

SAVOY THEATRES LTD.

v.

PARUSELLA

COURT OF APPEAL

TAMBIAH, J., AND G.P.S. DE SILVA, J.

CA (SC) 170/78; LT NO. 17/5011;

SEPTEMBER 16, 1982.

Industrial Disputes Act – Application for reinstatement and back wages by dismissed employee – Wrong person named as respondent – Death of respondent and substitution of his heir – Fresh substitution of new party – Jurisdiction – Acquiescence.

The applicant filed these proceedings against one C.V. de Silva, Managing Director of Savoy Theatres Ltd. where he (the applicant) worked as manager seeking reinstatement and back wages on the ground of unjust termination of his services. When proceedings were pending C.V. de Silva died whereupon the applicant moved and obtained an order substituting C.V. de Silva's daughter Mrs. R.P. de Silva. Mrs. R.P. de Silva objected to the substitution. This was followed by the substitution of Savoy Theatres Ltd. as the respondent on the application of the applicant. The President of the Labour Tribunal thereafter ordered Savoy Theatres Ltd. to pay two years salary as compensation as well as costs of suit.

Held –

1. The deceased employer's obligations to his employee ends with the death of employer. These obligations do not pass to others.
2. A deceased employer's heir cannot be substituted in L.T. proceedings under the Industrial Disputes Act. On the death of the employer the proceedings will have to come to an end.
3. The substitution of Savoy Theatres Ltd. and the order for payment of compensation against it are without jurisdiction. The want of such jurisdiction is not cured by acquiescence.

Cases referred to:

- (1) *Carson Cumberbatch & Co. Ltd. v. Nandasena* (1973) 77 N.L.R.
- (2) *Arnolda v. Gopalan* (1961) 64 N.L.R. 153
- (3) *The Superintendent, Deeside Estate, Maskeliya v. Illankai Thozhilar Kasakam* (1968) 70 N.L.R. 279
- (4) *The Manager, Ury Group, Passara v. Democratic Worker's Congress* (1968) 71 N.L.R. 47
- (5) *Superintendent, Nakiadeniya Group v. Cornelishamy* (1968) 71 N.L.R. 142
- (6) *Winter v. Ceylon Estate Staffs' Union* (1973) 76 N.L.R. 263.
- (7) *Cafeor v. Almeda* (1971) 74 N.L.R. 164

APPEAL from order of Labour Tribunal.

P. Nagendra for the respondent-appellant

Nimal Senanayake, S.A., for the applicant-respondent

November 25, 1982

TAMBIAH, J.

The applicant-respondent, on 10.6.75, made an application against "C.V. de Silva, Savoy Theatres Ltd., 12, Galle Road, Colombo 6 – Employer", under s.31B of the Industrial Disputes Act, and asked for re-instatement with back wages. In his application he stated he was "employed under the employer abovenamed" since 14.11.1957 in the capacity of a Manager on a monthly salary of Rs. 734/20 per month. He further stated that his services were "terminated by the employer abovenamed" without any justification.

The said C.V. de Silva, as employer, filed his answer and justified the termination of the workman's services. He did not say that he was not the employer. He made two charges against the workman – gross neglect of duty by the workman on 1.1.75. and that on 12.5.75. the workman, at a Dispensary in Dehiwela, had abused and humiliated him in the presence of several persons, without justification. He further stated that he terminated the services of the workman with effect from 31.5.75. on the ground of misconduct.

The workman then filed his replication. He denied the charge of misconduct and stated, *inter alia*, that he "accepts that he served the respondent (C.V. de Silva) from 1957 to 5.1.75."

Proceedings before the Labour Tribunal commenced on 2.10.75. The 1st witness called was the said C.V. de Silva. I reproduce portion of his evidence-in-chief-

"Q. Mr. de Silva, are you the Managing Director of Savoy Cinemas Ltd.?"

A. Yes.

Q. How long was this applicant employed at Savoy Cinemas Ltd.?"

A. From about 1957. I cannot say exactly.

Q. You terminated his services by letter dated 31st May 1957?"

A. Yes.

Q. You maintain that your action of termination of the applicant's services is justified?"

A. Yes."

The cross-examination of this witness was also done on the basis that the said C.V. de Silva was the workman's employer. I reproduce a portion of his evidence under cross-examination—

“Q. Do you admit that the applicant was your employee as far as in 1957?

A. Yes.

Q. Mr. Silva, you have given Mr. Parusella the authority at Savoy Cinema to be in charge of almost everything?

A. Yes.

Q. For 10 years you kept him as Manager?

A. I could not have helped him.

Q. How long has Mr. Parusella served you?

A. From 1954.”

The cross-examination of the witness was not over and the trial was postponed for 5.12.75. On this date, the case was put off for 23.9.76. for settlement.

On 23.2.76. Mr. Shanmuganathan for the workman informed the Tribunal that the said C.V. de Silva had died and he moved to amend the caption by substituting the daughter of the deceased, Mrs. R.P. de Silva, in his place. The Tribunal made the following order “Motion is allowed and caption may be amended. Inform the respondent under registered cover.” The case was to be called on 18.3.76.

On 18.3.76. an attorney-at-law appeared for the respondent and objected to the amendment of the caption. The Tribunal then asked him to make written submission and that it would make a ruling thereafter.

On 16.4.76. the attorney-at-law addressed a letter to the Secretary, Labour Tribunal, on behalf of Mrs. R.P. de Silva, in which he took up the position that the workman's application was made personally against the late C.V. de Silva, and that the application must abate as there is no provision in the Industrial Disputes Act for substitution of parties in the event of the death of either party to the application. He stated further that if either Savoy Theatres Ltd. or Mrs. R.P. de Silva was substituted in place of the deceased C.V. de Silva, the workman's application would stand prescribed against the substituted party, as the workman's services were terminated more than six months prior to the substitution. He asked for an order of dismissal of the workman's application.

Counter submissions were filed on behalf of the workman. The position taken up was that the employer was Savoy Theatres Ltd. and the late C.V. de Silva was the Managing Director, and as agent, he can be replaced in the event of death. It was submitted that proceedings so far were on the basis that Savoy Theatres Ltd. was the employer and it referred to the opening question and answer in the principal evidence of C.V. de Silva which brought out the facts that he was the Managing Director of Savoy Theatres Ltd. and that the workman was employed at Savoy Theatres Ltd. It was further submitted that C.V. de Silva who had died, has been replaced by a new Managing Directress, his daughter Mrs. R.P. de Silva and all that the workman was seeking to do was to substitute her in his place and for the inquiry to proceed against her.

It would appear that no order was made by the Tribunal on the written submissions made.

Thereafter on 12.10.1976 the workman filed a motion: I reproduce it in its entirety:-

“In the complaint filed in the above case I have shown the undermentioned as the respondent:-

C.V. De Silva,
Savoy Theatres,
12, Galle Road, Colombo

I hereby move that the Hon. Tribunal be pleased to amend the respondent as-

Savoy Theatres Limited,
12, Galle Road, Colombo 6,

since the name of the then Director has been inadvertently given here, and I state that the name of the lawful employer under whom I was serving has been given as “Savoy Theatres Limited” and that Mr. C.V. De Silva is not among the living at present.”

The Tribunal, on 25.4.77, allowed the motion to amend the caption and made order as follows- “I allow the substitution of the name ‘Savoy Theatres Ltd.’ for the name ‘C.V. de Silva’.” The attorney-at-law for the respondent then moved for a date as he was entrusted with the case only recently, and the inquiry was put off.

After the substitution of Savoy Theatres Ltd., two more witnesses gave evidence for the respondent, after which the applicant-workman

gave evidence. He stated that he joined Savoy Theatres Ltd. in 1957 and after learning work for three months, he was appointed Manager. The Managing Director of the Company at that time was C.V. de Silva and he was also the Managing Director at the time his services were terminated. He asked the Managing Director for a letter of appointment and was told there was no necessity for a letter; he was asked to function as Manager and C.V. de Silva told him that he was the Managing Director. He admitted his original application was against C.V. de Silva and cannot assign any reason for his dismissal from service by C.V. de Silva.

In regard to the charge of neglect of duty on 1.1.75. by leaving the work place without permission, the workman admitted leaving the work place without permission; his defence was that he suddenly took ill and he supported this position by a telegram (R1) requesting leave because of ill-health and a medical certificate (R5). The President of the Labour Tribunal, while accepting the workman's evidence regarding a sudden ailment, however considered it a serious lapse on his part in failing to inform the employer before he left the work place and found him guilty of neglect of duty on that date.

In regard to the abuse of C.V. de Silva on 12.5.75. at the dispensary, the President while accepting the employer's version that there had been an exchange of words at the dispensary and while censoring the conduct of the workman, holds that C.V. de Silva had provoked the workman by his failure to make payment in accordance with an agreement reached at the Labour Department. He considered this a mitigatory circumstance. He further took the view that the workman had not been given his due place as Manager at the work place and had been stripped of important functions which were allocated to the Cashier, and that this past treatment of the workman had contributed in no small measure to the workman's misconduct. While holding that there was neglect of duty on 1.1.75. and that the workman was guilty of misconduct on 12.5.75. which would undermine discipline at the work place, yet on account of mitigatory circumstances, he held the termination was unjustified, and ordered two years salary amounting to Rs. 17,616/- as compensation and Rs. 400/- as costs.

On the facts, I am not disposed to interfere with the findings made by the President of the Labour Tribunal. It seems to me that he has ordered compensation on the ground that, having regard to the mitigatory circumstances, dismissal was too harsh a punishment. The learned attorney-at-law, however, raised a point of law. He

submitted that the order made by the President that the proceedings in the case should continue against the respondent-appellant; on the death of C.V. de Silva, is wrong in law. Hence the order that Savoy Theatres Ltd. should pay compensation to the workman is one made without jurisdiction. I am inclined to uphold this submission.

The workman named C.V. de Silva as his employer, in his application for relief. C.V. de Silva filed answer as employer. The proceedings, till C.V. de Silva died, were conducted on the basis that he was the employer. Learned Senior Attorney, however, referred us to the evidence of C.V. de Silva where he admitted that he was the Managing Director of Savoy Theatres Ltd. He also referred us to the answer filed by him, which is headed "Savoy Theatres Ltd."; the address of the registered office is also given. The Managing Director is stated to be C.V. de Silva. I also find that the telegram (R1) sent by the workman requesting leave was addressed to the Managing Director. The show cause letter (R2) does not have the writer's name, but it is C.V. de Silva's evidence that it was he who sent the letter; the letter by the workman showing cause (R3) was addressed to the Managing Director. The letter (R5) asking the workman to attend an inquiry and setting out the charges does not show who wrote it; it is C.V. de Silva's evidence that he sent it. The letter (R6) amending one of the charges has been signed by "C.V. de Silva, Managing Director." The workman's letter (R8) threatening legal action was addressed to the Managing Director. The letter terminating the workman's services (R9) does not have the sender's name; C.V. de Silva stated that he sent it. The letter (R10) by the workman was addressed to the Managing Director and was replied to by "C.V. de Silva, Managing Director".

The definition of "Employer" in s. 48 of the Industrial Disputes Act contains three categories of employers. The workman selected and designated "C.V. de Silva, Savoy Theatres Ltd." as his employer, in his application to the Tribunal for relief. It was therefore an application for relief against C.V. de Silva, personally. Even if the application for relief was made against "C.V. de Silva, Managing Director, Savoy Theatres Ltd.", it seems to me, the position would not have altered; the application would still be one made against him personally and if he were alive, any order granting relief would have made C.V. de Silva personally liable. As was pointed out by Tennekoon, J. in *Carson Cumberbatch & Co. Ltd. v. Nandasena* (1) the person referred to as a person employing a workman in each of the three limbs of the definition of 'Employer' is intended to refer

to a person who is under contractual obligation to the workman. Even an agent can render himself liable by personally entering into a contract of employment.

In *Arnolda v. Gopalan* (2) the workman claimed wages, compensation and gratuity from the widow of the employer, who was dead at the time of the application. At the inquiry, the widow agreed to pay a certain sum of money to the workman on behalf of the estate of the deceased employer, and the Tribunal ordered the widow to pay the agreed sum. Proceedings were commenced in the Magistrate's Court and the Magistrate ordered the widow to pay the said amount. The Supreme Court set aside the order of the Magistrate, on the ground that the Tribunal had no jurisdiction to make an order compelling the widow of the deceased employer, to pay the claim of the workman.

Tambiah, J. observed (pgs. 156, 157)–

“The scope and ambit of the amended Industrial Disputes Act is to give relief or redress to a workman who is in a position to make an application before the Labour Tribunal against his employer or ex-employer who is alive at the time of the application. The Labour Tribunal derives its jurisdiction from the amended Industrial Disputes Act. Its powers, as well as its jurisdiction, has to be looked for within the four corners of this statute and 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. The counsel for the respondent was unable to refer me to any provision in the amended Industrial Disputes Act which enables an employee to make an application of this nature against the widow of a deceased employer.” “It is significant that the Industrial Disputes Act does not impose any liability on the executor, personal representative or the executor de son tort of a deceased person for his debts or liabilities.”

The effect of the decision in *Arnolda's* case (2) is that a Labour Tribunal has no jurisdiction to make an order against an employer who has died before proceedings have commenced before it. The deceased employer's obligation or liability ends with his death; it does not pass on to others.

It appears to me that the position would be the same if the employer has died during the pendency of the proceedings before the Labour Tribunal. So that, whether the employer died before proceedings commenced or while the proceedings were pending, his obligation and liability as employer comes to an end. I do not find, nor was this Court referred to, any provision in the Industrial Disputes Act which provides for the continuation of the proceedings, on the death of a party. A deceased employer's heir cannot be substituted and on his death the proceedings will have to come to an end.

In *The Superintendent, Deeside Estate, Maskeliya v. Ilankai Thozhilar Kasakam* (3), the workman applied for relief and named the "Superintendent, Deeside Estate, Maskeliya" as his employer. Siva Supramaniam, J. held that the Labour Tribunal can only make an order against a natural or legal person and that an order for reinstatement with back wages against the "Superintendent", is unenforceable, as the office of Superintendent is not a legal person.

In *The Manager, Ury Group, Passara v. Democratic Workers' Congress* (4), the party who was made respondent to the application and against whom the order was made was, "The Manager, Ury Group, Passara." Samerawickrame, J. held that where the name of the employer-respondent has not been stated, but the identity of the person can be sufficiently known from his designation or description, the caption in the pleadings may be suitably amended so as to satisfy the requirement that a Labour Tribunal's order can only be made against a natural or legal person. He directed that the caption in the pleadings and the order of the President, Labour Tribunal, be amended by stating the employer to be the person holding the office of Manager. He observed that there should not be the same insistence on the proper naming of the respondent as there should be, for example, in the case of an application made to a Court of law.

Learned Senior Attorney relied on the judgment of Samerawickrame, J. to justify the substitution effected in the instant case. I cannot see how this judgment can assist him. In the said case the "Manager" was neither a natural or a legal person. In order to make the order an enforceable one, Samerawickrame, J. amended the caption by inserting the name of the natural person who was the holder of the office. The identity of the person he was able to discover from a perusal of the proxy. In the present case, a new party, a legal person, has been substituted in place of a natural person and the effect of the substitution was to constitute the application a new one.

The view taken by Samerawickrame, J., however, was not followed by Wijayatilake, J. in *The Superintendent, Nakiadeniya Group, v. Cornelishamy* (5) and he preferred to follow the decision in *The Superintendent Deeside Estate, Maskeliya v. Illankai Thozhilar Kasakam* (3) and held that where the Tribunal has made an unenforceable order, an amendment cannot be effected in appeal. On account of the conflicting decisions of the Supreme Court, s. 51, was enacted in 1968 which enables a workman to apply for relief against the "Superintendent" or "Manager" without the addition of a name, if such Superintendent or Manager is his employer.

Learned Senior Attorney contended that Savoy Theatres Ltd. had participated in the proceedings before the Labour Tribunal. It has also exercised the right of appeal given to an employer under s.31 of the Act. It cannot take advantage of a right given to an employer and at the same time say that it is not the employer. It cannot approbate and reprobate. I am unable to accept this submission.

In *Arnolda's* case (2) the argument that Mrs. Arnolda had appeared before the Labour Tribunal and had consented to pay the workman and therefore had acquiesced in the proceedings, was rejected by Tambiah, J. He observed that consent cannot give jurisdiction and that the mere fact that the petitioner appeared before the Tribunal and had consented to pay a sum of money, does not confer jurisdiction, when it has, in fact, no jurisdiction conferred on it by statute law.

The workman first sought to substitute the daughter of the deceased employer. She objected to the substitution and stated, inter alia, that if Savoy Theatres Ltd. or she were substituted in the place of the deceased, the application by the workman would become a fresh application and would stand prescribed as against the substituted party. On the motion filed by the workman, the Labour Tribunal then made order that Savoy Theatres Ltd. be substituted. It is not clear whether the substituted party had notice before the order was made for its substitution. The substituted party had no option but to partake in the inquiry. The Industrial Disputes Act does not provide for interlocutory appeals. The only remedy it had in order to correct the wrong order of substitution, was by way of appeal.

In the case of *Winter v. Ceylon Estate Staffs' Union* (6) the workman in his application named three persons as his employers and made them respondents. The President, Labour Tribunal, held in his order that the workman was employed by a Company but yet made his award against the said respondents. One of the respondents appealed and was able to have the order of the Labour Tribunal set aside, in appeal.

Learned Senior Attorney relied on the case of *Gafoor v. Almeida* (7) and submitted that a succeeding employer can be attached with the liabilities of a preceding employer. In this case one of the questions that arose for decision was whether, if there is a change in the composition of the partnership by the introduction of a new member, the new partnership would be responsible for the liabilities of the old partnership in respect of payments due to the workman as gratuity, provident fund payments, etc. Weeramantry, J. applying the principles governing such matters in Partnership Law, held that in the circumstances of the case, there was both an express and an implied assumption by the new partnership of the liability of the old partnership towards the workman, in regard to his earlier period of service under the old partnership. I cannot see what relevance this case has to the present case before us.

I set aside the order of the President of the Labour Tribunal, dated 13th July, 1978. Having regard to all the circumstances in the case, I make no order as regards costs.

G.P.S. DE SILVA, J. - I agree.

Appeal allowed.