applied, if agreeable to you we wish you to proceed to Noumea by the s.s. *Saint Antoine* sailing on or about the 14th inst., and there report on board the *Dawn* to our Capt. E. F. Allen, who will enter into an agreement with you to act in the capacity of second mate from that date for a period of twelve months, at a monthly wage of fifteen pounds sterling free from all overtime or other Australian Union or Guild conditions. Your passage will be paid by us to Noumea and return.—The Samoa Shipping and Trading Co. Ltd.: W. Blacklock, Director—Witness, J. Benzeville." "I am willing to proceed to Noumea by the *Saint Antoine* and there enter into an agreement on the terms and conditions stated above.—H. J. Der P. Romanoff—Witness, B. M. Chellew."

I am of opinion that the same answer should be given to the Samoa Company as to the Lever Company.

(1) 16 C.L.R., at p. 703.

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We are not concerned here with any question as to the enforcing in foreign Courts of any penalty for any breach of the award. Australian Courts, at all events, would have to enforce the award, if the award be valid. And if, in pursuance of its first duty—conciliation,—the Court of Conciliation could secure an agreement, there would seem to be no doubt that the agreement could be enforced in foreign Courts.

It cannot be too clearly understood that in *Currie's Case* (1) there was not any indication whatever of any agreement made in Australia, or of any struggle as to the terms of the agreement in Australia. It was the Indian industrial peace that would be disturbed, not the Australian. I have taken the precaution of examining the form of articles in *Currie's Case* (they are exhibited in the case, and marked "A"); and I find that the articles are signed in Calcutta on 22nd January 1908, that the date of joining the ship is on the same date and at Calcutta, that the officer is to be discharged at Calcutta, that the wages are payable at Calcutta. There was no contract made in Australia.

On these grounds, though not on the grounds urged by the claimant, I should answer the question asked as to Lever's Company and as to the Samoa Company in the affirmative.

Perhaps I should add, lest there should be any misapprehension, that I had no intention of asking this Court to decide whether there was or was not in this case a dispute extending beyond the limits of any one State. I have found that there is such a dispute, and that these three respondents "are parties to the dispute in fact" —but subject to the answers to the questions asked (par. 4 of the case). The officers are engaged in Australia (pars. 10, 15, 22).

The question asked is in substance this: Treating these three respondents as parties to the dispute in fact (along with hundreds of other respondents), is the Court of Conciliation competent to entertain the claims as between the Guild and these three respondents respectively, the operations being carried on mainly outside Australia?

GAVAN DUFFY J. After carefully considering the case stated, I

(1) 5 C.L.R., 737.

remain in doubt as to what point is submitted for our determination. For practical purposes it will probably be sufficient to say that, if the learned Judge wishes to know whether a dispute within the meaning of sec. 51 (xxxv.) of the Constitution can exist with respect to industrial operations conducted outside the territorial limits of the Commonwealth, I adhere to what was said by my brother *Rich* and myself in *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (1), and I answer Yes. If he wishes to know whether such a dispute exists in the present case, I answer that I am unable to say on the facts stated, though the learned Judge may of course do so by ascertaining whether the facts which were then declared to be necessary to constitute an industrial dispute with reference to extra-territorial operations are to be found here.

Question answered in the negative as to each of the three companies mentioned therein.

Solicitors for the claimant, *Sullivan Brothers.*

Solicitors for the three respondents, *Allen, Allen & Hemsley*; *Norton, Smith & Co.*

B. L.

(1) 16 C.L.R., 664.