IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under and in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Assistant Commissioner of Labour

(Termination),

Department of Labour,

Colombo 05.

APPLICANT

SC / APPEAL / 34 / 2011

SC / SPL / LA / 36 / 2011

CA / PHC / APN / 183 / 2003

HCRA / 381 / 2003

MC / Mount Lavinia / 25223

-Vs-

Cupid Industries,
No. 12. 1st Cross Street,
Kandawala Road,
Rathmalana.

RESPONDENT

AND BETWEEN

1. **Dionisius Arjuna Dias**,
   (Former Chairman Cupid Industries)
   No.14, Charles Place,
   Colombo 03.
2. **Piero Ramesh Dias,**

(Former Director, Cupid Industries),
No.14, Charles Place,
Colombo 03.

RESPONDENT – PETITIONERS.

Vs.

1. **Assistant Commissioner of Labour (Termination),**
   Department of Labour,
   Colombo 05.

2. **Cupid Industries,**
   No. 12. 1st Cross Street
   Kandawala Road,
   Rathmalana.

3. **G.J. David**
   (Liquidator of Cupid Industries)
   C/o M/s. Someswaran Jayawickrema and Company,
   No. 222, Galle Road,
   Colombo 04.

4. **P.E.A. Jayawickrama**
   (Liquidator of Cupid Industries)
   C/o M/s. Someswaran Jayawickrema and Company,
   No. 222, Galle Road,
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RESPONDENTS – RESPONDENTS – RESPONDENTS – RESPONDENTS

Before: E.A.G.R. Amarasekara, J,
Yasantha Kodagoda, PC, J &
A.H.M.D. Nawaz, J

Counsel: Uditha Egalahewa, PC with Amaranath Fernando & Shenal Fernando
For the Respondent – Petitioner – Petitioner – Appellants.
Nirmalan Wigneshwaran, DGS for the Applicant – Respondent – Respondent – Respondent.
Rajindra Jayasinghe with Rhadeena De Alwis for the 2nd, 3rd & 4th Respondent – Respondents.

Argued on: 05.06.2023

Decided on: 16.06.2025

A.H.M.D. Nawaz, J

1. This case raises an important question in labour law: whether the Directors of a Company who otherwise and voluntarily assumes the Company's liability by admission may subsequently resile from such assumption in proceedings culminating in this appeal. The factual matrix surrounding this matter, which now falls for consideration before this Court, warrants careful examination.

2. The liability that is now sought to be impugned arose in the following manner. There was an application made by the 2nd Respondent Company (Cupid Industries) to the Commissioner of Labour to terminate the services of 134 employees in 1995. The Appellants in this case were Directors of the 2nd Respondent Company, whose line of business was in the apparel industry for the export market. At the end of an inquiry the Commissioner of Labour determined that a sum of Rs. 3,431,880 must be paid to the said employees on or before 30 September 1995.

3. The Company failed to honour this payment obligation imposed by the Commissioner of Labour. Instead, the determination of the Commissioner was challenged in a writ application bearing No. 773/96 which was however dismissed by the Court of Appeal. Special leave to appeal was refused by the Supreme Court in SC/SPL/LA/505/96.

4. Thus, the determination of the Commissioner of Labour to pay compensation remained an outstanding obligation which was not met even by May 1997. As a result, on 23 April 1998 Magistrate's Court proceedings were initiated by the Commissioner of Labour on the basis that the Company and its Directors had committed an offence under **Section 7 of the Termination of Employment Workmen (Special Provisions) Act No.45 of 1971 (TEWA)**. This was an application made to the Magistrate's Court of Mount Lavinia for the recovery of the sums ordered in April 1998.

5. The Company was asked to show cause by 19 June 1998. It is a salient feature of this case that **one day before** the show cause date namely 18 June 1998 winding up proceedings were filed in relation to the Company in the District Court of Colombo.

6. On 19 June 1998 – the day on which the Directors were asked to show cause they moved for time to file written submissions. It has to be noted that though the winding up application had been made in the District Court on 18 June 1998, it was not notified to the Magistrate on 19 June 1998. The existence of a winding up application was brought home to the Magistrate for the first time only in the written submissions filed on 14 August 1998.

7. The Magistrate, after having afforded the Appellant Directors an opportunity to show cause at the aforesaid inquiry, made order on 3 September 1999 **(marked P2),** finding the accused guilty of the offence. The Magistrate imposed compensation in the nature of a fine and further imposed a default sentence of imprisonment.

8. In other words, the learned Magistrate sentenced each director to a term of one year's simple imprisonment in default of payment of compensation. This order was made in terms of **Section 9 of TEWA**. The said provision reads as follows;

> ***Section 9 – Special provisions in respect of offences committed by bodies of persons.***
>
> *Where any offence under this Act is committed by a body of persons, then—*
>
> *(a) if the body of persons is a body corporate, every director and officer of that body corporate shall be deemed to be guilty of that offence;*
>
> *(b) if the body of persons is a firm, every partner of the firm shall be deemed to be guilty of that offence;*

(c) if body of persons is a trade union, every officer of that union shall be deemed to be guilty of that offence; and

(d) if the body of persons is a body, unincorporate other than a firm or a trade union, the President, Manager, Secretary and every officer of that body shall each be deemed to be guilty of that offence:

Provided, however, that no such person shall be deemed to be guilty of an offence under this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of that offence.

9. It has to be observed that the Directors themselves were found guilty of the offence on 3 September 1999 and this order of the Magistrate exposed the Appellant Directors to a default sentence of imprisonment.

The first revision application to the High Court.

10. The Directors moved the High Court of the Western Province against the Magistrate's order but the High Court affirmed this order and rejected the revision application filed by the Appellant Directors on 7 January 2002 – **P3.** In other words, the Magistrate's order dated 3 September 1999 **(P2)** was affirmed by the High Court on 7 January 2002 by **P3.**

11. In the course of his order the learned High Court judge stated *inter alia* as follows;

The accused appeared in Court on 23.4.1998. The accused was asked to show cause on or before 19.6.1998. The winding-up proceedings were filed one ***day before 19th****, namely on 18.6.1998 in the District Court. On 19.6.1998 the accused moved for time to file written submissions without any reference to the winding up case filed. In the written submissions filed on 14.8.1998 the accused informed Court for*

*the **first time** that 5138/Spl had been filed to wind up the accused company and moved to stay the action under Section 259 of the Companies Act.*

On the above facts, it becomes apparent that this winding up action was a frivolous action filed merely to defeat the purpose of the law….

12. Thus, one could reiterate the aforesaid timelines. The order of the Commissioner to pay compensation was made on 18 September 1995. The Company was asked to pay on or before 30 September 1995. The attempt to challenge the determination of the Commissioner went all the way to the Supreme Court and the attempt proved abortive with the Supreme Court refusing leave in 1997.

13. In the end, the Commissioner caused the Company and its Directors to be summoned before the Magistrate's Court for the purpose of enforcing compliance with his order. Upon inquiry, the Magistrate found them guilty of non-compliance and proceeded to make order accordingly on 3 September 1999. The order was one of conviction that resulted in a default term of imprisonment **(P2)**. That order was thereafter affirmed by the High Court by its judgment dated 7 January 2002 **(P3).**

14. It is in this enforcement action in the Magistrate's Court that the existence of the winding up application which had been filed on 18 June 1998 was brought to the notice of the Magistrate in the written submissions filed by the Appellants on 14 August 1998. Thus, there was a suppression of this winding up application when the accused first appeared in Court on 19 June 1998 to show cause and moved for time to file written submissions.

15. There should have been a disclosure of the winding up application on 19 June 1998, when in fact the winding up application had been made on 18 June 1998. The application to stay the enforcement proceedings in the

Magistrate's Court was made quite strangely only in the written submissions on 14 August 1998 – almost after the expiry of two months from the date of the so-called winding up application.

Can the winding up proceedings stay the enforcement action in the Magistrate's Court?

16. Both the learned Magistrate and the High Court judge, Hon. Eric Basnayake (as he then was) rejected the argument of the Directors that the enforcement proceedings in the Magistrate's Court should be stayed by virtue of the winding up application made in the District Court.

17. This was the 1st revision application which the Directors attempted against the enforcement proceedings. A winding up application filed just a day prior to the date of show cause inquiry was invoked for the purpose of staying the enforcement proceedings and the learned High Court judge describes it as a *frivolous action filed merely to defeat the purpose of the law.*

18. Whether the institution of winding up proceedings by the Directors—possibly set in motion with a view to deferring the payment of debts owed to employees—could operate to stall the proceedings before the Magistrate's Court, which had culminated in an order of payment enforceable by imprisonment for non-compliance, is a matter of some significance. This issue, which recurs throughout the proceedings, will be addressed more fully in the course of this judgment, as it pervades both the 2nd revision application and the appeal presently before this Court.

19. The circumstances that gave rise to the 2nd revision application merit a brief narrative, for they shed light on the procedural trajectory that has brought this matter before us.

2nd revisionary application and the instant appeal before this Court.

20. I have already made reference to the 1st revisionary application wherein the learned High Court judge Eric Basnayake rejected the application for a stay of the enforcement proceedings in the Magistrate's Court. He affirmed the Magistrate's order finding the accused guilty and the sentence of imprisonment of the Directors for non-compliance with an obligation that was imposed on the Company as far back 1995. As could be seen, It was on 3 September 1999 that the accused were found guilty. When the 1st revisionary order made by Hon. Eric Basnayake was remitted back to the Magistrate's Court, the learned Magistrate issued summons on the 1st Respondent Company, but by then it had closed its head office and another firm was operating from the said address.

21. However, on 27 June 2003 the Commissioner of Labour tendered a list of Directors of the Company and the learned Magistrate issued notice on the Directors (the Appellants).

22. What is particularly striking to this Court is the conduct of the Appellant Directors in response to the summons. When they appeared before the Court on 25 July 2003 and requested a two-week extension to settle the dues, this act clearly indicated an unambiguous acknowledgment of their obligation to pay the employees. Such a request amounts to an implicit acceptance of the Magistrate's order dated 3 September 1999, which had already been affirmed by the High Court in the 1st revision application.

23. There was, therefore, a clear and unequivocal affirmation by the Directors of their personal liability. Having thus acknowledged the liability—originally incurred as far back as 1995 and later crystallized into a judicially enforceable order in 1999 consequent to their non-compliance—it is difficult to comprehend the propriety of the Appellants' subsequent conduct. Notwithstanding their express admission, the

Appellants proceeded to file a 2nd revision application before the High Court of the Western Province, seeking to impugn the very order that reflected their acceptance of liability. This application was, quite correctly, refused by the High Court Judge S. Srikandarajah (as he then was) on 6 August 2003.

24. Such conduct on the part of the Appellants—asserting liability in one forum and thereafter seeking to challenge the same in another—cannot be countenanced. It strikes at the integrity of the judicial process and, in my view, constitutes an abuse of process. A party cannot be permitted to approbate and reprobate in the same breath by affirming an obligation in one proceeding and disavowing it in another before a superior Court – ***Allegans Contraria Non Est Audiendus*** – {He is not to be heard who alleges things contrary to each other} and quoting a judgment, **Broom's Legal Maxims** illustrates the maxim in following words:

> " *We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or in at different times, on the truth of each of the conflicting allegations, according to the promptings of his private interest",*[1]

25. Having failed in the 2nd revision application, the Appellants preferred an appeal to the Court of Appeal and Justice Sisira de Abrew dismissed the appeal of the Appellants holding *inter alia* as follows;

> *On 25.7.2003 when the learned Magistrate was going to implement the order dated 3.9.1999 (P2), the petitioners accepted the validity of the said order and moved for time to pay the entire amount. Vide P8. The petitions having accepted the validity of P2 before the learned Magistrate challenged the same in these proceedings. In my view a party which accepts the validity of a judicial order before a Court of Law, cannot later*

[1] 11th Edition, p 115.

challenge the validity of the same before another Court. In granting relief in a revision application, the Court must examine the conduct of the petitioner. The Petitioners, on 25.07.2003, having accepted the validity of the order marked P2 moved for time to pay the amount stated in the said order. The learned Magistrate granted time. But later they, in the High Court, challenged the very order which granted them time. It is therefore seen that the intention of the petitioners on 25.7.2003 was to hoodwink the Magistrate and obtain time to challenge the order allowing their own application. The revision being a discretionary remedy will not be available to a party who displays this kind of conduct. This view is supported by the judicial decision in Perera v. Peoples Bank BALJ 1995 part 1 page 12 wherein His Lordship GPS de Silva CJ held that: "revision is a discretionary remedy and the conduct of the petitioners is a matter which is intensely relevant for the granting of such relief."

For these reasons I hold that a party which attempted to hoodwink a Court is not entitled to claim relief under revisionary powers of this Court.

26. It is from the judgment of the Court of Appeal that this appeal was made to this Court. The protracted and labyrinthine course that the payment obligation — originally imposed by the Magistrate as far back as 1999 — has taken through the nooks and crannies of the legal system is difficult to articulate in a mere summation. It is for this reason that I have set out, at the outset, a detailed narration of the factual background. The legal issues that surface to the fore in this appeal cannot be meaningfully examined without first disentangling the factual matrix from which they arise.

27. I now proceed to consider the legal issue that has resurfaced at multiple stages in the course of these proceedings. The core of the contention centres on the applicability of Sections 259 and 264 of the Companies Act, No. 17 of 1982, which constitute the substantive law governing the matter presently before this Court.

Sections 259 and 264 of the Companies Act of 1982

28. The principal contention advanced by the Appellants is that Sections 259 and 264 of the Companies Act of 1982 operated to preclude the proceedings against the Directors. The aforesaid provisions go as follows;

Section 259 **–**

At any time after the presentation of a winding up petition, and before a winding up order has been made, the company, or any creditor or contributory, may

(a) where any action or proceeding against the company is pending in any Court in Sri Lanka, make an application to the Court in which such action or proceeding is pending for a stay of proceedings therein; and

(b) where any other action or proceeding is pending against the company, make an application to the Court having jurisdiction to wind up the company to restrain further proceedings in such action or proceeding,

and the Court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such, terms as it thinks fit

Section 264 **–**

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.

29. Before one analyzes these two provisions to ascertain whether the winding up application *ipso facto* precludes the action against the Company, the material facts have to be borne in mind. The liability of the Directors (the Appellants) came about via two sources. One, is the deeming provision found in Section 8 of the Termination of Employment of Workmen (Special Provisions) Act (TEWA) that deemed them guilty. The fact that the institution of the winding up proceedings would not preclude the deeming provision to come into operation was emphasized by the learned High Court judge on 07.01.2002 when he dismissed the 1st revisionary application filed by the Appellants **(P3)**. In other words, the conviction of the Directors by way of the deeming provisions **(P2)** was affirmed by the High Court judge in **P3**. Put differently, **P2** imposed personal liability on the Directors. Such an imposition of personal liability cannot be assailed now as **P2** has been validated by **P3**. It has to be recalled that the winding up application was described as frivolous and the corollary follows. This sham of an action could not have precluded the personal liabilities of the Directors arising as it is quite clear that the winding up applications filed by two persons, friendly hands or otherwise has been dismissed by the High Court as a facade.

30. Secondly, there is another way in which the personal liability of the Directors arose. In the first instance, the Magistrate Court imposed it on 03.09.1999 but in this instance of the 2nd way, the Directors themselves imposed the liability on them by voluntarily assuming it in the course of the Magistrate's Court proceedings on 25.07.2003. These two sources constitute the emergence of the personal liability of the Directors. In the overall emergence of this personal liability, it is crystal clear that the existence of the winding up application is not a relevant consideration. In other words, there was both an *imposition of personal liability as well as an assumption of personal liability*. Both arose after the institution of the winding up proceedings and

it is independent of the existence of the winding up proceedings.

31. In any event, what the two provisions of the Companies Act prohibit is the continuation of an action against the Company but not against the Directors. The liability in this case crystalized against the Directors regardless of the filing of the winding up proceedings when the liability of the Company arose as far back as 1995 and it became the liability of the Directors as from 03.09.1999. A voluntary assumption of this liability apart from the Court imposed obligation occurred on 25.07.2003.

32. Sections 259 and 264 could not operate so as to nullify this liability as the winding up application was a clever contrivance designed to keep at bay the compensation that had been ordered as far back as 1995. In corporate law it would be an abuse of process to organize the affairs of a Company if the cause of action had arisen long before the organization of the affairs takes place. It is quite clear that such an attempt partakes of an intention to defraud the creditors and the winding up proceedings filed just before the Company was due to show cause was a facade and a sham - ***Adams v. Cape Industries Plc***[2]**.**

33. I take the view that Section 264 only prohibits proceedings against the Company and not against the Directors and as such is not of any aid to the Appellants. However, in any event, it should be noted that at the time the order **P2** was made on 3 September 1999, a winding up order had not been made. As **P4** demonstrates the order was made only on 22 September 2003. Thus, at the time of **P2**, there was no obligation on the part of the Magistrate to stay proceedings. **P2** thus remains unassailable (and indeed it has not been challenged in these proceedings). **P2** embodying the conviction of the Directors and the consequent sentence against them which was affirmed by **P3, remains valid and effectual** up to date.

[2] 1990 (Ch) 547

34. Accordingly, there is no error in the judgement of the Court of Appeal and the High Court. I proceed to answer the questions of law in favour of the Respondents as follows;

- *Did the Learned Judges of the Court of Appeal and the High Court err in law by failing to consider that the Attorney-at-Law on behalf of the 3rd and 4th Respondents at no time declined to pay the said monies but only informed the Learned Magistrate that the Company was under liquidation and steps would be taken to make such payments in terms of Order marked P2?*

In view of our holding that the Company and the Directors were validly convicted and their liability was imposed by judicial orders, it is irrelevant to consider the statement made on behalf of the 3rd and 4th Respondents. Therefore, this question of law is answered against the Appellants.

- *Did the Learned Judges of the Court of Appeal and High Court err in Law when their Lordships failed to consider as per section 264 of the Companies Act, No. 17 of 1982 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?*

In view of our conclusion that S.264 of the Companies Act of 1982 will not prohibit an action against the Directors as a result of the questionable nature of the winding up proceedings, this question has to be answered in the negative.

- *Did the Learned Judges of the Court of Appeal and the High Court err in Law when their Lordships failed to consider that there has to be default on the part of the Company prior to summoning of its Directors?*

There was indeed a default on the part of the Company on 30 September 1995 that has lasted up to date. The frivolity and façade of the winding up application did not effect a

suspension or defeasance of the liability of the Company and consequently the Directors became liable when there was failure by the Company to meet its obligations towards the employees. Both the Company and Directors were convicted and their conviction has not been vacated by a superior Court. Thus, there was default on the part of the Company and consequently there was a crystallization of the Directors' liability. Therefore, this question of law is answered against the Appellants.

- *Did the Learned Judges of the Court of Appeal and High Court err in law when they failed to correct errors on the face of the record in both revision applications before the High Court and the Court of Appeal?*

In view of the aforesaid holding, this question of law must be answered in the negative.

35. Having thus answered the questions of law, I affirm the judgements of both the Court of Appeal and the High Court.

36. In addition, the learned Deputy Solicitor General for the Respondent raised three preliminary objections chief among which is the non-maintainability of this appeal he claimed would be the outcome as a result of the failure of the Appellants to challenge the findings of the Court of Appeal on the conduct of the Appellants in the revision application. It is true that the conduct of the Appellants in the 2nd revision application was critiqued by the Court of Appeal as an attempt to hoodwink the Magistrate. The learned Deputy Solicitor General argued that the failure to challenge that finding disentitles the Appellants to maintain this Appeal that flows from the 2nd revision application. I would agree that this preliminary objection is entitled to succeed and in any event in view of the fact that we have answered the questions of law against the Appellants we would not indulge in an analysis of the preliminary objections.

37. In view of the long and protracted proceedings embarked upon by the Directors which resulted in 134 employees being deprived of their compensation, this Court

deems it appropriate that it would serve the interest of justice that the Appellants should be ordered to pay the sum of Rs. 3,431,880 with legal interest from 03.09.1999.

38. We affirm the judgements of the Courts below and proceed to dismiss the appeal of the Appellants. The Commissioner of Labour is directed to recover the aforesaid sum ordered in paragraph 37 and defray them without delay.

39. The Registrar is directed to dispatch the judgement to the relevant Court for enforcement.

Judge of the Supreme Court

E.A.G.R.Amarasekara, J **Judge of the Supreme Court**

I agree

Yasantha Kodagoda, PC, J **Judge of the Supreme Court**

I agree