

AMERAJEEWA
v.
UNIVERSITY OF COLOMBO

SUPREME COURT.
FERNANDO, J.
AMERASINGHE, J.
DHEERARATNE, J.
GOONEWARDENA J. AND
WADUGODAPITIYA, J.
S. C. APPEAL NO. 12/93.
C. A. APPEAL NO. 271/88.
LT APPLICATION NO. 8/1193/96.
JUNE 11, 1993.

Industrial Dispute – Wrongful termination of services of employee – Death of employee – applicant– Dismissal of application – Substitution of widow – are right of the applicant in an application to the Labour Tribunal transmissible on his death when the application is still pending? Right of appeal of person not a party and seeking substitution – Audi alteram partem rule of natural justice – Res litigiosa – S. 31C(2) of Industrial Disputes Act.

When an applicant seeking relief in the Labour Tribunal dies when the application is pending, the question that arise is whether rights in the Res litigiosa are transmissible and if so, to whom. When the application for substitution by the dead applicant's widow was dismissed without affording her a hearing there was a breach of the audi alteram partem rule of natural justice. This makes the ex -parte orders of dismissal of the application by the Labour Tribunal on being informed of the death of the original applicant null and void.

Although the Industrial Disputes Act does not prescribe the procedure to be followed for substitution in the room of a applicant who dies during the pending of the application, s. 31C(2) confers powers upon the Tribunal to devise a suitable procedure.

Cases referred:

1. *Arnolda v. Gopalan* (1961) 64 NLR 153.
2. *Goonetilleke v. Walker and Sons Co. Ltd.* (1977) 79(2) NLR 563, 564.
3. *Menchinahamy v. Muniweera* (1950) 52 NLR 409, 415.

APPEAL from Judgment of the Court of Appeal.

Chula de Silva, P.C. with *A. G. I. Tilakawardene, Mrs. S. Meevanapalana* and *M. Hussein* for - appellant.

Gomin Dayasiri with *Ajith Perera* and *Manjula Sirimanne* for Employer - respondent.

Cur. adv. vult.

June 23, 1993

FERNANDO, J.

The Appellant is the widow of a store-keeper ("the Applicant") who was first employed by the Respondent in 1979. Upon the termination of the Applicant's services on 25.2.86, he made an application to the Labour Tribunal on 5.4.86, alleging that his services had been wrongful terminated and praying for re-instatement with back wages, compensation for wrongful termination, and other equitable relief.

After the evidence of two witnesses had been led, the Applicant died on 5.12.87, in consequence of a motor accident. The case was called on 13.5.88, and was postponed for 21.6.88 as the applicant was not present. On 21.6.88 the applicant's (former) representative was present and the Tribunal was informed that the Applicant had died. Thereupon the President made order:

"Both parties state that the Applicant has died. This application cannot therefore be considered. The application is dismissed."

A formal order in identical terms was made on 1.8.88. On 5.8.88 the Appellant filed a petition and affidavit in the Tribunal stating that she, being the widow of the Applicant, was entitled to be substituted in his place, that she wished to continue with the proceedings to recover compensation and damages for wrongful termination, gratuity and other reliefs; she prayed that she be substituted and that the application be fixed for further hearing. The Labour Tribunal took no action in respect of that petition. On 15.8.88 the Appellant filed a petition of appeal to the Court of Appeal stating:

"5. By an order dated 1.8.88 received by the Appellant on 5.8.88, the learned Labour Tribunal President dismissed the application on the ground that the applicant had died and therefore this application cannot be considered.

6. The Appellant is the widow of the above Applicant and is entitled in law and in equity to continue the said application and to obtain relief.

8(c) The learned President erred in Law in failing to address his mind as to whether the said deceased had vested rights which were transmissible/transmitted to his heirs.

(d) The learned President erred in law in failing to issue notices on the heirs of the said deceased prior to making the said order.

(e) The learned President violated the principles of Natural Justice in not affording the appellant an opportunity of being heard prior to making the said order of dismissal."

She prayed that the order dated 1.8.88 be set aside, that the Tribunal be directed to substitute her in place of the deceased, and that the Tribunal be directed to hear the evidence and make a just and equitable order. The Court of Appeal having dismissed the appeal, the Appellant* comes to this Court with special leave to appeal.

The essence of the Applicant's case was that the rights of the Applicant in the pending application were rights transmissible upon his death ; that upon his death those rights devolved on her ; that she was thus a person entitled to an opportunity of being heard before any order adverse to the interests of the heirs of the deceased was made ; that the Tribunal had erred in failing to give such a hearing; further, that the Tribunal had failed to consider whether the rights of the deceased were transmissible, and if so, to whom, and had instead wrongly assumed that upon the death of an applicant the application had necessarily to be dismissed ; and that therefore the order dismissing the application and subsequent proceedings should be set aside, and fresh proceedings taken, as from the date of dismissal, in regard to substitution and thereafter upon the merits.

The principal questions which the Court of Appeal had to decide were therefore whether the orders of 21.6.88 and 1.8.88 were wrong and void for failure of Natural Justice, and whether the Tribunal was wrong in assuming that upon the death of an applicant the right to sue did not survive. There was also a question as to whether the Appellant, who not been substituted, was entitled to file an appeal since she was not a party ; the Respondent did not submit that the Appellant had no right of appeal, and that question was not considered by the Court of Appeal.

The Court of Appeal failed to deal with the question whether the *audi alteram partem* rule had been breached. Without considering the facts of the particular case, and the nature of the rights asserted and the reliefs prayed for, the Court proceeded to hold that a contract of employment was of a personal nature, that the death of the workman would bring that contract to an end, that no interest devolved on the heirs who were accordingly not entitled to continue the proceedings. In coming to this conclusion reliance was placed on the decision in *Arnolda v Gopalan*, ⁽¹⁾ that a Labour Tribunal had no jurisdiction under the Industrial Disputes Act to order the widow or legal representative of a deceased employer to pay the workman any wages, compensation or gratuity due for the period that he was employed under the deceased. That case however dealt with a very different situation. There it was the employer who had died, and death was before any application had been filed. That case did not consider or decide the position in regard to the death of an applicant after proceedings had commenced. There is at least one important difference, in that death before litigation commences only involves the question of transmissibility of (contractual) rights, whereas death pending litigation involves the further question of transmissibility of a *res litigiosa* (cf. Lee, Roman-Dutch Law, 5th ed, P. 238). The Court of Appeal also referred to an observation in *Goonetilleke v. Walker Sons & Ltd.* ⁽²⁾, that there is no legal machinery in the Act for substitution in place of any deceased party in the course of the proceedings before the Tribunal ; the Court of Appeal accordingly held that there is nothing in the statute which empowered the Appellant to be substituted. That observation was clearly an *obiter dictum*, for what was there considered was not death pending proceedings in the Tribunal, but the death of an applicant-appellant pending appeal.

This appeal has been referred to this Bench of five Judges as learned President's Counsel for the Appellant stated that he was contesting the correctness of the decision in *Arnolda v. Gopalan* ⁽¹⁾ and the obiter dictum in *Goonetilleke v. Walker Sons Co. Ltd.* ⁽²⁾

Upon being notified of the death of the Applicant, two questions arose for determination by the Tribunal : Whether the rights of the deceased Applicant, in the pending application, were rights which were transmissible upon death ; if so, upon whom did those rights devolve. These were questions of mixed fact and law. The Tribunal erred in assuming, without inquiry, that upon the death of the Applicant the application had necessarily to be dismissed : this decision was ex parte because the person who had previously represented the deceased Applicant had no longer any authority to represent either the deceased or persons claiming through him. Any person claiming interests on the basis that the Applicant's rights were transmissible on death should have been heard before determining those questions. While it is correct that the Industrial Disputes Act does not prescribe the procedure to be followed in such a situation, yet section 31C(2) confers powers upon the Labour Tribunal to devise a suitable procedure. It was therefore incumbent upon the Tribunal to have taken some appropriate steps to give notice to interested persons so as to satisfy the basic requirements of Natural Justice. It was only thereafter that the Tribunal could have proceeded to inquire into and determine those questions. This failure to do so renders the order of 21.6.88 and all subsequent orders and proceedings null and void (see *Menchinahamy v. Muniweera*, ⁽³⁾).

This Court is therefore not called upon at this stage of the proceedings to answer the two questions which the Labour Tribunal failed to determine. It is therefore unnecessary to consider the correctness of the decision in *Arnolda v. Gopalan* ⁽¹⁾ and the obiter dictum in *Goonetilleke v. Walker Sons & Co Ltd*, ⁽²⁾ but this must not be assumed to be approval thereof.

The appeal is accordingly allowed. The Judgment of the Court of Appeal, as well as the order dated 21.6.88 and all subsequent orders and proceedings in the Labour Tribunal, are set aside. The Labour Tribunal is directed to call this case on 16.8.93 to fix a date for inquiry ; and thereafter to inquire into and determine whether the rights of the deceased Applicant were transmissible upon his death, and, if so, to whom, after hearing the Appellant and any other

interested persons. The Tribunal will hear and determine the application as soon as possible. The Appellant will be entitled to costs, in both Courts, in a sum of Rs. 5,000/-.

AMERASINGHE, J. – I agree.

DHEERARATNE, J. – I agree.

GOONAWARDENA, J. – I agree.

WADUGODAPITIYA, J. – I agree.

*Appeal allowed
case sent back*
