WICKRAMASINGHE
v.
SRI LANKA STATE TRADING (CONSOLIDATED EXPORTS) CORPORATION

SUPREME COURT.
FERNANDO, J.
DR. AMERASINGHE, J. AND
WADUGODAPITIYA, J.
S.C. APPEAL NO. 14/19
C.A. NO. 249/81
L.T. NO. 1/11838/75
MARCH 11, 1992.

Industrial dispute – Company converted into Corporation – Pending proceedings in Labour Tribunal – Liability of Corporation.

Consolidated Exports (Ceylon) Ltd. was converted into the Sri Lanka State Trading (Consolidated Exports) Corporation. Before the conversion the applicant whose services had been terminated filed proceedings in the Labour Tribunal.

Held:

Where the liabilities of an employer, in a pending Labour Tribunal application, devolve upon another person, the application can be maintained and continued against such other person after substitution. Where the issue as to devolution of liabilities involves no question of fact, an order for substitution based on errors of law can, generally speaking, be set aside in appeal. If, however, questions of fact are involved, and either no evidence is led, or the facts are not disputed, a party who invites or consents to the order for substitution cannot afterwards challenge it in appeal.

The result of the substitution in the caption was that the Company was effectively discharged from the proceedings on the representation that the Corporation would be responsible for the Company's liabilities; the applicant was deprived of his remedies against the Company.

The applicant was entitled to maintain his application against the successor in title of the Company; that the Company and the Corporation intentionally represented that the liabilities of the Company in respect of the subject-matter of the application had, as a matter of fact, devolved on the Corporation, and that the Corporation should accordingly be substituted in place of the Company. The substitution of the Corporation was not vitiated by a patent want of jurisdiction. Accordingly the Corporation was not entitled to question the substitution at the stage of appeal.

Arnolda v. Gopalan (1961) 64 NLR 153 doubted.

Cases referred to:

1. *Arnolda v. Gopalan* (1961) 64 NLR153, 157.
2. *Re Arnaldo Da Brescia* (1922) 23 NLR 391, 395.
3. *Savoy Theatres Ltd. v. Parusella* (1982) 2 Sri LR 753.
4. *Deerananda Thero v. Ratnasara Thero* (1958) 60 NLR 7, 14.
5. *Ramaswamy v. B.C.C.* S.C. No. 60/87 SCM 21.3.91.
6. *Shaw Wallace and Hedges v. Palmerston Tea Co.*(1982) 2 Sri LR 427, 433.
7. *Ceylon Estate Staffs' Union v. Land Reform Commission* (1987) 2 Sri LR 203, 207, 208.
8. *Liquidators, Janawasama Commission v. Chandradasa* (1985) 2 Sri LR 17.
9. *Hire Purchase Co. Ltd. v. Fernando* (1978) 79(2) NLR 15.

APPEAL from judgment of the Court of Appeal.

E. D. Wickramanayake with *A. P. Niles* for appellant.

Lucian G. Weeramantry with *Jacob Joseph* and *Uditha Egalhewa* for respondent.

Cur adv vult.

April 29, 1992.
FERNANDO, J.

The Applicant-Appellant ("the Applicant") was employed in June 1968 by Consolidated Exports (Ceylon) Ltd., a limited liability company incorporated under the Companies Ordinance ("the Company"). His services were terminated in February 1970, whereupon he made an application to the Labour Tribunal against his employer, the Company. The inquiry commenced in 1972.

The matter now in dispute arose in consequence of the following proceedings in 1974 and 1975:

> "Counsel for the respondent submits that there is a change of address and requests that all further communications be sent to the following address in future;
>
> Sri Lanka State Trading Consolidated Exports Corporation,
> 68/70, York Street,
> Colombo 1. " (proceedings of 22.11.74)
>
> "Respondent moves to amend the caption to read as Sri Lanka State Trading (Consolidated Exports) Corporation, York Street, Colombo 1." (proceedings of 23.10.75)

Although no formal order was made, it is common ground that such amendment was effected, and the original application contains an endorsement to that effect. The same Counsel and instructing Attorneys appeared for the substituted respondent Corporation. After a protracted inquiry, the Labour Tribunal dismissed the application on the merits, in June 1981. The Applicant appealed naming the Corporation as the respondent. The appeal was taken up for hearing in the Court of Appeal on 7.11.89. A preliminary objection was taken on behalf of the Corporation that the respondent to the appeal was not the employer of the Applicant. A supporting affidavit was filed averring that:

1. The Corporation was established under section 2(1) of the Sri Lanka State Trading Corporations Act, No. 33 of 1970, in February 1972;

2. One of the objects of the Corporation was the conversion of the Company into a State Trading Corporation, and the purchase by the Government of the shares held in that Company by private individuals and corporations;

3. The shares not purchased as aforesaid were vested in the Corporation by a vesting order made in May 1973; and

4. The said Company "was not and has not been functioning as such" since the Corporation was established.

The Court of Appeal considered that the questions which arose were whether the Applicant was an employee of the Corporation, and whether an employee whose services were terminated before the Corporation came into existence could sue and obtain relief against the Corporation. It was held that the applicant had no contract of employment with the Corporation. In regard to the second question, it was held that the Corporation had statutory power to employ servants, and accordingly when the Corporation came into existence,

> "a fresh employment of officers, servants and agents is provided for. The previous employees are not deemed to be employees of the respondent."

The Court of Appeal upheld the preliminary objection relying on *Arnolda v. Gopalan* [1]. In that case, after the death of the employer, his widow informed the workman that his services had ceased in view of the death of her husband. The workman made an application to the Labour Tribunal, naming the widow as the respondent, for wages, compensation and gratuity for the period of employment under the husband. A settlement was entered into whereby the widow agreed to pay the workman a sum of Rs. 2,073/50, on behalf of the estate of the husband, and the Tribunal made order accordingly. It was held that the Tribunal had no jurisdiction to make an order against the widow or legal representative of a deceased employer. Although the widow had consented to pay the said sum, such consent did not confer jurisdiction on the Tribunal when in fact no jurisdiction had been conferred on it by statute. *Re Arnaldo Da Brescia* [2], was also relied on for the proposition that:

> "The Court is bound to withhold its hand whenever it appears that it is without jurisdiction, and cannot refuse to entertain an objection to the jurisdiction at any stage of the suit."

Reference was also made to *Savoy Theatres Ltd v. Parusella* [3].

Arnold's case dealt only with the question whether a workman had the right to make an application against the widow or legal representative of a deceased employer, and not with the question whether an application duly made against the employer could, after his death, be continued against the person on whom his liabilities had devolved under the law. In the **Savoy Theatres Ltd** case, the Managing Director of the company who had been named as the employer died *pendente lite*, and the substitution of the company in his place was held to be improper. Such substitution was not on the basis that the company had succeeded to the rights and liabilities of the deceased, but rather by way of an amendment as if the Company had been the real employer throughout.

The question that arises in the present appeal is thus not covered by the *ratio decidendi* of **Arnolda's** case. However, I must express my doubts as to the correctness of that decision. If it was based on the principle *actio personalis moritur cumpersona* (cf *Deerananda Thero v. Ratnasara Thero*,[4]), that decision is unexceptionable.

However, the workman was employed in the husband's **business**, which was registered in the name of the widow within a month, and the workman had in fact been employed for a few days under the widow (64 N.L.R. at p. 157). The question therefore did arise whether the widow had become the employer of the workman, and had accepted responsibility for past services; and if so, whether it was she who had terminated the services of the workman. That was not considered. Apart from that, the general question whether the rights of a workman, employed in connection with a business, who had resigned, retired or been dismissed shortly before the death of his employer, are enforceable against the person who succeeds to that business (at least to the extent of the assets of that business) has not been considered in that case. If, for instance, the employer had actually put aside funds for the retiring gratuity due, for, say, a thirty year period of service, would the employer's premature death disentitle the retired workman from recovering that gratuity from the successor to the business? Would such successor be entitled to retain all the assets of that business, and refuse to pay that gratuity? If all other liabilities in respect of that business-taxes owed to the State, loans repayable to lenders, sums due on contracts with suppliers, and the *like* – have to be discharged by the successor, can it be that only liabilities to workmen are extinguished? Would such successor be entitled under the common law to recover a loan taken by the workman, but not be liable under the Industrial Disputes Act to discharge a vested liability in respect of arrears of salary, bonus or retiring gratuity? These questions need to be considered in an appropriate case. I note also that **Arnolda's** case did not deal with devolution of rights and liabilities otherwise than by death, in relation to both natural and artificial persons – e.g. upon the vesting of an estate or a business under the Land Reform Law No. 1 of 1972 as amended by Law No. 39 of 1975, or under the Business Undertakings (Acquisition) Act, No. 35 of 1971.

Even assuming that it is correct that a Labour Tribunal has no jurisdiction to entertain an application made against the widow, heirs, legal representatives or other successors in title of a deceased employer, it does not follow that an application validly made against an employer in his lifetime, cannot be maintained against the person on whom his liabilities have devolved by operation of law. It has been

held that consequent upon such devolution no order can be made against the former employer, as his liability ceases and devolves on the successor (whether in Labour Tribunal applications: *Ramaswamy v. B.C.C.*,[5] or upon a reference to arbitration *Shaw Wallace and Hedges v. Palmerston Tea Co.*[6] That the former employer's liability not only devolves on the successor in title, but that the successor may properly be substituted, was confirmed in *Ceylon Estates Staffs' Union v. Land Reform Commission*.[7] In *Liquidators, Janawasama Commission v. Chandradasa*,[8] an order was made by the Labour Tribunal against the Commission. While an appeal against that order was pending, the Commission was dissolved and the Liquidators were substituted as appellants. On behalf of the Liquidators it was contended (as in this case) that they had no contract of employment with the workman, and were not liable to comply with the order, in the absence of express statutory provision. Rejecting this contention, the Court of Appeal held that the Liquidators had succeeded to the assets and liabilities of the Commission, and that the order made against the Commission was binding on the Liquidators. If such a substitution was permissible at the stage of appeal, *ex hypothesi* it was proper in the Tribunal itself.

Learned Counsel for the appellant referred us to the affidavit submitted on behalf of the Corporation in the Court of Appeal, and to certain provisions of the Sri Lanka State Trading Corporations Act, defining the powers of a corporation, in particular section 5(2) (n):

> "to amalgamate with any other body, corporate or unincorporate whose objects are or include objects similar or substantially similar to those of the Corporation, whether by sale, purchase or compulsory acquisition of the undertaking of such body corporate or unincorporate, subject to the liabilities of such body corporate or unincorporate, or by sale, purchase, or compulsory acquisition, of all, or a controlling interest in, the shares or stock of such body corporate or unincorporate;"

It was his submission that on a proper construction of the affidavit and the incorporation order, there had been an amalgamation of the

Company and the Corporation, subject to the condition that the liabilities of the Company vested in the Corporation. It is, however, unnecessary for us to consider this submission. The substitution of a Corporation did not result in a patent want of jurisdiction, but at most in a latent want of jurisdiction: for the question whether the liabilities of the Company vested in the Corporation *pendente lite* was a mixed question of fact and law. It was for the Tribunal to determine the facts, and the necessary evidence should have been placed before the Tribunal. Had the matter been disputed, an order made by the Tribunal which was wrong on the facts could not have conferred jurisdiction on the Tribunal, and could have been contested in appeal. Here the Corporation represented to the Applicant and to the Tribunal, and induced both to act on the **factual** basis that the liabilities of the Company, in respect of the subject-matter of the *lis*, had devolved on the Corporation, and invited the Tribunal to substitute the Corporation. While a wrong order for substitution can sometimes deprive a court or tribunal of jurisdiction, this consequence will not follow where a party having consented to such order, thereafter seeks to take the objection at the stage of appeal, "where the point depended upon a question of fact, which if disputed, should have been determined on evidence": *Deerananda Thero v. Ratnasara Thero* (at p. 14). In that case the objection was entertained and upheld in appeal, because all the facts necessary for the decision were in evidence and were not in dispute at all. The *Arnaldo Da Brescia* case has no relevance, because there the objection to jurisdiction was taken at the outset; there was no question of an initial waiver or consent, followed by a belated objection; further, the objection was taken and decided in the same proceedings, and not raised for the first time in appeal.

I am of the opinion that where the liabilities of an employer, in a pending Labour Tribunal application, devolve upon another person, the application can be maintained and continued against such other person after substitution. Where the issue as to devolution of liabilities involves no question of fact, an order for substitution based on errors of law can, generally speaking, be set aside in appeal. If, however,

questions of fact are involved and either no evidence is led, or the facts are not disputed, a party who invites or consents to the order for substitution cannot afterwards challenge it in appeal.

In the present case, the matter was not even presented as a question of substitution, but virtually as a change of name and address. What is more, the result of that substitution was that the Company was effectively discharged from the proceedings, on the representation that the Corporation would be responsible for the Company's liabilities; the Applicant was deprived of his remedies against the Company. If the liabilities of the Company had, in fact not devolved on the Corporation, the Applicant was entitled to pursue his application against the Company (or perhaps the liquidators, if it was in liquidation: cf *Hire Purchase Co. Ltd. v. Fernando.*[9] The Corporation which by 1973 was the sole owner of the Company, represented that the liabilities of the latter had devolved on the Corporation; procured the Company's discharge from the proceedings by seeking and obtaining its own substitution; and then submitted fifteen years later that the substitution was illegal. To set aside the order for substitution, without restoring the Company as the respondent to the application, was hardly just and equitable, especially since the Company was wholly owned by the Corporation. Hence, even if the question of devolution had only involved matters of law, I doubt whether a wrong order for substitution should have been set aside without restoring the *status quo*.

I therefore hold that the Applicant was entitled to maintain his application against the successor in title of the Company; that the Company and the Corporation intentionally represented that the liabilities of the Company in respect of the subject-matter of the application had, as a matter of fact, devolved on the Corporation, and that the Corporation should accordingly be substituted in place of the Company; that the substitution of the Corporation was not vitiated by a patent want of jurisdiction; and that accordingly the Corporation was not entitled to question the substitution at the stage of appeal. The order of the Court of Appeal is therefore set aside; the Applicant will be entitled to costs in a sum of Rs. 10,000/- in both

Courts. Since 22 years have elapsed after the Applicant's dismissal, we directed that this case be called today to ascertain whether any settlement was possible, failing which the Court of Appeal is directed to hear and determine the appeal on the merits.

AMERASINGHE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Order of Court of Appeal set aside.