LIQUIDATOR OF THE RIVER VALLEYS DEVELOPMENT BOARD
v.
HENDRICK APPUHAMY AND ANOTHER

SUPREME COURT.
FERNANDO, J.,
PERERA, J.,
WIJETUNGA, J.,
ANANDACOOMARASWAMY, J. AND
GUNAWARDENA, J.
S.C. APPEAL NO. 97/95.
H.C. NO. 310/92.
L.T. NO. 1/ADDL/7213/90.
4TH MARCH, 1997.

Industrial Disputes Act – Relief under section 31(B)(1) – Public Corporation dissolved under section 19 of the Finance Act No. 38 of 1971 – Right of Employee of the dissolved corporation to seek relief against the Liquidator appointed under section 20 of the Finance Act.

Held: (Fernando, J. and Gunawardena, J. dissenting)

"The powers of a Liquidator under the Finance Act are restricted to those expressly mentioned in section 20, though that section must be read with sections 19 and 21. The workmen cannot make the liquidator a party respondent to an application for relief under section 31(B)(1) of the Industrial Disputes Act."

Per Wijetunga, J.

"To clothe the liquidator with a status in excess of the powers conferred on him by section 20 of the Finance Act would do violence to those provisions. If there is a lacuna in the law, it is the legislature that must take remedial action".

Cases referred to:

1. *Ratwatte v. Bandara* (1966) 70 NLR 231.
2. *De Silva v. Samajawadi Lanka Kamkaru Samithiya* C.A. 472/82 C.A. Minutes 2nd April 1987.
3. *Mahipala v. State Fertilizer Manufacturing Corporation* C.A. 470/87 C.A. Minutes 14th September, 1994.
4. *Someswaran et al v. de Silva* C.A. 1042/91 C.A. Minutes 10th February, 1994.
5. *Ramasamy v. B.C.C. Ltd.*, S.C. 60/87 S.C. Minutes 21st March 1991. C.A. Minutes 28th September, 1987.
6. *Shaw Wallace & Hedges v. Palmerston Tea Co.*, (1982) 2 Sri L.R. 427; (1981) 1 Sriskantha 11.
7. *Ceylon Estates Staffs Union v. Land Reform Commission* (1987) 2 Sri. L.R. 203.
8. *De Silva v. Samajawadi Lanka Kamkaru Samithiya* S.C. 48/87 S.C. Minutes 15th July 1993.
9. *Loku Banda v. Competent Authority G.O.B.U. of N.T.C.* C.A. 832/82 C.A. Minutes 8th October, 1987.
10. *De Mel v. Withana* S.C. 282/76 S.C. Minutes 21st November 1977.
11. *N.T.C. v. Sri Lanka Nidahas (etc.) Sevaka Sangamaya* C.A. 361/78 C.A. Minutes 20th June 1980.
12. *Wijewardene v. Chandradasa* (1985) 2 Sri L.R. 17.
13. *Jayawickrama v. Jinadasa* (1994) 3 Sri. L.R. 185.
14. *Latiff v. Fernando* (1978 – 79) (2) NLR 89.
15. *Nandasena v. Carson Cumberbatch & Co., Ltd.* (1973) 77 NLR 73.
16. *Times of Ceylon v. Nidahas Karmika Samithiya* (1960) 63 NLR 126.
17. *Arnolda v. Gopalan* (1961) 64 NLR 153.
18. *Attorney-General v. Sabaratnam* (1955) NLR 481, 485.
19. *Wickramasinghe v. Sri Lanka State Trading (Consolidated Exports) Corporation* (1994) 3 Sri L.R. 41.
20. *Cumberbatch & Company v. Nandasena* (1973) 77 NLR 73 at 81.
21. *De Silva v. Liquidator of the National Textile Corporation* SC 40/87. SCM 15.7.93

APPEAL from the judgment of the High Court.

P. Nagendran, P.C. with *C. W. Pannila,* and *Miss S. M. Senaratne* for appellant.

Desmond Fernando, P.C., with *Suren Peiris, Janaprith Fernando, Gamini Dissanayake,* and *Samantha Jayamanne* for respondent.
K. C. Kamalasabeyson, P.C. A.S.G. with *U. Egalahewa, S.C.* as *amicus curiae.*

Cur. adv. vult.

May 29, 1997.
FERNANDO, J. (Dissenting)

The question of law for determination by this bench of five Judges is whether an employee of the River Valleys Development Board ("RVDB"), a public corporation, was entitled to make and maintain an application under section 31B(1) of the Industrial Disputes Act ("IDA"), for relief or redress in respect of the termination of his services by the RVDB and benefits due thereupon, against the persons appointed as liquidators of the RVDB upon its dissolution. That section provides:

31B(1) A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a labour tribunal for relief or redress in respect of any of the following matters:-

(a) the termination of his services by his employer;

(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits;

(c) such other matters relating to the terms of employment, or the conditions of labour, of a workman as may be prescribed.

The RVDB was dissolved, and the 1st respondent-respondent-appellant firm (which I will refer to as "the Appellant") were appointed liquidators under the Finance Act, No. 38 of 1971. The relevant provisions of that Act are:

19. Where the appropriate Minister considers that the activities of a public corporation should be terminated, the Minister may, under the authority of a resolution passed by Parliament –

(a) dissolve the corporation; and

(b) appoint one or more persons to be the liquidator or liquidators of the corporation.

20. The liquidator of a public corporation appointed under section 19 shall, subject to the directions of the appropriate Minister, have power to –

(a) decide any questions of priority which arise between the creditors;

(b) compromise any claim by or against the corporation with the sanction of the Minister previously obtained;

(c) take possession of the books, documents and assets of the corporation;

(d) sell the property of the corporation with the previous sanction of the Minister; and

(e) arrange for the distribution of the assets of the corporation in a manner set out in a scheme of distribution approved by the Minister.

21(1) In the liquidation of a public corporation, the funds of the corporation shall be applied first to the cost of liquidation and then to the discharge of the liabilities of the corporation.

(2) When the liquidation of a public corporation has been closed, a notice of liquidation shall be published in the Gazette and no action in respect of any claim against the corporation shall be maintainable, unless it is commenced within two years from the date of the publication of such notice in the Gazette.

(3) Any surplus remaining after the application of funds to the purposes specified in subsection (1) and the payment of any claim for which an action has been instituted under subsection (2) shall be vested in the Secretary to the Treasury.

The facts are not in dispute, except as to the exact date of dissolution. The RVDB had employed the applicant-appellant-respondent ("the applicant") from 1968. By a notice dated 26.2.90 the RVDB terminated his services with effect from 31.3.90. On 30.9.90 the applicant filed an application in the Labour Tribunal naming the appellant and the RVDB as respondents. The appellant filed answer on 16.11.90 averring that, pursuant to a resolution in

Parliament, by notice published in the Government Gazette of 4.5.90, the Minister acting in terms of section 19 of the Finance Act, No. 38 of 1971, had dissolved the RVDB, and appointed the appellant to be the liquidator of the RVDB.

The Labour Tribunal took up for consideration the preliminary objection that the application could not be maintained: as against the RVDB, because it was not in existence; and as against the appellant, because – so it was argued – the Appellant was never the employer of the applicant, had not been concerned in the termination of his services, did not carry on the business of the RVDB, and was not its successor. The Tribunal upheld the objection and dismissed the application, but on appeal the High Court held that the application was maintainable. There were other appeals in which the same question arose, and the High Court order notes that the parties agreed that the order would be binding in 97 connected cases as well; accordingly, the order of this Court will apply to those cases. The appellant now appeals to this Court, having obtained leave to appeal from the High Court.

At the commencement of the hearing, Mr. P. Nagendran, PC, for the appellant produced, without objection, the Hansard of 23.3.90, which showed that a resolution had been passed by Parliament authorising the Minister to dissolve the RVDB, and the Gazette of 4.5.90, which contained the Minister's notification dated 15.4.90 to the general public that the appellant had been appointed liquidator with effect from 1.4.90. However, the document embodying the Minister's opinion that the activities of the RVDB should be terminated, as well as his decision to dissolve it, was not produced at any stage in the Labour Tribunal, in the High Court, or in this Court. Mr. Nagendran also moved to produce a letter dated 28.3.90 by which, he said, the Secretary to the Ministry had informed the appellant that the RVDB was being dissolved with effect from 31.3.90. There was neither a motion (with prior notice to the applicant) to produce that letter, nor a supporting affidavit to establish its authenticity. No explanation was offered for the failure to produce the Minister's order of dissolution. That letter could not be regarded as direct evidence of a valid dissolution or of its effective date. Quite obviously, that letter was one which could easily have been produced, had minimum diligence been exercised, in the

Labour Tribunal. The appellant thus failed to satisfy all three pre-conditions for permitting new evidence in appeal (see *Ratwatte v. Bandara*,[1] and so we did not allow that letter to be produced. It is indeed regrettable that the preliminary objection had been taken and pursued without furnishing necessary supporting material even six years later at the stage of the second appeal.

However, because the parties had throughout proceeded as if there had been a valid dissolution, this appeal will be determined on that basis. As for the date of dissolution, we will assume that it was 31.03.90 because Mr. Desmond Fernando, PC, who appeared for the applicant, agreed that this appeal be decided upon that assumption.

The question for our determination involves two matters. Upon the dissolution of the RVDB and the appointment of the liquidator, did the liabilities of the RVDB (in respect of the termination of the applicant and the benefits due to him on termination) vest in or devolve upon the appellant? If so, was the applicant entitled to make and maintain an application under section 31B(1) against the appellant in respect of those liabilities?

VESTING OF LIABILITIES IN LIQUIDATOR

Mr. Nagendran contended that a liquidator appointed under the Finance Act is in a different position to one appointed under the Companies Act; that the only powers of the former are those set out in section 20 of the Finance Act; that Act provides neither for the vesting of the liabilities of the dissolved corporation in the liquidator, nor for the liquidator to bring or defend actions; and that the claims which the liquidator may compromise, under section 20(b), do not include claims made in a Labour Tribunal.

In regard to the Companies Act, Mr. Nagendran submitted that it provides for the corporate existence of the company under liquidation to continue until the liquidation is completed, and to cease only upon a court order being made thereafter; that it specifies numerous powers which the liquidator may exercise during the liquidation; and that many of these are normally functions of the Board of Directors, and even include the carrying on of the business

of the company. However, under the Finance Act corporate existence ceases before the liquidation commences, and the liquidator cannot carry on the business of the corporation. I agree that clearly there are significant differences between the two liquidation procedures, and I think that this means that no relevant inference can be drawn from a comparison. Indeed, I must stress that if the scheme of the Companies Act is that corporate existence continues during liquidation, it would have been quite inappropriate, and perhaps impossible, for the company's rights and liabilities to be vested in the liquidator. But from that certainly does not follow that the rights and liabilities of a dissolved corporation do not vest in a liquidator appointed under the Finance Act: on the contrary, since that Act provides a very different scheme whereby corporate existence ceases, it seems desirable, if not essential, that the corporation's rights and liabilities must thereupon vest in someone – and, arguably, who better than the liquidator? However, I do not wish to rest my decision upon such an inference. Nor do I think that the failure of the Legislature, to reproduce in the Finance Act all the powers which the Companies Act confers upon liquidators, leads to the conclusion that a liquidator's powers under the former are restricted to those expressly mentioned in section 20, because that is a matter which must be determined upon an interpretation of that section taken in its context.

Turning then to section 20, I find that Mr. Nagendran's contention has three limbs: first, it is only from that section that a liquidator's powers can be ascertained; second, those powers are restricted to what is expressly specified, and no other powers may be implied; and third, even what is expressly specified must be narrowly construed – thus "any claim", according to him, excluded a claim made in a Labour Tribunal, and included only a pending claim.

Section 20 cannot be interpreted in isolation; it must be read with sections 19 and 21, in the context of the scheme of dissolution contemplated by the Act. What is that scheme? There is a corporation in existence, with a business, assets, rights and liabilities; it is dissolved; its affairs must necessarily be wound up (and that is a process which involves the recovery and realisation of its assets, and the discharge of its liabilities, with the object of paying any surplus to

its ultimate owner); someone – and that is a liquidator – is needed to do all that, and he must have the necessary rights, powers, duties, and functions; and upon completion of the liquidation, he must pay the surplus to the Secretary to the Treasury. There are two additional features. The first is that section 20 provides for a measure of control and guidance: not only is the Minister empowered to give directions as to the exercise of the powers set out in section 20, but certain transactions require his specific sanction. The second is that the termination of the liquidation is in two stages: even after a "notice of liquidation" is published (section 21(2)), actions may be filed, in respect of claims against the corporation (e.g. claims which the liquidator had repudiated, or claims which had not previously been made because they had not yet matured).

In that scheme, a restrictive interpretation is not at all justified, particularly one which would impede a fair, orderly and expeditious winding up. Mr. Nagendran asks us to hold that, under section 20, the liquidator has no power to bring or defend actions, or to defend or compromise a claim made in a Labour Tribunal, whether before or after dissolution. But section 21(2) permits a claimant to file an action even after the "notice of liquidation", and Mr. Nagendran conceded that it was open to an employee to institute an action at that stage, although, he said, there would be the difficulty that by that time the assets of the corporation would already have been distributed. I cannot agree with Mr. Nagendran that "action" must be narrowly interpreted to mean a *civil* action instituted in terms of the Civil Procedure Code. Even the definition of "action" in that Code is "a proceeding for the prevention or redress of a wrong", and would include an application, for relief or redress, to a Labour Tribunal. Further, the words "against the corporation" qualify "claim", and not "action", and so all such actions must be filed against the liquidator, and not against the dissolved corporation, since it is no longer in existence. To interpret section 20 to mean that a liquidator cannot **defend** an action would be to make nonsense of section 21(2) the consequence would be that a liquidator faced with an action in terms of section 21(2) must let judgment go against him by default. In the absence of compelling language, I am not prepared to attribute to the Legislature an intention that a liquidator can compromise an exaggerated claim, but cannot repudiate a false claim and fight it in

court. If he can defend an action under section 21(2), he can do so under sections 19 and 20. Likewise it is unrealistic to contend that section 20 does not allow a liquidator to **bring** an action. If, for instance, a liquidator in the exercise of his power to take possession of assets, demanded the payment of a sum of Rs. 100 million which the corporation had placed on deposit with a bank, and the bank refused, could it possibly be suggested that it was the intention of the Legislature that the liquidator could not bring an action for recovery? If that was the case, how could he discharge his obligation to wind up the affairs of the corporation, and pay the owner the surplus?

I hold that the express power and duty to collect assets and to discharge liabilities necessarily implies the power and the duty to bring and defend actions in relation to his functions. And even if section 20 had not been enacted, the mere fact of being the liquidator was probably sufficient to imply that power and duty, unless expressly excluded. But that does not mean that section 20 is superfluous, for its purpose is obvious: to impose restrictions in relation to some of liquidator's powers and duties. Thus while he has himself the discretion to repudiate a claim or to defend an action, yet to compromise a claim he needs the sanction of the Minister; and while he may transfer an asset in the custody of the corporation to its rightful owner, or recover an asset from the custody of another, if he wishes to sell property, the price must be approved by the Minister.

In support of his contention that the liability, if any, of the RVDB did not pass to the appellant, Mr. Nagendran cited three decisions of the Court of Appeal: *De Silva v. Samajavaadi Lanka Kamkaru Samithiya,*[2] which was followed in *Mahipala v. State Fertilizer Manufacturing Corporation*[3] and *Someswaran et al. v. de Silva.*[4] It was also his submission that when an application is made to a Labour Tribunal any alleged right or liability is inchoate, and that it is only the determination of the Tribunal which creates rights and liabilities. While that may be true of industrial arbitration in respect of claims for better terms and conditions of employment, the position is different in regard to rights and liabilities consequent upon termination: the cause of action is complete, and the fact that the Tribunal has a discretion in regard to relief, or that it is empowered to grant equitable relief, only means that rights and liabilities are

contingent. The death of a workman will preclude the grant of reliefs which are personal in nature (such as reinstatement), but not monetary compensation. "Liability" includes inchoate, future, unascertained or imperfect obligations, and these are capable of devolving upon a successor (see *Ramasamy v. BCC Ltd.*,[5] citing Jowitt, Dictionary of English Law, Vol. 2, page 1085).

There are several other decisions of this Court which show that, even before an adjudication under the IDA, an employer is subject to a "liability", in respect of the wrongful dismissal of a workman, which can pass to his successor: *Shaw Wallace & Hedges v. Palmerston Tea Co.*[6] *Ceylon Estates Staffs Union v. Land Reform Commission*[7] and *De Silva v. Samajavaadi Lanka Kamkaru Samithiya.*[8]

Those decisions establish, beyond doubt, that the employer's liability ceases. And that is so even if the employer does not cease to exist (as in *Ramasamy, Shaw Wallace & Hedges,* and *C.E.S.U. v. L.R.C.)*

The question whether pending proceedings can be continued against the successor depends on who that successor is: if he is a person not subject to the jurisdiction of the Tribunal, the proceedings come to an end. Thus upon a vesting order under the Business Undertakings (Acquisition) Act, No. 35 of 1971, the liability vests in the Government (see *Ramasamy*) which is not amenable to the jurisdiction of the Labour Tribunal, by virtue of section 49 of the IDA, and hence the proceedings cannot continue against the Competent Authority appointed under that Act: *de Silva v. Samajavaadi Lanka Kamkaru Samithiya* (which cites *Loku Banda v. Competent Authority, G.O.B.U. of N.T.C.*[9] and *de Mel v. Withana.*[10]

However proceedings may be continued where the liability devolves upon other bodies (such as the Land Reform Commission, as in *Shaw Wallace & Hedges,* or the Janatha Estates Development Board, as in *C.E.S.U. v. L.R.C.).*

There are two decisions dealing with the National Textile Corporation which have caused some confusion. The business undertaking of that corporation had been vested in the Government

by an order made in 1979 under the Business Undertakings (Acquisition) Act, and thereafter, in 1980, the corporation was dissolved and a liquidator appointed under the Finance Act. *N.T.C. v. Sri Lanka Nidahas (etc) Sevaka Sangamaya,*[11] was an appeal filed **before** such vesting and dissolution. Although the Court of Appeal noted that upon the vesting of its business undertaking the rights and liabilities of the corporation had vested in the Competent Authority, the Court did not order that he be substituted, although notice was issued on him; nor was the liquidator substituted. The appeal was, subject to a variation as to the amount of compensation, dismissed.

In *de Silva v. Samajavaadi Lanka Kamkaru Samithiya,*[2] (*Supra*) the application to the Labour Tribunal had been filed before the vesting order. The Court of Appeal held that the powers of the liquidator are confined to the five specified in section 20, and did not extend to bringing or defending actions; that the liquidator does not carry on the business of the corporation, and is not its successor; and that he could not be added as a party. However, the Court held that "the inquiry that has commenced can be continued and concluded by the Tribunal and a just and equitable order (can) be made", and that the liquidator would be liable in law to pay any amount awarded as back wages, compensation, or gratuity (citing *Wijewardene v. Chandradasa.*[12] This view is, with respect, inconsistent because it assumes that the liability of the corporation does not pass to the liquidator upon dissolution, at the stage when the proceedings are pending, but passes subsequently, when the proceedings are concluded. It also appears to sanction an action being continued against a non-existent party-respondent. Further, it is not easy to accept an interpretation which results in a liquidator being unable to resist a wholly unmeritorious claim although he knows that he would be bound to satisfy that claim in full later, upon an award made *ex parte.*

The Court of Appeal also refused to grant a writ of prohibition to stay further proceedings. Against that order the liquidator successfully appealed to this Court (SC 48/87 SCM 15.7.93).[8] The resulting position was that the liquidator was not added or substituted as a party, and the Labour Tribunal proceedings came to an end. The judgment of Kulatunga, J. shows ample justification for that result.

The correct position was that in 1979 (i.e. before the dissolution of the corporation) its business undertaking, including its liabilities, had been vested in the Government under the Business Undertakings (Acquisition) Act; no proceedings could be maintained against the Competent Authority appointed under that Act because of section 49 of the IDA; when the corporation was later dissolved, in 1980, its liabilities had already vested in the Government, and could not, and did not, devolve upon the liquidator. Naturally, the pending proceedings in respect of those liabilities could not be continued against him. In so far as that decision has any bearing upon a dissolution without an intervening vesting in the Government or a third party, it supports the view that the liabilities of the corporation do pass to the liquidator.

Finally, I must refer to *Jayawickrama v. Jinadasa*[13], which dealt with an application pending in the Labour Tribunal when the RVDB was dissolved. The order of the Tribunal refusing to add the liquidator was reversed by the High Court, which correctly held that although the liquidator was not an "employer", he had to be made a party. An appeal to this Court by the liquidator was dismissed – not on the merits, but for non-compliance with the Supreme Court Rules.

All those decisions dealt with dissolution while proceedings were pending, in the Labour Tribunal or in appeal, with the exception of *Wijewardene v. Chandradasa*, (*Supra*) in which the dissolution of the Janawasama Commission took place **after** all proceedings were concluded. There the Court of Appeal held that the liquidator succeeded to the assets and liabilities of the dissolved Commission, and was bound by the final order.

Reference was made at the hearing to analogies from the law relating to executors and administrators: that property of a deceased vests in his heirs but leaving an executor or administrator a limited right of dealing with it for the purpose of administration. The decisions of this Court to which I have referred indicate that assets, rights and liabilities pass to the liquidator. For the purpose of this appeal, it is unnecessary to decide whether that is a vesting which is absolute, or which is subject to some condition or trust, or which amounts only to the power and the duty to deal with assets, rights

and liabilities. It is sufficient to say that the appellant, as liquidator, has the right, the power and the duty to discharge any liabilities of the dissolved corporation which arose upon the termination of the services of the applicant effected by the notice dated 26.2.90. Of course, his liability is not personal, and extends only to the assets of the corporation (see *Latiff v. Fernando*[14]).

The case now before us differs from the above decisions to the extent that the dissolution occurred **before** proceedings commenced. But that cannot affect the legal position that the rights and liabilities of the RVDB did pass to the appellant. However, Mr. Nagendran submitted that even if rights and liabilities in a pending proceeding against an employer might devolve on a liquidator, a Labour Tribunal application cannot be filed against a liquidator, naming him as the respondent, because the provisions of the IDA did not permit it.

MAINTAINABILITY OF SECTION 31B(1) APPLICATION

It was Mr. Nagendran's contention that an application under section 31B(1) could only be made against an "employer"; that the applicant's "employer" was the RVDB; that the appellant was never his "employer", had not been concerned in the termination of his services, did not carry on the business of the RVDB, and was not its successor; and that in any event no enforceable order could be made against the appellant because under section 40 of the IDA it is only an "employer" who could be punished for non-compliance.

Nandasena v. Carson Cumberbatch & Co. Ltd.[15], *Times of Ceylon v. Nidahas Karmika Samithiya*[16] and other decisions were cited, in support of the proposition that "employer" did not include an employer's successor-in-title; and it was urged, relying on *Arnolda v. Gopalan*[17], that an application could not be made against the successor of an employer.

The definition of "employer" admittedly does not include an employer's successor-in-title. But however narrow that definition may be, one must first examine section 31B(1) to ascertain whether it permits an application to be made against an "employer's"

successor; and if it does, it is irrelevant that the definition does not include such successor. Mr. Nagendran's argument is based mainly on the references in that subsection to "the termination of his services **by his employer**" and to "benefits due **from his employer**"; and also on the fact that Regulations 15 and 31(3) made under the IDA, as well as Form D, when referring to the respondent to an application, describe him as the "employer". But regulations and forms cannot circumscribe the provisions of the principal Act, by adding limitations which the Legislature did not enact.

It is important not to blur the distinction between two distinct matters: the cause of action and the identity of the respondent. Section 31B(1) confers a jurisdiction on Labour Tribunals, which is not unlimited. However being a provision conferring jurisdiction, there is no reason to interpret it restrictively, unless the words require a narrow interpretation. In determining what is the jurisdiction of the Tribunal, three questions arise. First, **Who can invoke that jurisdiction, or who can make an application**? The answer is clear, "it can be invoked only by or on behalf of a workman". Second, **To what subject-matter does that jurisdiction extend**? Once again the answer is not in dispute, "only in respect of the termination of services of a workman and/or terminal benefits thereupon". The third, and distinct, question is, **Who is subject to that jurisdiction, or against whom can such an application be made**? Section 31B(1) is silent as to the proper respondent. Mr. Nagendran would have us answer that question by adding the words – words of limitation: "against his employer". But the language of the subsection suggests that the Legislature intended a broader construction, for it gave a workman a right "to apply for relief or redress". Since it does not restrict that right to relief or redress **against his employer**, it means, at least *prima facie*, that relief or redress can be claimed against any person. Of course, if that leads to any absurd, unreasonable, or unjust result, it should not be adopted. It may be argued, for instance, that this would allow a total stranger to be sued. But that is possible in any kind of litigation. Here the Tribunal will ensure that no injustice will result, by holding either that the workman who has invoked the jurisdiction has no cause of action against a stranger, or that its jurisdiction extends only to a person who is liable to give "relief or redress" to the workman. The decisions of this Court, which I

have discussed, establish that although upon dissolution an employer-corporation may cease to be liable, its liability passes to the liquidator. Whatever might be the basis on which a Tribunal will dismiss an application against a total stranger, a liquidator is by no means a stranger, for he is legally bound to discharge the liability of the dissolved corporation. A workman is therefore entitled to claim relief or redress from him. I hold that section 31B(1) entitles a workman to make and maintain an application for relief or redress against the liquidator of the dissolved corporation which was his employer.

Cases such as *Nandasena v. Carson Cumberbatch & Co. Ltd.* (*Supra*) and *Shaw Wallace & Hedges v. Palmerston Tea Co.*, (*Supra*) dealt with situations in which an agent of the employer was sought to be made liable, and any observations to the effect that the employer alone was liable were in the context of that question. Indeed, the latter case is almost conclusive, for having held that the agent was not liable, this Court went on to hold that the employer too had ceased to be liable because its liability had vested in the Land Reform Commission (cf. also C.E.S.U. v. L.R.C.). Had the employer been a corporation in respect of which a liquidator had been appointed, the conclusion would have been that the liability had passed to him.

In *Arnolda v. Gopalan* (*Supra*) it was held that a workman was not entitled to make an application against the widow of his deceased employer, because the IDA "does not impose any liability on the executor, personal representative, or the executor *de son tort* of a deceased person for his debts and liabilities". With respect, the question for decision was not whether **the Act** imposes such a liability; but whether in law the liability of the deceased had passed to the widow, and, if so, whether the IDA permitted the workman to claim relief or redress against the widow. Had the widow been sued only *qua* widow, I would have agreed that she was not liable – because that was not sufficient to show that the liability of the deceased had passed to her. However, the judgment refers to two significant matters: the impugned settlement had been reached on behalf of the estate of the deceased, and the widow had registered the deceased's business in her own name and had thereafter herself

employed the workman for a few days. Although it was said (at p. 157) that the Tribunal had **adjudicated** on the workman's claim, the judgment shows that it had been **settled** (p. 154) – so that the facts relevant to the question whether the widow was the employer, either in her own right or by succession, were not placed before the Tribunal for adjudication. There was thus no patent want of jurisdiction. Hence the consent order of the Tribunal, never challenged in appeal, ought not to have been reviewed in a revision application arising from proceedings for enforcement. I have already set out my reasons for holding that the IDA permits an application to be filed against the person to whom the liability of the employer has passed. For these reasons, with respect, I am of the view that *Arnolda v. Gopalan* was wrongly decided.

Mr. Nagendran referred to section 40(1) (q) of the IDA which only penalises a person who, "being an employer", fails to comply with the order of a Labour Tribunal. He submitted that an award made against the appellant, the liquidator, would not be enforceable because he was not an "employer". Therefore, he argued, an application could not have been made against him. The fact that an order made by a court or tribunal is not enforceable does not mean that it has no jurisdiction to make it. Thus in *Attorney-General v. Sabaratnam*[18], a declaratory decree against the Crown was affirmed in appeal, although the Courts were powerless to enforce it, because:

> "... Courts of justice have always assumed, so far without disillusionment, that their declaratory decrees against the Crown would be respected."

And one must not assume that a Labour Tribunal award, to use the words of Gratiaen, J, in that case. "would be insolently ignored" by a liquidator performing statutory functions under the directions of the Minister.

It seems to me, however, that an award is enforceable by action. Section 44B of the IDA provides for the Commissioner of Labour (or a trade union) to institute a suit "for the recovery of sums due under [the] Act from any employer to any workman in a court of competent jurisdiction.". Of course. I appreciate that this refers only to an

"employer", and does not deal with the successor to an employer, but it confirms the principle that an award is enforceable by civil suit. It is not this provision which creates the cause of action; on the contrary, it presupposes that the workman does have a cause of action enforceable in a civil court; and enacts that, without prejudice to the workman's own right to institute such an action, the Commissioner too may do so. Section 44B thus recognizes the principle that upon failure to comply with a Labour Tribunal award, the workman has a civil cause of action on an award. And if the Tribunal has – as I hold it has – jurisdiction to entertain an application against the employer's successor, its award will be similarly enforceable by civil suit.

It is thus unnecessary to deal with the alleged lack of criminal sanctions. I must observe, however, that section 48 contains a definition of "employer" which prevails "unless the context otherwise requires"; and it may well be that, in a context in which the real employer has ceased to exist, "employer" in section 40(1) (q) must be interpreted as including the person who has succeeded to the employer's rights and liabilities.

Let me reiterate in conclusion that Mr. Nagendran's contention that the present application is not maintainable at this stage, if correct, leads to the result that a future action (in respect of the very same claim) can be maintained if instituted within two years from the date of publication of the notice under section 21(2).

ORDER

For these reasons I hold that the applicant was entitled to institute and maintain an application under section 31B(1) against the appellant, who continues to be liable to discharge the liabilities of the RVDB. The appeal is dismissed, the order of the High Court is affirmed, and the Labour Tribunal is directed to inquire into the application on its merits. The applicant will be entitled to costs in a sum of Rs. 15,000 payable by the appellant.

GUNAWARDENA, J. – I agree.

Appeal dismissed.

WIJETUNGA, J.

I have had the advantage of reading in draft the judgment of my brother Fernando. I regret very much that I am unable to agree with him.

Since the facts relevant to this appeal have been set out by him in his judgment, I do not propose to repeat them except where necessary.

As formulated by him, "the question for our determination involves two matters. Upon the dissolution of the RVDB and the appointment of the liquidator, did the liabilities of the RVDB (in respect of the termination of the applicant and the benefits due to him on termination) vest in or devolve upon the appellant? If so, was the applicant entitled to make and maintain an application under section 31B(1) against the appellant in respect of those liabilities?"

It was the contention of learned President's Counsel for the appellant that a liquidator appointed under the Finance Act is in a different position to one appointed under the Companies Act. Fernando, J. agrees that clearly there are significant differences between the two liquidation procedures but states that this means that no relevant inference can be drawn from a comparison. However, I think it would be useful to set out the provisions of law applicable to a liquidator under the Companies Act, No. 17 of 1982, at least for purposes of easy reference. The provisions of sections 19, 20 and 21 of the Finance Act, No. 38 of 1971, have been reproduced in the judgment of Fernando, J.

The relevant provisions of the Companies Act are:

S. 277 (1) The liquidator in a winding up by the court shall have power with the sanction, either of the court or of the committee of inspection–

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company;

(b) to carry on the business of the company, so far as may be necessary for the beneficial winding up of such company;

(c) to appoint an attorney-at-law to assist him in the performance of his duties:

Provided that where the liquidator is an attorney-at-law he shall not appoint his partner unless the latter agrees to act without remuneration;

(d) to pay any classes of creditors in full;

(e) to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(f) to compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or alleged to subsist between the company and a contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The liquidator in a winding up by the court shall have power–

(a) to sell the movable and immovable property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;

(c) to prove, rank and claim in the bankruptcy, insolvency, or sequestration of any contributory, for any balance against his

estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateable with the other separate creditors;

(d) to draw, accept, make, and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made, or endorsed by or on behalf of the company in the course of its business;

(e) to raise on the security of the assets of the company any money requisite;

(f) to take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself:

Provided that nothing herein empowered shall be deemed to affect the rights, duties, and privileges of the Public Trustee appointed under the Public Trustee Ordinance;

(g) to appoint an agent to do any business on behalf of such liquidator;

(h) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(3) The exercise by the liquidator in a winding up by the court of the powers conferred by the provisions of this section shall be subject to the control of the court, and any creditor or contributory may make an application to the court for the exercise or proposed exercise of any of those powers.

S. 333. (1) The liquidator may –

(a) in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and, in the case of a creditors' voluntary winding up, with the sanction of either the court or the committee of inspection or (if there is no such committee) a meeting of creditors, exercise any of the powers specified in the provisions of paragraphs (d), (e) and (f) of subsection (1) of section 277 to a liquidator in a winding up by the court;

(b) without sanction, exercise any power other than those referred to in paragraph (a) by this Act given to the liquidator in a winding up by the court;

(c) exercise the power of the court under the provisions of this Act of settling a list of contributories, and the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories;

(d) exercise the power of the court of making calls;

(e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.

(2) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

(3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two.

Even on a superficial reading of the respective provisions of the Finance Act and the Companies Act, the vast disparity between the powers and functions of liquidators under the two Acts becomes quite evident. In my view, the powers of a liquidator under the Finance Act are restricted to those expressly mentioned in section 20, though that section must be read with sections 19 and 21. Fernando, J. holds that the express power and duty to collect assets and to discharge liabilities necessarily implies the power and the

duty to bring and defend actions in relation to his functions. I have no difficulty in broadly agreeing with that proposition. But, that does not dispose of the matter. In the case before us, even assuming that upon the dissolution of the RVDB and the appointment of the liquidator, the liabilities of the RVDB (in respect of the termination of the applicant and the benefits due to him on termination) did vest in or devolve upon the appellant, there is the threshold question whether the applicant was entitled to make and maintain an application **under section 31B (1) of the Industrial Disputes Act** against the appellant in respect of those liabilities.

Fernando, J. states that in determining what the jurisdiction of the Tribunal is, three questions arise, and provides the answers–

> "First, **who can invoke that jurisdictions, or who can make an application?**
>
> The answer is clear, 'it can be invoked only by or on behalf of a workman.'
>
> Second, **to what subject-matter does that jurisdiction extend?** once again, the answer is not in dispute, only in respect of the termination of services of a workman and/or terminal benefits thereupon.
>
> The third, and distinct question, is **who is subject to that jurisdiction, or against whom can such an application be made?** Section 31B(1) is silent as to the proper respondent."

It is in regard to his answer to the third question that I am unable to agree with him.

He goes on to say that "Mr. Nagendran would have us answer that question by adding the words – words of limitation: 'against his employer'. But the language of the subsection suggests that the Legislature intended a broader construction, for it gave a workman a right 'to apply for relief or redress.' Since it does not restrict that right to 'relief or redress against his employer,' it means, at least *prima facie*, that relief or redress can be claimed against any person. Of course, if that leads to any absurd, unreasonable, or unjust result, it should not be adopted. It may be argued, for instance, that this would allow a total stranger may be sued. But that is possible in any kind of litigation. Here the Tribunal will ensure that no injustice will

result, by holding either that the workman who has invoked the jurisdiction has no cause of action against a stranger, or that its jurisdiction extends only to a person who is liable to give 'relief or redress' to the workman. The decisions of this Court, which I have discussed, establish that although upon dissolution an employer-corporation may cease to be liable, its liability passes to the liquidator. Whatever might be the basis on which a Tribunal will dismiss an application against a total stranger, a liquidator is by no means a stranger, and is obliged to discharge the liability of the dissolved corporation. A workman is therefore entitled to claim relief or redress from him. I therefore hold that section 31B(1) entitles a workman to make and maintain an application for relief or redress against the liquidator of the dissolved corporation which was his employer."

I am of the view that the Industrial Disputes Act, when it speaks of 'relief or redress', takes cognizance of the 'employer – workman' relationship based on a contract of service, which concept is woven into the entire fabric of that law. It is, therefore, superfluous to specify that such relief or redress should be claimed against the employer.

A bench of five judges of the then Court of Appeal of Sri Lanka, in setting aside a judgment of the then Supreme Court, considered the definition of the term 'employer' in section 48 of the Industrial Disputes Act, in *Carson Cumberbatch & Co. Ltd. v. Nandasena,*[15] under three limbs:

(1) any person who employs any workman,

(2) any person on whose behalf any other person employs any workmen,

(3) any person who on behalf of any other person employs any workman.

The majority of the Court (with one Judge dissenting) held *inter alia* that (i) a labour Tribunal cannot, by making a wrong decision as to the identity of the employer, whether by reason of a mistake of fact or by reason of a mistake of law, give itself power or jurisdiction to make orders against a person who is not the particular workman's 'employer' within the meaning of the Industrial Disputes Act and (ii) the appellant was not an employer of the workman within the

meaning off the definition of the term 'employer' in section 48 of the Industrial Disputes Act. The person referred to as a person employing a workman in each of the three limbs of the definition is intended to refer to a person who is under contractual obligation to the workman.

Tennakoon, J. said at page 83 that "there are numerous other enactments in which the term 'employer' is defined in a manner similar to that employed in the Industrial Disputes Act ... we must confess that we have found this excursion into the field of labour legislation unhelpful in trying to ascertain the meaning of the word employer as used in the Industrial Disputes Act. A more legitimate and more profitable exercise would be to examine the Industrial Disputes Act itself for any indication of the legislative intent. We find considerable evidence within the four corners of the Industrial Disputes Act to support the view that an employer, whether he be principal or agent, must have a contract of service with the workman." He emphatically stated at page 84 that "the existence of a contract with his employer is the *sine qua non* for identifying a workman".

That only the employer could be made a party respondent in a dispute under the Industrial Disputes Act was once again recognised in *Shaw Wallace & Hedges Ltd. v. The Palmerston Tea Co. Ltd.,*[6] where Samarakoon, C.J. said at pages 14 and 15 that "We are here concerned with a dispute between an employer and workman ... The question for decision then is whether the appellant was an Agent which entered into a contractual obligation with the petitioner and thereby made itself liable to the petitioner.... The appellant was not the employer of the petitioner and therefore has been wrongly made a party to the reference by the Minister".

In *Ceylon Estates Staffs Union v. Land Reform Commission,*[7] where counsel for the JEDB conceded that the JEDB became liable to employ the workman and pay him his wages and arrears as from the date when the estate vested in the Board, but disputed the Board's liability to pay the arrears of wages prior to that date, Sharvananda, C.J. held that by operation of law the JEDB had succeeded to the rights and liabilities of the Commission in respect of the workman and that the liability in respect of which the award was made became the liability of the JEDB and that the JEDB will have to

give effect to the reliefs ordered by the award. He however made further observation that the Court has "taken the unusual course of amending the award to make the JEDB liable."

In *De Silva (Liquidator of the National Textile Corporation) v. Samajavadi Lanka Kamkaru Samitiya,*[6] the Court of Appeal held *inter alia* that the powers of the liquidator are confined to those specified in section 20 of the Finance Act. The only question for decision by the Supreme Court was whether a writ of prohibition against the continuation of proceedings by the Labour Tribunal should be granted; and Kulatunga, J. did set aside that part of the order of the Court of Appeal which permitted the continuation of proceedings before the Labour Tribunal. But, in the absence of a cross appeal against the order quashing the addition of the appellant, the Court declined to accede to the request of counsel to make order for such addition. It was also held that the Competent Authority of the Government Owned Business Undertaking of the N.T.C. cannot be sued before the Labour Tribunal.

In *Jayawickrama v. Jinadasa,*[13] where the RVDB was dissolved and the appellant was appointed as its liquidator under section 19 of the Finance Act No. 38 of 1971, whilst the application made to the Labour Tribunal by the respondent against the termination of his services by the said Board was pending, the Labour Tribunal refused to add the appellant as a respondent. But in appeal the High Court directed the addition of the appellant.

The Supreme Court was unable to hear the case and decide that question as the appeal had to be dismissed in terms of Rule 40 of the Supreme Court Rules, 1978. Thus, that decision is no more than an opinion of the High Court.

The decision of Fernando, J. in *Wickramasinghe v. Sri Lanka State Trading (Consolidated Exports) Corporation*[19] was in a situation where "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".

The Industrial Disputes Commission (presided over by H. W. Jayawardene, Q.C.), having made a thorough and exhaustive examination of the Industrial Disputes Act, made specific reference in its report (Ceylon Sessional Papers, 1970) to the expression 'employer' as defined in that Act and stated that "in our opinion this definition is not sufficiently wide since it does not take into consideration the legal heirs, successors in law, executors and administrators, and liquidators of a company, any one of whom may be called upon to answer to a claim made by a workman" – (page 175, paragraph 571).

The Commission went on to draft a comprehensive Labour Relations Act to replace the Industrial Disputes Act and in section 172 thereof (page 395) included the following definition of 'employer': "Employer" means any person who employs, or on whose behalf any other person employs, any workman, and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person, who on behalf of any other person, employs any workman; and includes the legal heir, successor in law, executor or administrator, and liquidator of a company, and in the case of an unincorporated body, the President or the Secretary of such body, and in the case of a partnership, the managing partner or manager."

It is significant that despite a number of decisions of the Appellate Courts pertaining to the question of identity of an 'employer' under the Industrial Disputes Act and the specific recommendations of the Commission on Industrial Disputes aforementioned, the Legislature chose not to amend the existing definition of 'employer' in section 48, even when substantial amendments were made to that Act by the Industrial Disputes (Amendment) Act, No. 32 of 1990.

In fact, with regard to appeals to the High Court from an order of a Labour Tribunal, the amending Act provides in section 31D (4) that "every employer who appeals to a High Court ... shall furnish to such labour tribunal, security in cash" etc. Implicit in that provision is the recognition of the fact that it is the employer alone who could be sued in proceedings before the Labour Tribunal.

In the light of what has been stated above, I do not think that the Legislature intended that a liquidator would be made a party

respondent to an application by a workman for relief or redress before a Labour Tribunal or that such liquidator would be substituted in place of the 'employer'.

On the question of enforceability of an order made by a Labour Tribunal, section 40(1) (q) would have no application to a liquidator, as he is not the employer within the meaning of the Industrial Disputes Act. Fernando, J. observes that "The fact that an order made by a court or tribunal is not enforceable does not mean that it has no jurisdiction to make it." But, of what use would such an order be to a workman who is seeking relief within the framework of the Industrial Disputes Act? I would not be content to assume that such an award made by a Labour Tribunal would not "be insolently ignored by a liquidator performing statutory functions under the directions of the Minister". Litigation in this sphere is not without examples to the contrary. In any event, I would rather ensure that such an order is given effect to, having recourse where necessary to the penal provisions of the Industrial Disputes Act, than leave it to the 'good sense' of the liquidator.

Even as regards the provisions of section 44B to which Fernando, J. refers, such a civil suit also could be instituted only against an employer and, as he himself points out, does not deal with the successor to an employer. In the view I have taken, I cannot agree with him that such an award would be enforceable by civil suit against a liquidator, who is not even the successor in law of the employer.

On the other hand, from the point of view of a liquidator, what is the justification for exposing him to liability under the penal provisions aforesaid, when he was never the 'employer'? The words "unless the context otherwise requires" in section 48 do not in my view warrant the inclusion of a person who is not even a successor in law of the employer, merely for the reason that "the real employer has ceased to exist." Such an interpretation would even inhibit a person from undertaking the functions of a liquidator under the Finance Act. To clothe the liquidator with a status in excess of the powers conferred on him by section 20 of the Finance Act would do violence to those provisions. If there is a lacuna in the law, it is the Legislature that must take remedial action.

The foremost question is whether the liquidator is the 'employer' of the 'workman', within the meaning of the Industrial Disputes Act. If the answer to that question is in the negative, then it would follow that the workman cannot make the liquidator a party respondent to an application for relief or redress under the Industrial Disputes Act.

While I do appreciate the desirability of giving the term 'employer' a wider definition, (which my brother Fernando seeks to do through 'interpretation'), in my view, it is essentially a matter for the Legislature and not for this Court.

This brings me to the question whether *Arnolda v. Gopalan* (*Supra*) was wrongly decided. The workman's application was 'for the period he was employed under Mr. Bobby Arnolda.' The settlement arrived at between the petitioner (the widow) and the respondent was 'on behalf of the estate of the late Mr. Bobby Arnolda'. Counsel for the respondent argued that "the sum which she (the petitioner) had consented to pay included the wages due to the respondent for a few days in September when he was employed under the petitioner." Thambiah, J., however, held that the Labour Tribunal had only adjudicated on a claim of the respondent for wages, gratuity etc., alleged to be due to him during the period he worked under the late Mr. Bobby Arnolda, and this contention, therefore, was untenable. There was no finding that the sum which she had agreed to pay included the wages due for those few days.

Fernando, J. states that "the question for decision was ... whether in law the liability of the deceased had passed to the widow, and, if so, whether the IDA permitted the workman to claim relief or redress against the widow. Had the widow been sued only qua widow, I would have agreed that she was not liable – because that was not sufficient to show that the liability of the deceased had passed to her."

The judgment in Arnolda's case states at page 157 that "liability under this statute, therefore, cannot be extended to a widow of a deceased employer, who is brought before the Labour Tribunal and against whom relief is sought for a liability incurred by her late husband", indicating thereby that the Tribunal did not deal with any other claim.

Except for the mere assertion of counsel for the respondent at the stage of appeal that "the sum which she (the widow) had consented to pay included the wages due to the respondent for a few days in September when he was employed under the petitioner", there is no material whatsoever to show that the widow had been sued in any capacity other than qua widow. The fact that the settlement did not take into account the alleged period of service under the widow is clear as "the petitioner agreed to pay the respondent the sum of Rupees 2,073/50 cts. on behalf of the estate of the late Mr. Bobby Arnolda". Furthermore, what the petitioner (the widow), by letter dated 2nd September 1959, had informed the respondent was that "the latter's services had ceased in view of the death of her husband."

There was thus no need to adjudicate upon the question whether the widow was the employer in her own right, as the entire basis of the applicant's claim against her was qua widow.

I cannot, therefore, agree that *Arnolda v. Gopalan* was wrongly decided.

For the reasons aforesaid, I would allow this appeal, set aside the order of the High Court, and affirm the order of the Labour Tribunal. The appellant will be entitled to costs, both here and in the Court below. It is noted that, as agreed by the parties in the High Court, this order would be binding in the 97 connected cases as well.

PERERA, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

By majority decision appeal allowed.