

1978

Present : Ismail, J. and Tittawella, J.

HIRE PURCHASE COMPANY LTD. and ANOTHER
Respondent-Appellants

and

P. A. C. N. FERNANDO, Applicant-Respondent

S. C. 46/76—L. T. 2/8128/75

with S. C. 44/76, S. C. 45/76 and S. C. 47/76

Labour Tribunal—Application against company after order for winding up—Liquidator also made a respondent to such application—Companies Ordinance, sections 165, 171 and 219—Does section 171 prevent Tribunal from making award after winding up order—Existence of company as legal entity during winding up proceedings—Liquidator a proper party as representing the company during winding up—Jurisdiction of Tribunal to make award in such circumstances.

Interpretation of Statutes—Rule that words of Statute understood in the sense they bore when it was passed—Application of such rule.

Held : (1) That the prohibition against continuance of legal proceedings contained in section 171 of the Companies Ordinance has no application to proceedings before a Labour Tribunal which could make an award even after an order for the winding up of a company has been made by the District Court.

(2) That the fact that a company was in liquidation did not deprive a Labour Tribunal of jurisdiction to make an award in proceedings before it. The company which is the employer does not cease to exist as a legal entity during the winding up proceedings and the liquidator is appointed for the purpose of administering the property of the company during the winding up. Although the liquidator was not an employer, he is properly a party inasmuch as he represents the company in all matters during the winding up, and particularly if it comes to the question of enforcement of an award made by a Labour Tribunal.

Per Tittawella, J. :—

“ At the time the Companies Ordinance came to be enacted Labour Tribunals were not in existence and it would be correct to state that the proceedings before the Tribunal could not have been contemplated in the words “ action or proceeding ” in section 171 of the Companies Ordinance. Adopting the rule of interpretation that “ the words of a statute will generally be understood in the sense which they bore when it was passed ” (Maxwell, eleventh edition, page 58) and which was followed by Basnayake, C. J. in the case of *Daniel Appuhamy v. Ilangaratne*, 66 New Law Reports 97 at 103, it is not difficult to reach the conclusion that the “ action or proceeding ” in section 171 of the Companies Ordinance does not apply to industrial disputes which are resolved by a Labour Tribunal. ”

Cases referred to :

Arnolda v. Gopalan, 64 N.L.R. 155 ; 64 C.L.W. 49.

Daniel Appuhamy v. Ilangaratne, 66 N.L.R. 97 ; 66 C.L.W. 17.

United Engineering Workers Union v. Devanayagam, 69 N.L.R. 289.

John & Others v. Coir Yarn & Textiles Ltd., A.I.R. 1947 Kerala 60.

Mell Mendis Ltd. v. D. P. Simon & Others, S.C. 204/73—S.C. Minutes of 15.7.75.

APPEAL from an order of a Labour Tribunal.

E. Gunaratne, for the appellants.

D. Joseph, for the respondent.

G. P. S. de Silva, Deputy Solicitor-General, with A. J. Meegama, State Counsel, as *amicus curiae* in S. C. 46/76.

Cur. adv. vult.

March 1, 1978. TITTAWELLA, J.

This appeal was before us for argument along with S.C. 44/76, S.C. 45/76 and S.C. 47/76. They were all matters of a similar nature and it was agreed at the outset that the order made in one will also be the order in the others. The facts set down below are particularly in relation to S.C. 46/76.

The Hire Purchase Company Ltd. was a company incorporated under the Companies Ordinance (Cap. 145). On the 5th May, 1975, the District Court of Colombo had made an order under section 165 of the Companies Ordinance for winding up the said company. One A. M. de Costa of Carter de Costa & Company was appointed the liquidator in the winding up proceedings.

P. A. C. N. Fernando was in the employment of this company from the 15th December, 1959 to the 28th February, 1975, when his services were terminated due to financial losses incurred by the company. On the 17th June, 1975, he made an application to the Labour Tribunal for a gratuity and other terminal benefits in respect of the fifteen years of service. The Hire Purchase Company Ltd. and A. M. de Costa the liquidator were named the 1st and 2nd respondents respectively to this application. Both respondents filed answers and at the inquiry before the Tribunal on the 11th November, 1975, raised two objections, viz. :

(a) The liquidator was not an employer under the Industrial Disputes Act;

(b) The applicant has no right to institute proceedings under the Industrial Disputes Act against the company in liquidation.

The President of the Labour Tribunal over-ruled both objections and after agreement had been reached regarding certain particulars relating to the details of the service records of the applicant proceeded to order the payment of a gratuity to the

applicant and determined that the date of payment should be fixed by the District Judge in the liquidation proceedings. The company and the liquidator (hereinafter referred to as the appellants) have appealed against this order of the Tribunal made in favour of the applicant (hereinafter referred to as the respondent). The following matters have been taken up in the petition of appeal and at the hearing of the appeal :—

- (i) the Labour Tribunal has no jurisdiction to make an order against the 1st appellant, a company in liquidation ;
- (ii) it has no jurisdiction to make an order against the first appellant, an insolvent company ;
- (iii) it has no jurisdiction to make an order against the second appellant who was not the employer of the respondent to this appeal ;
- (iv) section 171 of the Companies Ordinance precludes the institution or the continuation of any proceeding or action against a company where a winding up order has been without the leave of the Court.

As is well known a company comes into existence as a legal personality on its incorporation and ceases to exist as such on its dissolution. Winding up or liquidation is the process whereby the management of the company's affairs is taken out of its directors' hands. A liquidator is appointed to administer the property of the company. He must apply the assets to the payment of the creditors in their proper order. The point to be remembered is that throughout this process of winding up the company does not cease to exist as a legal entity (*vide* the proviso to section 219 of the Companies Ordinance).

On this view of the matter the first appellant was the respondent's employer at all relevant times and the question of lack of jurisdiction of the Labour Tribunal does not arise. Reference has been made by the learned counsel for the appellants to the case of *Arnold v. Gopalan*, 64 N. L. R. 153. It was held there that a Labour Tribunal has no jurisdiction to order the widow or the legal representative of a *deceased* employer to pay back wages, gratuity, etc., to a workman who made an application *after* the death of the employer. This case has no bearing on the facts and circumstances of the present appeal. The unreported case of *Messrs. Mell Mendis Ltd. v. D. P. Simon and others* (S.C. 204/73—S. C. Minutes of 15.7.76), makes reference to the situation that has arisen in the present instance. Accordingly the jurisdiction question raised by the learned counsel

for the appellants must necessarily fail. Regarding the second appellant, that is the liquidator, he was clearly not the respondent's employer but has been made a party for the reason that he now represents the company in all matters and so becomes a necessary party particularly when it comes to the question of the enforcement of any award made by a Labour Tribunal.

The other matter that remains for determination is whether section 171 of the Companies Ordinance stands in the way of a President of a Labour Tribunal making an award once an order for the winding up has been made. It must be noted that the order for the winding up of the company was made on 11th November, 1974, the services of the respondent were terminated on the 28th February, 1975, the application to the Tribunal was made on the 14th August, 1975 and the award in favour of the respondent was made on the 11th February, 1976.

Section 171 of the Companies Ordinance enacted in 1938 reads thus :

Where a winding up order has been made or a provisional liquidator has been appointed no *action or proceeding* shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.

Section 231 of the English Companies Act is in identical terms. The corresponding section in the Companies Act (1913) of India reads as follows :

When a winding up order has been made or a provisional liquidator has been appointed no *suit or other legal proceeding* shall be proceeded with, or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.

The Companies Act (1956) of India which replaced the 1913 Act makes a significant departure in that the appointment of the provisional liquidator does not affect the continuance of a pending proceeding and leave of the winding up court is required only for commencing a new proceeding. This however has no bearing on the present problem.

The Industrial Disputes Act, No. 43 of 1950, came into operation in 1951 and Labour Tribunals were established by an amending Act No. 62 of 1957. The preamble to the original Act reads as follows:—

An Act to provide for the prevention, investigation and settlement of industrial disputes and for matters connected therewith or incidental thereto.

The question for determination is whether what takes place at a Labour Tribunal is an "action or proceeding" within the meaning of section 171 of the Companies Ordinance. At the time the Companies Ordinance came to be enacted Labour Tribunals were not in existence and it would be correct to state that the proceedings before the Tribunal could not have been contemplated in the words "action or proceeding" in section 171 of the Companies Ordinance. Adopting the rule of interpretation that "the words of a statute will generally be understood in the sense which they bore when it was passed" (Maxwell, Eleventh Edition, page 58) and which was followed by Basnayake, C. J. in the case of *Daniel Appuhamy v. Ilangaratne*, 66 N. L. R. 97 at 103, it is not difficult to reach the conclusion that the "action or proceeding" in section 171 of the Companies Ordinance does not apply to industrial disputes which are resolved by a Labour Tribunal.

The matter could also be looked at by a consideration of the scope of section 171 of the Companies Ordinance which as stated earlier is in identical terms with section 231 of the English Companies Act.

The purpose of the statutory provisions is to ensure that all claims against the company which can be determined by the cheap, summary procedure available in a winding up are not made the subject of expensive litigation. (Parrington—*Company Law*, 3rd Edition, p. 686).

The matters that are agitated before a Labour Tribunal may not normally come within the ambit of the Court dealing with the winding up of a company. The Privy Council in the case of *United Engineering Workers Union v. Devanayagam*, 69 N. L. R. 289, had the following observations to make regarding Labour Tribunals at pages 302 and 303 :—

Labour Tribunals were established to provide for the prevention, investigation and settlement of industrial disputes. The Act making provisions for them did not say that they were to perform the functions of a court in giving effect to the legal rights of workmen in connection with their employment. Far from being established in substitution for or as an alternative to the ordinary courts Labour Tribunals were created as part of the machinery for preventing industrial disputes.

It is thus clear that even on this view the very character of a Labour Tribunal appears to take proceedings before it out of the prohibition contained in section 171 of the Companies Ordinance.

The case of *B. V. John and others v. Coir Yarn Textiles Ltd.* A. I. R. (47) Kerala 1960 was one that had to consider the section in the Indian Companies Act corresponding to section 171 of the Companies Ordinance in relation to the Industrial Disputes Act (1947) of India. An Industrial Tribunal had made an award in favour of some employees in August 1957. Their services had been terminated by the employer and the reference to the Tribunal had been in June 1956. In July 1957 however a winding up order had been made in respect of the employer company and a provisional liquidator appointed. It was sought to be argued that under section 446 (1) of the Indian Companies Act 1956 once a winding up order is made the continuance of a pending proceeding can only be by leave of Court and this not having been obtained all the proceedings including the award would be void for want of the required leave. The Court whilst over-ruling this objection and holding that the award and the proceedings leading up to it were valid had the following observations to make—

The Industrial Disputes Act is conceived in the public interests. Its object is to ensure fair terms to workmen and to secure industrial peace so that the economy may not suffer. Although an adjudication under the Act might have the result of giving individual workmen personal rights against the property of the owner of the undertaking be it an individual or a company, its purpose is not really that but to settle the industrial disputes. Obviously the purpose is something before which the personal interests of the creditors or members of the company concerned must yield.

The Companies Act can have no application to proceedings pursuant to a reference under the Industrial Disputes Act. To come within the scope of this section the proceeding must be in the nature of an action against the property of the company. To put it somewhat differently the proceedings must be for the enforcement of something in the nature of a personal right against the assets of the company and not one in vindication of public interest.

.....if there are interests that transcend the interests of the creditors and the members of the company it is not reasonable that these interests should be subjected to the

control of the winding up court a control which it is to exercise for the benefit of the creditors and the members.

These observations made regarding the Industrial Disputes Act of India and the Companies Act of India are, *mutatis mutandis* of equal relevance when examining the provisions of section 171 of our Companies Ordinance in relation to the Industrial Disputes Act of this country.

For the reasons set out I hold that section 171 of the Companies Ordinance has no application to proceedings before a Labour Tribunal. In the result this appeal has to be dismissed with costs. The same order is made with respect to the other connected appeals S.C. 44/76, S.C. 45/76 and S.C. 47/76.

We are greatly obliged to learned counsel on both sides and also to the learned Deputy Solicitor-General who appeared as *amicus curiae*.

ISMAIL, J.—I agree.

Appeal dismissed.

