

**RAMASAMY
V.
BRITISH CEYLON CORPORATION**

SUPREME COURT
AMERASINGHE, J.,
DHEERARATNE, J., AND
GOONEWARDENE, J.
S.C. APPEAL 60/87; CA 138/75; LT 2/1132/79.
December 6 and 7, 1990.

Labour Tribunal proceedings - Business Undertaking (Acquisition) Act No. 35 of 1971, Sections 4 and 17 - Vesting of business undertaking - Liability of the undertaking.

The workman, the Managing Director of B.C.C. Ltd., sued the Respondent Company for wrongful termination of his services in 1969. The Business Undertaking of the Respondent Company was vested in the Government of Sri Lanka on 25.02.72. The Respondent Company moved that it be discharged from the proceedings as the liabilities of the Company were that of the Business Undertaking. The Labour Tribunal discharged the Company and the Court of Appeal affirmed that order.

Held:

- (1) The liability of a business undertaking which vests in the Government in terms of Section 4(1) are under a contract when that contract subsists. Section 4(1) does not enable the Respondent-Company to be discharged from the Labour Tribunal proceedings.
- (ii) All other liabilities not covered by section 4(1) will vest with the Government.
- (iii) The phrase "all the liabilities" used in Section 17 is wide enough to cover potential liabilities which will include liabilities flowing from the order of the Labour Tribunal in the future.

Cases referred to:

- (1) *B.C.C. vs. Weerasekera* (1982) 1 Sri L.R. 180
- (2) *Thileris Perera v. Eliza Nona* (1948) 50 N.L.R. 176
- (3) *Decro Wall S.A. v. marketing Ltd.* W.L.R. (March 19, 1971)
- (4) *Weerakoon v. Hewanallika* (1978 - 79) 2 SLR 97
- (5) *United Engineering Union v. Devanayagam* (1967) 69 N.L.R. 289
- (6) *Walters v. Barbergh District Court* (1982) QBD 82 LGR 235
- (7) *Bornelov Edwards Ltd. v. Inland Revenue Commissioner* (1969) All E.R. 536

APPEAL from Judgement of the Court of Appeal.

H. L. De Silva, P.C. with *L. C. Senevirathna P.C.* and *T. Keenwinna* for applicant - appellant.

Lakshman Kadiragamar with *Lalitha Senaratna* for respondent - respondent.

Cur. adv. vult.

MARCH 21, 1991

DHEERARATNE, J.

This appeal relates to some interesting questions of law which have arisen in the interpretation of certain provisions of the Business Undertakings (Acquisition) Act No. 35 of 1971, in the process of considering the impact of that Act on a proceeding pending before the Labour Tribunal.

The appellant (Employee) sought relief from the Labour Tribunal by an application made on 18.06.1969 for termination of his services on 11.04.1969 by the respondent - a limited liability company, the primary relief claimed being reinstatement with back wages. The various defences taken up by the respondent-company are immaterial for the decision of this appeal but it is sufficient to say that the respondent - company did admit that the appellant was removed from the office of Managing Director.

When the matter was pending before the Labour Tribunal, the business undertaking of the respondent - company vested in the government of Sri Lanka, by primary vesting order dated 25.2.1972, made by the Minister of Finance in terms of section 2(1)(b) of the Business Undertakings (Acquisition) Act No. 35 of 1971. Consequent to this vesting, the respondent - company moved the Labour Tribunal to have it discharged from the proceedings, on the basis that the liabilities of the respondent-company in respect of the matter pending before the Labour Tribunal were liabilities of the business undertaking, which vested in the Government of Sri Lanka with effect from 25.02.1972. The Labour Tribunal made order discharging the respondent-company and the Court of Appeal affirmed that order, the present appeal made by the employee is the sequel. If such liabilities did vest with the Government, it was common ground before us that the respondent-company should have been discharged from the proceedings.

For the proper appreciation of the points of law involved, it would be convenient at this stage to set out the relevant provisions of the Business Undertakings (Acquisition) Act.

Section 2(1) The Minister of Finance on his own motion or at the request of any other Minister;

(a)

(b) may, by orderpublished in the Gazette, vest in the Government with effect from such date as shall be specified in the vesting order any such business undertaking as shall be so specified.

Section 4(1) subject to the provisions of sub section (2) where any business undertaking is acquired by or vested in the Government, all the rights and liabilities under any contract or agreement which relates to the purposes of that undertaking and which subsists on the date of transfer or on the primary vesting date of that undertaking shall vest in the Government.

4(2) The Minister of Finance may at any time repudiate the liabilities under any contract or agreement referred to in subsection (1) if he is of opinion that such liabilities were incurred *mala fide*, dishonestly or fraudulently. Notice of the repudiation may be given by the competent authority to the parties to the contract or agreement.

4(3) Where the Minister of Finance under subsection (2) repudiates the liabilities under any contract or agreement such liabilities shall be deemed never to have vested in the Government.

4(4) For the purpose of this section "liabilities" shall not include any loan repayable to a director of any business undertaking which is acquired by or vested in the Government or to any member of the family of such director.

That portion of section 17 which defines what a business undertaking is, reads:-

"business undertaking" means any undertaking of a commercial, industrial, agricultural or professional nature and includes -

- (1) all property, movable or immovable which was used for the purposes of the undertaking on the day immediately preceding the date of transfer or the primary vesting date and which may be specified by the Minister of Finance in the primary vesting order;
- (ii) subject to the provisions of this Act all rights, powers, privileges and interests arising in or out of the property or business and *all the liabilities of that undertaking*;
- (iii) all books, accounts and documents relating to or appertaining to the business undertaking or any property of that undertaking;

It may be useful at this point, for the sake of clarity, to refer to the description of "liability" appearing in *The Oxford Companion to Law* by David M. Walker (1980) pages 765 and 766, leaving out the reference to the criminal law aspect.

"Liability. The legal concept of being subject to the power of another, to a rule of law requiring something to be done or not done. Thus, a person who contracts to sell goods is liable to deliver them and the buyer is liable to pay the price. Each is required by law to do something and can be compelled by legal process at the other's instance to do it; the other is empowered to exact the performance or payment. It is sometimes called subjection. The correlative concept is power.

A person is said to be under a liability when he is, or at least may be, legally obliged to do or suffer something. Thus, one may be said to be liable to perform, to pay, to be sued, to be imprisoned or otherwise to be subject to some legal duty or legal consequence.

In general, liability attaches only to persons who are legally responsible; an insane person does not generally incur any liability.

Liability may arise either from a voluntary act or by force of some rule of law. Thus, a person who enters into a contract thereby becomes liable to perform what he has undertaken, or to pay for the counterpart performance, or otherwise to implement his part of the contract. If he acts in breach of contract, he becomes liable by law to pay damages in compensation for the breach. Similarly, if a man acts in breach of any of the general duties made incumbent on him by statute or common law such as to refrain from injuring his neighbour, or to maintain his tenant's house in reasonable repair, or to exercise diligence in administering property of which he is trustee, he incurs legal liability to make good his omission or default . . . civil liability may arise from many grounds, from the natural relations of the family, from undertaking or contract, the commission of a harm, from trust, statute, or decree of court...

The term liability is sometimes used of the sanction or penalty itself. Thus a debt is spoken of as a liability.

The term is also used in the analysis of rights and duties (q.v) as a synonym for 'subjection' and the correlative of 'power'.

From the foregoing description, it would be noticed that the liabilities of the respondent-company as an employer, in relation to the appellant as an employee, consequent upon the termination of the latter's services, could spring from four different sources, namely:-

- (i) under the contract of employment (unquantified).
- (ii) by a judgment of a competent civil court exercising its ordinary jurisdiction in relation to the contract. (quantified); but this situation does not arise here.
- (iii) by operation of the statute - the Industrial Disputes Act which empowers the Labour Tribunal in the exercise of its just and equitable jurisdiction to grant relief. (unquantified)
- (iv) by the order of the Labour Tribunal (quantified).

The liabilities of the business undertaking which qualify for vesting in the Government in terms of section 4(1), are those *under* a contract when that contract *subsists*. The operation of section 4(1) in similar circumstances came up for consideration before this court in the case of *British Ceylon Corporation V. Weerasekera* (1). In that case Victor Perera J. stated at page 1 & 6 as follows:

"In this case the employees were dismissed in 1963 and there was a termination of their contracts of employment. The company itself had repudiated the contract of employment and the employees were entitled to claim contractual damages if they had gone to the courts. Therefore at the date of the vesting there was no subsisting contract but there remained only a right or liability to be determined. By resorting to arbitration under the Industrial Disputes Act they could have obtained reliefs on equitable grounds outside the contract such as reinstatement if the termination was held to be unjustified . . .

With respect to Victor Perera J. the conclusion reached that there was no subsisting contract in those (so indeed in the present) circumstances, does not appear to me to be based on a correct legal foundation.

A contract cannot come to an end by a unilateral act of an employer and it cannot be generally extinguished otherwise than by performance, payment or reparation, mutual agreement, operation of law or being set aside by a competent court, and so long as the bond that unites the parties - '*vinculum juris*' remains, the contract subsists. See *Thideris Perera v. Eliza Nona* (2); *Decro - Wall S.A. v. Marketing Ltd. (C.A.)* (3) and *Weerakoon v. Hewamallika* (4) page 108.

However, the difficulty of the application of section 4(1) to the facts of the present case, appears to come from the word 'under' in that section. The proceedings in the Labour Tribunal, no doubt stem from the relationship of master and servant established by the contract of employment between the appellant and the respondent - company but it could not be said that those proceedings, are concerned with liabilities arising 'under' the contract, particularly because section 31(5) (4) of the Industrial Disputes Act states as follows:-

Any relief or redress may be granted by a Labour Tribunal to a workman upon an application made under subsection (1) notwithstanding anything to the contrary in any contract of service between him and his employee.

For the above reasons I hold that section 4(1) does not enable the respondent - company to get itself discharged from the pending proceedings of the Labour Tribunal.

I shall now proceed to consider the applicability of the provisions of section 17. If one looks at the scheme of the Business Undertakings (Acquisition) Act, in relation to the vesting of liabilities of a business undertaking with the Government, such liabilities intended by the legislature to be vested could conveniently be grouped into two categories; namely:-

- (a) those liabilities under a subsisting contract or agreement in terms of section 4(1), not repudiated by the Minister in terms of section 4(2) as those incurred *mala fide*, dishonestly or fraudulently.
- (b) in terms of section 17 (having being caught up in the definition of business undertaking) "subject to the provisions of the Act", all the liabilities of that undertaking (read with section 2(1)(b)).

The term 'subject to the provisions of this Act' would mean save and except as otherwise provided by the Act; so that the clear intention of the legislature appears to be that all other liabilities, not covered by section 4(1), shall vest with the Government, lock, stock and barrel. The Minister's freedom of repudiation has been limited to liabilities under subsisting contracts and agreements specified in section 4(1) only and that seems to have been the necessity of drafting that part of section 17 in the present shape it has taken so as to include every other liability in relation to the business undertaking.

It is contended on behalf of the appellant, on the authority of the majority judgment of the Privy Council in *United Engineering Union v. Devanayagam* (5) that the Labour Tribunals, unlike the ordinary Courts which adjudicate between existing rights of parties, create new rights. It is therefore contended that the liabilities of the respondent-

company will arise only in the future, when the decision of the Labour Tribunal is pronounced and that section 17 deals with only liabilities in *esse* not with potential liabilities. I would like at this juncture to refer to the following illuminating passage in the minority judgment in *Devanayagam's case* (supra) appearing at page 309, with which I am in respectful agreement.

"It is the statute which creates the right to equitable relief by giving to the workman the option of going to the Labour Tribunal to ask for it instead of taking what the common law gives him. One method of altering the law on master and servant would be to enact a new set of rules, as has been done to some extent in the United Kingdom by the statutes we have mentioned, leaving to the court only the task of interpretation and application. Another method frequently employed is to give fresh powers to Court. Under the latter method the right comes into existence as soon as there is created the relationship, in this case that of employer and workman, from which it springs, it does not have to wait for life until the relief granted is spelt out in words by the court."

If liabilities also flow from the statute as I have already held, they would not be potential liabilities in the pending proceedings and they exist unquantified until they are quantified by the order of the Labour Tribunal. The Dictionary of English Law by Earl Jowitt (Volume 2 1959) at 1085 states.

"Liability, the condition of being actually or potentially subject to an obligation, either generally as including every kind of obligation, or, in a more special sense to denote inchoate, future, unascertained or imperfect obligations as opposed to debts, the essence of which they are ascertained and certain. Thus when a person becomes surety for another he makes himself liable, though it is unascertained in what obligation or debt the liability may ultimately result."

In any event, the words 'all the liabilities' in section 17 are wide enough even to cover potential liabilities which will include liabilities flowing from the order of the Labour Tribunal in the future. See also *Walters v. Barbergh District Council* (6); *The Times* 21st June 1983; and *Bromilow and Edwards Ltd., v. Inland Revenue Commissioners* (7). It was contended on behalf of the appellant that since a 'business undertaking' is not a legal person and therefore incapable

of acquiring any liabilities, that part of section 17 which speaks of 'all the liabilities of that undertaking' is meaningless and inoperative, in the result no liabilities whatsoever vest with the Government in terms of that section. The intention of the legislature appears to me to be quite clear that the section refers to the proprietor's liabilities in relation to the business undertaking. As said by Megarry J. in *Bromilow and Edwards Ltd.; V. Inland Revenue Commissioners* (Supra) " I have no hesitation in choosing the interpretation which makes sense and makes this part of the subsection work, as against one which reduces it to dust".

For the above reasons I hold that in terms of section 17, the respondent-company has been correctly discharged from the proceedings. The appeal is dismissed with costs.

AMERASINGHE J. - I agree.

GOONEWARDENE J. - I agree.

Appeal dismissed.