

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

In the matter of an application for Mandates
in the nature of Writs of Certiorari and
Mandamus in terms of Article 140 of the
Constitution.

S.P. Morawaka,
Liquidator,
Janatha Fertilizer Enterprise Limited,
19, Dhawalasingharama Mawatha,
Colombo 15.

Petitioner

Court of Appeal case

No. CA 152/2015 Writ

Vs.

1. Commissioner General of Labour,
Department of Labour,
Labour Secretariat,
Colombo 05.
2. Assistant Commissioner of Labour,
(Colombo North),
District Labour Office, 4th Floor,
Labour Secretariat,
Department of Labour,
Colombo 05.
3. Labour Officer,
District Labour Office,
Department of Labour,
Anuradhapura.
4. Assistant Commissioner of Labour,
District Labour Office,
Anuradhapura.

5. D.K. Wijesundara,
No. 7413,
Freeman Mawatha,
Anuradhapura.
6. Assistant Secretary (Administration),
Ministry of Agriculture,
“Govijana Mandiraya”,
Battaramulla.

Respondents

Before : A.L. Shiran Gooneratne J.

Counsel : D.H. Siriwardena for the Petitioner.

Jayasinghe, SC for the Respondents.

Written Submission on : 02/02/2018

Judgment on : 02/05/2018

A.L. Shiran Gooneratne J.

Parties have agreed that the Judgement will be delivered by Hon. A.L. Shiran Gooneratne, J

The Petitioner, the Liquidator of Janatha Fertilizer Enterprises limited (hereinafter sometimes referred to as the Liquidator) inter alia, is seeking to quash the determination of an award dated 25/8/2014, made by the 2nd Respondent (Assistant Commissioner of Labour) embodied in document marked P21, dated 9/10/2014.

The relevant facts briefly are as follows;

The 5th Respondent (D.K. Wijesundara) complained to the 2nd Respondent that Janatha Fertilizer Enterprises Limited (herein after sometimes referred to as JFEL) has defaulted in making contributions as required, under the Employees Provident Fund Act No. 15 of 1958. Subsequent to an inquiry, the 2nd Respondent held that JFEL is liable to pay a sum of Rs. 2,136,415.50 to the 5th Respondent. JFEL was subjected to a voluntary winding up proceeding and by special resolution in Gazette Notification dated 25/10/2013, marked X, the Petitioner was appointed as Liquidator.

By document dated 9/10/2014, marked P21, the 2nd Respondent informed the Liquidator to make the said payment to the 5th Respondent in his capacity as Liquidator.

The Petitioner objecting to the enforcement of the said determination of award as contemplated in P21, inter alia, contends that the said award does not bind the Liquidator and the Liquidator cannot be personally liable to the workman concerned and therefore the said order has been made in violation of the law and without legal authority. In support, the Petitioner has cited the case of *Latif vs. Fernando (1978) 79 NLR page 89*.

The last paragraph of document marked P21 states,

“නැවත වරක් ඔබ වෙත මා දැනුම් දී සිටින්නේ මෙම පැමිණිලිකරුට ගෙවීමට නියමිත හිඟ සේවක අර්ථසාධක අරමුදලේ මුදල ගෙවීමට කටයුතු කරන ලෙසයි. එසේ කිරීමට අපොහොසත් වුවහොත් ඔබවද පාර්ශවයක් කර මහේස්ත්‍රාත් අධිකරණයේ මුදල අයකර ගැනීම සඳහාද නීති මගින් කටයුතු කිරීමට සිදුවන බවද කාරුණිකව දැනුම් දෙමි.”

The Counsel for the Petitioner contends that the inquiry held by the 2nd Respondent which is embodied in the letter marked P21, was held in an informal manner and no proceedings were made available to the Petitioner. This Court was not apprised of the said inquiry proceedings even though, the Respondents reserved their right to submit the relevant documents to this court at the argument stage. The Petitioner's undertaking to court to produce certified copies of the said proceedings has also not been met. Therefore, this court cannot look into the merits or the findings of the said inquiry. However taking into consideration Document marked P21, the court can make a determination as to the liability of the Petitioner, Liquidator, in his capacity as Liquidator to make good the award of the Labour Commissioner.

The State Counsel appearing for the 1st to 4th and 6th Respondents is objecting to this application on the basis that the 5th Respondent in his capacity as a fertilizer commission agent and an area coordinator was an employee of JFEL and therefore comes within the definition of an employee in terms of the Employee's Provident Fund Act No. 15 of 1958 (EPF Act) and therefore is entitled to draw benefits under the said Act.

According to the penultimate paragraph of P21, an award has been made against JFEL to pay a sum of Rs. 2,136,415.50 as default EPF payment to the 5th Respondent. By document marked P21, the 1st Respondent has informed the Petitioner that he is also liable to make the default payment in his capacity as the Liquidator. In P12, the 2nd Respondent has clearly communicated to the Petitioner that in the event JFEL fails to satisfy the award made in terms of the said Act the Petitioner would be held liable together with others in proceedings to be instituted in the Magistrate's Court.

The Petitioners concern is that of the liability to the default payment in his capacity as Liquidator of JFEL and not that of the company, (JFEL) which is under Liquidation. Therefore, the Judgement of this Court would be limited to the determination of legality of enforcement of the award by the 2nd Respondent against the Petitioner Liquidator.

Initiated by the members of JFEL, the said company has adopted a resolution for a Members Voluntary Winding Up in terms of Section 319 (1) of the Companies Act No. 7 of 2007. In Members Voluntary Winding up, the Liquidator is appointed by a resolution at a General Meeting and the powers of the Directors cease upon the appointment of a Liquidator except so far as the company in general meeting or the Liquidator sanctions the continuance of the powers. (Section 326(2) of the Companies Act) In every voluntary liquidation, the Liquidator must apply the property of the company first in paying the preferential

debt, (Section 365 of the Companies Act) and then in discharging the liabilities of the company pari-passu (Section 343 of the Companies Act). Also in terms of Section 343 of the Companies Act, in every voluntary winding up, it is the duty of the Liquidator to pay the debts of the company and adjust the rights of the contributories among themselves.

In the case of *Latif vs. Fernando*, 78 NLR 89 at page 90, the Supreme Court has considered the effect of an award directing the company as well as its liquidator to deposit certain amounts with the Assistant Commissioner of Labour. Held,

“That a liquidator of a company which is being wound up cannot be personally liable for the obligations of the company and no award under the Industrial Disputes Act could have been made against him by the Arbitrator.”

It was also held that,

“The liquidator assumes all the functions of the directors, but in the performance thereof he is charged with certain special statutory duties of collecting and realizing the Company’s assets and discharging its debts and liabilities. He is given wide powers for the purpose of winding up the Company’s affairs and distributing its assets. The property of the company does not vest in him; the company continues in existence and he administers the affairs of the

company on behalf of the company. Before a resolution to wind up voluntarily is passed, the management of the company is in the hands of the officers, the directors; after such a resolution, it is in the hands of its agent, the liquidator and the Company, acting by its agent, the liquidator, carries out its obligations towards its employees.”

In the case of ***East West Research and Design (PVT) LTD. Vs. Weerakoon, Commissioner of Labour (1993) 1 SLR 191*** the Court held,

“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.

Therefore, it is abundantly clear that a liquidator performs a statutory duty in collecting the company’s assets and discharging its debts and liabilities and in the execution of such statutory rights would not be liable for any obligations of the company once liquidation has begun.

Therefore, in all the above circumstances, the relief prayed for in Paragraph (d), (erroneously stated as paragraph (b) to the prayer) is granted, limited to the finding, that the Petitioner in his capacity as liquidator, cannot be made personally liable to the default payment as contemplated and embodied in the last paragraph

of the impugned document marked P21, to an action to be instituted in the Magistrate's Court pertaining to the industrial dispute in question.

I order no costs.

JUDGE OF THE COURT OF APPEAL