

**EAST WEST RESEARCH & DESIGN
(PVT) LTD.
v.
WEERAKOON, COMMISSIONER OF LABOUR**

COURT OF APPEAL.

S. N. SILVA, J., EDUSSURIYA, J.

CA APPLICATION NO. 322/92.

HCRA NO. 82/91.

MC COLOMBO 11456/5.

JANUARY 28, 1993.

Company Law-Winding-Up of Company incorporated under the Companies Act, No. 17 of 1982 – Winding-up order made by the District Court and a liquidator appointed – Order against the Company for payment of compensation to a dismissed workman by Labour Tribunal – Right to prosecute the Company in the Magistrate's Court for not complying with order of Labour Tribunal while winding – up is pending and a liquidator is appointed – Necessity for sanction of District Court which ordered the winding-up – Industrial Disputes Act – Section 40 (1)(q) – Companies Ordinance Section 171 – Sections 264, 259, 261 of the Companies Act, No. 17 of 1982.

1. Section 264 of the Companies Act applies in two situations:

- (i) where a winding-up order has been made (in terms of section 258 of the Act) or,
- (ii) where a provisional liquidator is appointed (in terms of section 271 of the Act, after the presentation of a winding-up petition but before the making of a winding-up order).

In either situation section 264 imposes a bar on other actions or proceedings against the company. The bar is twofold : firstly, it strikes at the commencement of actions or proceedings against the Company. Secondly, it strikes at the continuance of actions or proceedings already commenced against such company. Such pending actions and proceedings are stayed by operation of law.

2 The bar imposed by section 264 can only be removed by the Court before which the winding-up is pending. The section specifically provides " that no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as it may impose ". Therefore a person who intends to commence an action or proceeding against a company in respect of which a winding -up order has been made or a provisional liquidator appointed, has to get the prior leave of the court before which the winding-up is pending. Similarly, where an action or proceeding is pending, a party who wishes that matter to be proceeded with, has to obtain the leave of the winding-up Court, for such purpose. Leave may be granted by the Court subject to terms, as provided in the section.

3. The purpose underlying the provisions of section 264 and section 261 (avoiding attachment, sequestration, distress or execution against the estate or assets of a company when winding-up is pending) is to put all unsecured creditors upon an equality and to pay them *pari passu* for otherwise the winding-up will resolve itself into a scramble for the assets. The bar contained in section 264 of the Act is an essential element of a legislative scheme to provide for the orderly winding-up of a company and the distribution of its assets and should be effective in relation to all actions or proceedings against such company, whether pending or to be commenced, in the absence of a specific statutory reservation.

4. The word " proceeding " appearing in section 264 should be construed in the light of the word " action " and will encompass any proceeding instituted against the Company before an institution established by law for the administration of justice. Hence a prosecution before the Magistrate's Court for an alleged failure to comply with the order of the Labour Tribunal, will be a proceeding as contemplated by the section. Such a prosecution could not have been commenced or proceeded with except by the leave of the District Court which made the winding-up order.

Per S. N. Silva, J :

" It has to be borne in mind that the liquidator should not be considered the *alter ego* of the errant employer He is an officer of court whose functions are regulated by the provisions of the Companies Act and the orders made by the winding-up court from time to time".

Hire Purchase Co., Ltd., and Others v. Fernando 79 (2) NLR 15 distinguished

Cases referred to :

1. *Hire Purchase Co. Ltd., and Others v. Fernando* [1979] (2) NLR 15.
2. *John and Others v. Coir Yarn and Textiles Ltd.*, AIR 1947 Kerala 60.
3. *Re Oak Pitts Colliery Co.*, (1882) 21 Ch. D. 322, 329.
4. *Ayerst v. C. & K. Construction Ltd.*, (1976) AC 167, 176.
5. *Roberts Petroleum Ltd., v. Bernard Kenny Ltd.*, (1983) 2 AC 192, 208.

S. Mahenthiran with N. R. Sivendran for accused-petitioner.

K. Sripavan, S.S.C. for Attorney-General.

Cur. adv. vult.

February 26, 1993.

S. N. SILVA, J.

The accused-petitioner has filed this appeal from the judgment dated 10.03.1992 of the Provincial High Court. By that judgment the Provincial High Court upheld the order dated 14.08.1991 of the Additional Magistrate, Colombo, subject to certain reservations that will be referred to below.

The relevant facts are briefly as follows : The appellant is an incorporated company subject to the Companies Act, No. 17 of 1982. On 01.03.1989 the District Court, Colombo, in case No. 2939/spl. made a winding-up order in respect of the company and appointed a liquidator and an official receiver. The liquidation proceedings are in progress and no order of dissolution has been made. In the meanwhile, a person claiming to have been an employee of the company whose services were wrongfully terminated, instituted proceedings in the Labour Tribunal against the company, for relief. The company was absent and unrepresented before the Labour Tribunal. On 01.06.1990, the Labour Tribunal took up the application for inquiry *ex parte* and made order directing the company to pay a sum of Rs. 25,920 as compensation to the workman. It appears that learned President of the Labour Tribunal was aware of the liquidation proceedings since he directed that a copy of the order be served on the liquidator. The order directs the company to deposit the said sum with the Asst. Commissioner of Labour, Colombo North, on or before 16.07.1990. The liquidator who received a copy of the said order sent letters dated 13.06.1990, 26.07.1990 and 05.02.1991 to the Asst. Commissioner of Labour, Colombo North, informing him that the award against the company has been noted and that disbursement can be made only from the assets that are realised, according to the Companies Act. There was no response to these letters but the company was prosecuted by the Commissioner of Labour for an offence under section 40 (1)(q) of the Industrial Disputes Act for failing to comply with the order made by the Labour Tribunal.

The liquidator appeared in the Magistrate's Court in response to the summons and counsel submitted that proceedings cannot be commenced in the Magistrate's Court against the company except with the leave of the District Court that has made the winding-up

order, in terms of section 264 of the Companies Act, No. 17 of 1982. Learned Magistrate called for written submissions from the parties and by his order, decided to continue the prosecution against the company. In revision, learned Provincial High Court Judge upheld that order notwithstanding a specific submission made by State Counsel representing the Hon'ble Attorney-General that he has no objection to relief being granted to the petitioner. Learned Judge has made a reservation that the liquidator should obtain the sanction required to appear in the Magistrate's Court and to make payment of the amount ordered by the Labour Tribunal. For this purpose the Magistrate was directed to afford reasonable time to the liquidator.

Submissions before this Court were one-way. Learned Senior State Counsel, rightly in our view, did not seek to support the orders of the Additional Magistrate and of the Judge of the Provincial High Court. In view of the fact that the same issue has come up for consideration in other applications, we decided to hear submissions of both counsel and to set down reasons for the order that we propose to make.

The specific issue that comes up for consideration is whether a prosecution could be instituted for an offence under section 40 (1)(q) of the Industrial Disputes Act in the Magistrate's Court against a company in respect of which a winding-up order has been made in liquidation proceedings, without the leave of the District Court that made the winding-up order. Section 264 of the Companies Act, No. 17 of 1982, is directly in point and it states thus:

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

Learned Additional Magistrate and learned Provincial High Court Judge made their respective orders on the premise that section 264 has no bearing on proceedings taken under the Industrial Disputes Act for a non-compliance with the order of the Labour Tribunal. It appears that learned Judges were guided by the judgment of the Supreme Court in the case of *Hire Purchase Co. Ltd., and Others v. Fernando*, ⁽¹⁾. In that case, the Supreme Court considered the

application of section 171 of the Companies Ordinance (which was then in operation and which was similarly worded to section 264 of Companies Act referred above), in relation to proceedings that were pending in the Labour Tribunal. A workman whose services had been terminated prior to an order for winding-up made an application to the Labour Tribunal against the company after such order had been made. The liquidator was named as the 2nd Respondent to the application. Several objections were taken before the Labour Tribunal, of which one is of particular significance to this case. That, in view of section 171 of the Companies Ordinance proceedings could not have been commenced or continued against the company except with the leave of the District Court that made the winding-up order. Learned President of the Labour Tribunal overruled the objection and this order was affirmed in appeal by the Supreme Court. In the judgment of Tittawella, J. two grounds were relied upon to support the finding that section 171 has no bearing on the proceedings commenced in the Labour Tribunal. They are :

- (i) that at the time the Companies Ordinance came to be enacted, Labour Tribunals were not in existence having been established under Act No. 62 of 1957 and that the phrase "action or proceeding" found in section 171 could not be interpreted as applying to proceedings in the Labour Tribunal. In other words, that the earlier Ordinance cannot detract from the later enactment (p19) ;
- (ii) that the very character of Labour Tribunals appear to take the proceedings before it out of the prohibition contained in section 171 of the Companies Ordinance (p. 20).

As regards the first ground, we have to note that the order in point of time in relation to the two enactments is now reversed. The Companies Ordinance which was then in force has been repealed and the new Companies Act, No. 17 of 1982 was certified on 20.05.1982. Hence section 264 of the Companies Act should now be considered the later enactment. It could no longer be contended that the legislature did not intend to bring within the purview of section 264, proceedings before a Labour Tribunal under the Industrial Disputes Act. Furthermore, the Industrial Disputes Act is a statute of general application with the overall objective of providing for the prevention, investigation and settlement of industrial

disputes, irrespective of the character of the parties to such dispute. The Companies Act on the other hand, is a special enactment which specifically provides for the incorporation, regulation and dissolution of companies. If one of the parties to an industrial dispute is a company, such party would necessarily have to be subject to the special enactment which provides for its creation, regulation and dissolution. Therefore the first ground stated by the Supreme Court in relation to section 171 of the Companies Ordinance cannot apply to section 264 of the new Companies Act which came into operation after the amendment to the Industrial Disputes Act referred above.

As regards the second ground, it is seen that the Supreme Court placed reliance on certain observations of the High Court of Kerala in the case of *John and Others v. Coir Yarn and Textiles Ltd.*,⁽²⁾. In that case the High Court of Kerala considered the application of the corresponding provision of the Indian Companies Act in relation to the Industrial Disputes Act (1947) of India. The relevant passage is as follows :

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

The observations of the Supreme Court and the High Court of Kerala were made in relation to proceedings where a special adjudicatory process was invoked in relation to an industrial dispute. The public interest there referred to is the resolution of the industrial dispute. These observations will not have a bearing where a prosecution is instituted against the company with penal consequences.

The judgment of the Supreme Court in the *Hire Purchase Company* case is in relation to a proceeding pending in a Labour Tribunal against a company in respect of which a winding-up order had been made. We are inclined to accept the submission of counsel that this judgment should not have been applied in relation to a prosecution in the Magistrate's Court for an alleged failure to comply with an order of a Labour Tribunal. In any event, for the reasons stated above,

we hold that the grounds upon which the judgment is based are not relevant to the application of section 264 of the Companies Act, No. 17 of 1982, viz-a-vis such a prosecution.

I will now examine the component elements of section 264 of the Companies Act and consider the ambit of its operation. The section applies in two situations. They are :

- (i) where a winding-up order has been made (in terms of section 258 of the Act) or,
- (ii) where a provisional liquidator is appointed (in terms of section 271 of the Act, after the presentation of a winding-up petition but before the making of a winding-up order).

In either situation, the section imposes a bar on other actions or proceedings against the company. The bar is twofold. Firstly, it strikes at the commencement of actions or proceedings against that company. Secondly, it strikes at the continuance of actions or proceedings already commenced against such company. Such pending actions and proceedings are stayed by operation of law.

The anterior stage, that is the interval of time between the presentation of a winding-up petition and the making of a winding-up order (where no provisional liquidator is appointed), is covered by section 259 of the Act. This section gives a right to the company, any creditor or contributory, to move for stay of any action or proceeding pending in any Court in Sri Lanka against the company sought to be wound up. In such a situation, there is no stay by operation of law as in section 264 but, the Court before which the action or proceeding is pending is given the discretion of staying or restraining such proceedings.

The bar imposed by section 264 can only be removed by the Court before which the winding-up is pending. The section specifically provides "that no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as it may impose". Therefore a person who intends to commence an action or proceeding against a company in respect of which a winding-up order has been made or a provisional liquidator appointed, has to get the prior leave of the court before

which the winding-up is pending. Similarly, where an action or proceeding is pending, a party who wishes that matter to be proceeded with, has to obtain the leave of the winding-up Court, for such purpose. Leave may be granted by the Court subject to terms, as provided in the section.

Section 261 of the Act is also a provision of similar import to that of section 264 referred above. This section avoids any attachment, sequestration, distress or execution against the estate or assets of the company after the commencement of the winding-up.

The purpose underlying these provisions is stated very clearly in Palmer's Company Law, 24th edition (1987) vol. 1p. 448 as follows :

" The object of the winding-up provisions of the Companies Act 1868, " said Lindley, L.J. in *Re Oak Pitts Colliery Co.* ⁽³⁾ " is to put all unsecured creditors upon an equality and to pay them *pari passu*. To accomplish this it was indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended ; otherwise the winding-up would resolve itself into a scramble for the assets. "

As observed by Lord Diplock in *Ayerst v. C. & K. Construction Ltd.* ⁽⁴⁾, " the making of a winding-up order brings into operation a statutory scheme for dealing with the assets of the company that is ordered to be wound up, the scheme is now contained in Part V of the Companies Act 1948 and extends to voluntary as well as compulsory winding-up, but in so far as it deals with compulsory winding-up its essential characteristics have remained the same since it was first enacted by the Companies Act 1862 ". A portion of the foregoing dicta was cited by Lord Brightman in the case of *Roberts Petroleum Ltd. v. Bernard Kenny Ltd.* ⁽⁵⁾ It was also observed further that the general sense of the sections of the Act of 1948 is to " preclude inroads into the assets of a company once liquidation has begun " (at p. 209).

It is thus clear that sections 261 and 264 of the Companies Act No. 17 of 1982, referred above are based upon a clear legislative purpose of preventing inroads into the assets of a company once liquidation has begun. As observed in Palmer, in relation to the

corresponding sections 128 (1) and 130 (2) of the English Act, these provisions are intended to avoid a " scramble for the assets of the company " that is being wound up. Hence, we are of the view that the bar contained in section 264 of the Act is an essential element of a legislative scheme to provide for the orderly winding-up of a company and the distribution of its assets and should be effective in relation to all actions or proceedings against such company, whether pending or to be commenced, in the absence of a specific statutory reservation.

The word " proceeding " appearing in the section should be construed in the light of the word " action " and will encompass any proceeding instituted against the company before an institution established by law for the administration of justice. Hence a prosecution before the Magistrate's Court for an alleged failure to comply with the order of the Labour Tribunal, will be a proceeding as contemplated by section 264 of the Act. Accordingly, we hold that the prosecution at issue could not have been commenced or proceeded with except by the leave of the District Court which made the winding-up order.

Before I conclude, there are certain matters adverted to in the order of learned High Court Judge that have to be dealt with. Learned High Court Judge has adverted to the provisions of section 277 (1)(a) of the Companies Act and commented on the liquidator appearing in the Magistrate's Court and filing an application in the High Court without the sanction referred to in that section. These provisions empower a liquidator to bring or defend any action or other legal proceeding in the name and on behalf of the company. However, it is required that the liquidator should obtain the sanction either of the Court that makes the winding-up order or of the committee of inspection. There is no evidence as to whether or not such sanction was obtained by the liquidator before he appeared in the Magistrate's Court or moved in revision to the High Court. Learned High Court Judge's comments appear to be based on the premise that no such sanction was obtained. It is to be noted that section 277 (1)(a) is not a bar to the liquidator bringing or defending any action or proceeding, against the company. It is an empowering provision which enables the liquidator to do so, with the requisite sanction. The liquidator is appointed by the Court before which the winding-up proceedings are pending and is an officer of that Court. If the liquidator

has taken any action without obtaining the requisite sanction, it is a matter for that Court to inquire into and to consider whether such sanction should be granted or refused. The provisions of section 277 (1)(a) are not relevant to the matter at issue in this case. Here, we are not concerned with any step taken by the liquidator. We are concerned with the validity of a prosecution instituted by the Commissioner of Labour contrary to the provisions of section 264 of the Companies Act. The liquidator has appeared in the Magistrate's Court in response to a summons received from that Court, as the officer of the District Court administering the affairs of that company. He certainly cannot be faulted for responding to the summons and informing the Magistrate's Court of the salutary provisions of section 264 of the Companies Act. Learned Judge has also made certain observations as to want of diligence on the part of the liquidator in relation to the proceedings had before the Labour Tribunal. The liquidator was not a party to the proceedings before the Labour Tribunal and according to the order of the learned President he was to be given notice of the order only after it was made. It has to be borne in mind that the liquidator should not be considered the *alter ego* of the errant employer. As noted above, he is an officer of Court whose functions are regulated by the provisions of the Companies Act and the orders made by the winding-up Court from time to time. Learned Judge has also made certain observations with regard to section 347 (1) of the Companies Act as to preferential payments of assets of the company. It appears that these observations too are irrelevant to the matter at issue.

For the reasons stated above the appeal is allowed and we set aside the order dated 14.08.1991 of learned Additional Magistrate and the order dated 28.01.1982 of learned Judge of the Provincial High Court. We make further order discharging the accused in the prosecution instituted by the Commissioner of Labour.

P. EDUSSURIYA, J. – I agree.

Appeal allowed.

Accused discharged.