1978 *Present :* Samarakoon, C.J., Sharvananda, J. and Ratwatte, J.

A. A. LATIFF and ANOTHER, Petitioners

and

L. E. J. FERNANDO and TWO OTHERS, Respondents

S. C. Application No. 911/74

Industrial Disputes Act, section 4—Dispute regarding termination by company of the services of its workmen—Reference to arbitration—Liquidator of the company which was being wound up made a respondent—Jurisdiction of arbitrator to make award against such liquidator—Can consent confer such jurisdiction.

Companies Ordinance, sections 216, 218, 232, 239—Winding up of company—Appointment of liquidator—His status and powers—Validity of order against liquidator in proceedings under Industrial Disputes Act.

Where a dispute between certain workmen who were members of a Trade Union and a company incorporated under the Companies Ordinance which said company was in liquidation, was referred to arbitration under section 4 of the Industrial Disputes Act and the Arbitrator after holding an inquiry made his award directing the company as well as its liquidator to deposit certain amounts with the Assistant Commissioner of Labour.

Held : (1) That a liquidator of a company which is being wound up cannot be personally liable for the obligations of the company and no award under the Industrial Disputes Act could have been made against him by the Arbitrator.

(2) That the fact that the company and its liquidator did not protest against the assumption of jurisdiction by the Arbitrator could not confer on him jurisdiction to proceed against or make an award against the liquidator on the industrial dispute in question. The award against the liquidator lacked any legal basis and was null and void.

Per Sharvananda, J. :

"According to section 218, a voluntary winding up shall be deemed to commence at the time of passing of the resolution for voluntary winding up ; and section 219 provides that, in the case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof, provided that the *corporate state and corporate powers of the Company shall, not withstanding anything to the contrary in its articles,* continue until it is dissolved. There is no change of personality. Section 232(2) provides that in the case of a creditor's voluntary winding up, all the powers of the directors cease on the appointment of a liquidator, except so far as the committee of inspection, or if there is no such committee, the creditors sanction the continuance thereof. The liquidator assumes all the functions of the directors, but in the performance thereof he is charged with certain special statutory duties of collecting and realising the Company's assets and discharging its debts and liabilities. He is given wide powers for the purpose of winding up the Company's affairs and distributing its assets. The property of the company does not vest in him ; the company continues in existence and he administers the affairs of the company on behalf of the company. Before a resolution to wind up voluntarily is passed, the management of the company is in the hands of the officers, the directors ; after such a resolution, it is in the hands of its agent, the liquidator and the Company, acting by its agent, the liquidator, carries out its obligations towards its employees."

Cases referred to :

Knowles v. Scott, (1891) 1 Ch. 717 ; 64 L. T. 135 ; 60 L.J. Ch. 284 ; 7 T.L.R. 306.

Fraser v. The Province of Brescia Steam Tramways Co., (1887) 56 L.T. 771 ; 3 T.L.R. 587.

In re The Anglo-Morovian Hungary Junction Railway Company, Ex-parte Watkin, (1875) 1 Ch. D. 130 ; 45 L. J. Ch. 115 ; 33 L. T. 650.

APPLICATION for a Writ of Certiorari.

H. W. Jayewardene, Q.C., with *M. S. M. Nazeem* and *Miss B. Walles*, for the petitioners.

Siva Rajaratnam, for the 3rd respondent.

G. P. S. de Silva, Deputy Solicitor-General, with *G. K. K. Wijewardena, State Counsel*, for the 4th respondent.

Cur. adv. vult.

July 20, 1978. SHARVANANDA, J.

The 2nd petitioner, on this application, is Sheldons Ltd. a company incorporated under the provisions of the Companies Ordinance. It has gone into creditors' voluntary winding up and the 1st petitioner is the liquidator appointed by its creditors. Prior to its going into liquidation, it was carrying on the business of rubber dealers and suppliers of rubber to the Commissioner of Commodity Purchase in Ceylon. Since the Commissioner of Commodity Purchase decided, by his order dated 31.5.73. that he would not buy rubber from the 2nd petitioner any more, the company could not carry on the business any longer and it was resolved to voluntarily wind up the company. The creditors of the company appointed the 1st petitioner A. A. Latiff as liquidator of the company and he thereafter functioned as liquidator of the company.

On certain workmen of the 2nd petitioner, who were members of the 3rd respondent-Union, making a compaint to the Commissioner of Labour against the termination of their services consequent to the closure of the company's business, the Minister of Labour, acting under section 4 of the Industrial Disputes Act, referred, by reference dated 14.3.74, the following industrial dispute to the 1st respondent for settlement by arbitration :

> " In the matter of an industrial dispute *between Sri Lanka Nidahas Welanda Ha Karmika Ayathana Sewaka Sangamaya* ..... and certain workmen on the one part and *Messrs Sheldons Ltd. (under liquidation)*, No. 361, Grandpass Road, Colombo 14, and *Mr. A. A. Latiff (Chartered Accountant)*, liquidator of Messrs Sheldons Ltd..... on the other part.
>
> *Statement of matter in dispute*
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> The matter in dispute between the aforesaid parties is whether the demand made by the Sri Lanka Nidahas Welanda Ha Karmika Ayathana Sewaka Sangamaya (3rd respondent) on behalf of the workmen referred to therein for the payment of gratuity and/or compensation from Messrs. Sheldons Ltd. (under liquidation) consequent to the closure of business of Messrs. Sheldons Ltd. is justified, and if so, what quantum of gratuity and/or compensation that each them should be paid."

The 1st respondent thereafter issued summons on the parties mentioned in the reference and proceeded to inquire into the said dispute. By letter dated 4.4.74, the 1st petitioner informed the arbitrator that the financial position of Messrs. Sheldons Ltd. would not permit the payment of gratuity to the employees as he had received claims from the company's trade creditors, which themselves could not be settled in full for want of funds. He also furnished to the arbitrator a provisional statement of the affairs as at 27.7.73. In that statement the 1st petitioner referred to the liability in a sum of Rs. 143,585.00, alleged to be due to trade creditors, but significantly omitted to clarify as to what happened to the stock of rubber purchased on credit for the said sum of Rs. 143,585.00.

After inquiry, by his order dated 31.7.74, the 1st respondent made his award on the alleged industrial dispute between the 3rd respondent-Union and the several workers on the one part and Messrs. Sheldons Ltd. (under liquidation) and Mr. A. A. Latiff (Chartered Accountant), liquidator of Messrs. Sheldons Ltd., on the other part, whereby he directed the respondents to the reference, viz. Messrs. Sheldons Ltd. (under liquidation) and Mr. A. A. Latiff (Chartered Accountant), liquidator of Messrs. Sheldons Ltd., the petitioners in this Court, to deposit with the Assistant Commissioner of Labour the amounts due to the workers, totalling Rs. 43,146.00, as indicated in his award, within one month of the publication of the award in the *Government Gazette*. The award was published in the *Government Gazette* on 23.8.74.

By application dated 11.9.74, the petitioners have moved this Court for a writ of certiorari quashing the said award. At the hearing before us, Counsel submitted that there was no "industrial dispute" within meaning of section 4 of the Industrial Disputes Act between the 1st petitioner, viz. A. A. Latiff, liquidator of Messrs. Sheldons Ltd. and the workmen employed by Messrs. Sheldons Ltd. He stressed that the 1st petitioner was not the employer of the workmen whose services were terminated by the closure of the 2nd petitioner's business and that Sheldons Ltd. was, for all relevant purposes, their employer. The following summarises basically his contention :—

> 'Industrial dispute' is defined in the Industrial Disputes Act to mean 'any dispute or difference between the employer and the workman'. According to this concept, for a dispute to acquire the status or character of an industrial dispute, the parties thereto should be in the relationship of employer and workman. Section 4 of the Act (Chap. 131) vests the Minister with jurisdiction to refer for settlement by arbitration only an 'industrial dispute'. So that the Minister of

Labour, when he makes a reference under section 4, could name as parties to an industrial dispute only the employer and the workmen, which includes the Trade Union which represents them. Persons who do not stand in that relationship could not be made parties to such reference. Under the reference in issue, the Minister could not have validly included the 1st petitioner, A. A. Latiff (liquidator), as a party to the industrial dispute between Sheldons Ltd. (in liquidation) and its workmen. Notwithstanding the company going into voluntary liquidation, its corporate status subsisted until dissolution, and the company remained the employer of the workmen in spite of the 1st petitioner being appointed the liquidator. Hence, there never existed an industrial dispute between the workmen and liquidator which could be the subject of reference under section 4 of the Act. The Minister of Labour exeeded his jurisdiction in including the 1st petitioner, viz. A. A. Latiff (liquidator of Sheldons Ltd.), as a party to the industrial dispute that existed between the workmen and Sheldons Ltd. Since there was no industrial dispute between the said workmen and the 1st petitioner, the reference was *pro tanto* invalid and the 1st respondent lacked jurisdiction to proceed against and make an award against the 1st petitioner.

On a proper appreciation of the status and function of the liquidator of a company in voluntary liquidation, it will appear that Counsel's submission is well-founded.

Section 216 of the Companies Ordinance states that a company may wind up voluntarily if the company resolves by special resolution that the company be wound up voluntarily (members voluntary winding up), or if the company resolves by extraordinary resolution to the effect that it cannot, by reason of its liabilities, continue its business and that it is advisable to wind up (creditors' voluntary winding up).

According to section 218, a voluntary winding up shall be deemed to commence at the time of passing of the resolution for voluntary winding up; and section 219 provides that, in the case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof, provided that *the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its Articles*, continue until it is dissolved. There is no change of personality. Section 232(2) provides that in the case of a

creditors' voluntary winding up, all the powers of the directors cease on the appointment of a liquidator, except so far as the committee of inspection, or if there is no such committee, the creditors sanction the continuance thereof. The liquidator assumes all the functions of the directors, but in the performance thereof he is charged with certain special statutory duties of collecting and realising the Company's assets and discharging its debts and liabilities. He is given wide powers for the purpose of winding up the company's affairs and distributing its assets. The property of the company does not vest in him ; the company continues in existence and he administers the affairs of the company on behalf of the company. Before a resolution to wind up voluntarily is passed, the management of the company is in the hands of its officers, the directors ; after such a resolution, it is in the hands of its agent, the liquidator, and the company, acting by its agent, the liquidator, carries out its obligations towards its employees. Romer, J. in *Knowles v. Scott*, (1891) 1 Ch. 721 at 725, said of a voluntary liquidator: "In my view, a voluntary liquidator is more rightly described as the agent of the company —an agent who has no doubt cast upon him by statute or otherwise special duties, amongst which may be mentioned the duty of applying the company's assets in paying creditors and distributing the surplus among the share-holders." He proceeded to emphasise that the liquidator's fiduciary duty is not to individual creditors, but is to the creditors as a body. Section 239 of the Companies Ordinance sets out the powers and duties of a voluntary liquidator. Section 239(1)(*b*) read with section 184(1)(*a*) refers to the power of the liquidator "to bring or defend any action or other legal proceeding *in the name and on behalf of the Company*". If a liquidator conducts or defends litigation in the company's name, he is no more liable for costs awarded against the company any more than its directors were while it was a going concern. (*Fraser v. The Province of Brescia Steam Tramways Co.*, (1887) 56 L. T. 771). He is not a party to the action personally ; he is not the litigant. The company (in liquidation) is the proper party to the litigation and not the liquidator, and it is the company which is liable on the contracts entered into on its behalf by the liquidator. The case of *In re the Anglo-Morovian Hungary Junction Railway Company, Ex-parte Watkin*, (1875) L. R. Ch. D. 130, where the solicitor appointed by the liquidator was held to have no claim against the liquidator personally for the costs of the winding up, illustrates the point. In the course of his judgment, Mellish, L. J. (at page 134) stated the law as: "In the case of a voluntary winding up, the liquidator is an officer of the company who acts

instead of the directors. He is no more personally liable for contracts which he makes on behalf of the company than the directors would be for the contracts they make on behalf of the company." On this view of the legal position, the liquidator, the 1st petitioner, cannot be personally liable for the obligations of the company and no award under the Industrial Disputes Act could have been made against him by the 1st respondent.

In reply to Counsel's submission that the reference to arbitration involving the liquidator was *pro tanto* bad in law and that the arbitrator had no jurisdiction to proceed and make an award against the liquidator, Mr. Siva Rajaratnam contended that the petitioners never protested against the assumption of jurisdiction by the arbitrator and hence were precluded or estopped from making such a complaint in this Court. He argued that the 1st petitioner had, by participating in the proceedings before the arbitrator, waived his objection. It is a fundamental principle that no consent can confer a tribunal with limited statutory jurisdiction any power to act beyond the jurisdiction which the law vests it with, or can preclude or estop the consenting or acquiescing party from subsequently protesting against the assumption of such jurisdiction. Estoppel cannot enlarge the jurisdiction of a tribunal with limited jurisdiction. Consent or lack of objection, such as alleged here could not have conferred jurisdiction on the 1st respondent to proceed against or make an award against the liquidator on the industrial dispute in question. The arbitrator, before taking steps on the reference, should have satisfied himself that it was *intra vires* the Minister to make the reference in issue under section 4 of the Industrial Disputes Act. The 1st petitioner's failure to protest to the arbitrator against his being improperly made a party to the reference cannot enlarge the jurisdiction of the arbitrator so as to enable him to make an award against the 1st petitioner personally. It is to be noted that section 40 (1) (*a*) of the Industrial Disputes Act makes it an offence for any person who is bound by an award of an arbitrator to fail to comply with the terms or conditions of that award. The award in the instant case directs the petitioners, viz., the liquidator and the company, to deposit the sum of Rs. 45,146. The 1st petitioner-liquidator runs the risk of being prosecuted for failing to comply with the award.

In my view, the award against the 1st petitioner, viz. the liquidator, lacks any legal basis and is null and void. The arbitrator had no legal authority to make such an award against the 1st petitioner. The application of the 1st petitioner for a

writ of certiorari to have the award made against him personally quashed is allowed, and that part of the award dated 31.7.74 which the arbitrator made against the 1st petitioner, viz. the liquidator of the 2nd petitioner-company, is annulled. The impugned part can be severed from the award made against the company. This quashing of the invalid portion of the aforesaid award does not, however, affect the validity of the award made against the 2nd petitioner, viz. Sheldons Ltd. (in liquidation). In the circumstances, each party will bear his own costs of this application.

SAMARAKOON, C. J.—I agree

RATWATTE, J.—I agree.

Award against 1st petitioner quashed.