

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

In the matter of an Appeal with Special Leave to Appeal granted by Supreme Court under Article 128 read with Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 22/2012

SC.(Spl) LA. No. 12/2011
C.A. (Writ) Application No.99/2006

Mercantile Investments Ltd.,
236, Galle Road, Colombo 03.

Petitioner

Vs.

1. J.A. Sumith Adhihetty,
No. 1, Cambridge Terrace.
Colombo 7.
2. Mahinda Madihahewa,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat, Colombo 05.
3. Minister of Labour
Department of Labour,
Labour Secretariat, Colombo 05.
4. T. Piyasoma Esq.,
The Arbitrator,
9th Floor, Industrial Court,
Department of Labour,
Labour Secretariat, Colombo 05.

Respondents

And Now Between

J.A. Sumith Adhihetty,
No. 1, Cambridge Terrace.
Colombo 7.

Respondent-Appellant

Vs.

Mercantile Investments Ltd.,
236, Galle Road, Colombo 03.

Petitioner-Respondent

1. Mahinda Madihahewa,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat, Colombo 05.
2. Minister of Labour
Department of Labour,
Labour Secretariat, Colombo 05.
3. T. Piyasoma Esq.,
The Arbitrator,
9th Floor, Industrial Court,
Department of Labour,
Labour Secretariat, Colombo 05.

Respondent-Respondents

BEFORE : **Eva Wanasundera, PC. J**
Upaly Abeyratne, J. &
Anil Gooneratne, J.

COUNSEL : I.S.de Silva with Deeptha Perera for the Respondent-Appellant.
Nigel Hatch PC. with Ms. S. Illangage for the Petitioner-Respondent.
Mrs. Murdu Fernando, PC. ASG. With Rajitha Perera for Respondent-Respondents.

ARGUED ON : **03.12.2015**

DECIDED ON : **15 .02.2016**

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EVA WANASUNDERA, PC.J.

In this matter, this Court granted Special Leave to Appeal on 30.01.2012 on the questions of law set out in paragraph 39(a) to (c) of the amended Petition dated 06.07.2011. They are as follows:-

- 39(a) Have the Learned Judges of the Court of Appeal misdirected themselves in law when they proceeded to hold that as the Petitioner had claimed to be in the employment of the Respondent at the time of referred to arbitration the said reference was bad in law?
- (b) Have the Learned Judges of the Court of Appeal misdirected themselves in law when they held that despite the long participation at the arbitral proceedings, the Respondent was entitled to canvass the fact that the reference to arbitration was bad in law?
- (c) Have the Learned Judges of the Court of Appeal erred in law when they proceeded to consider matters irrelevant to the proper issue before their Lordships'?

The facts can be summarized as follows:-

J.A. Sumith Adhietty, the Respondent-Appellant (hereinafter referred to as the 'Appellant'), was an employee of Mercantile Investments Ltd., the Petitioner-Respondent Company (hereinafter referred to as the "Respondent"), from the year 1977. The Appellant had joined the Respondent Company as an Accountant and had risen to the post of "General Manager and Executive Deputy Managing Director". On 04.04.2003, he was transferred to the Company's Kohuwala Branch where its garage was situated. The Appellant was dissatisfied with this transfer.

He made representations in this regard to the Commissioner General of Labour, the 1st Respondent-Respondent (hereinafter referred to as the "1st Respondent") by letters dated 05.04.2003 and 09.04.2003. The 1st Respondent called the Appellant for an inquiry to be held on 30.04.2003. Thereafter the Minister of Labour, the 2nd

Respondent-Respondent by notice dated 16.12.2003 referred the matter for arbitration. The matter in dispute, referred to arbitration was, "Whether the deprivation of privileges of Mr. J.A. Sumith Adhihetty who joined the Mercantile Investment as an Accountant on 01.10.1977 that he had enjoyed while serving in the post of General Manager and the post of Executive Deputy Managing Director of the Company and the transfer of him to its Kohuwala Branch where the Company's garage is situated with effect from 04.04.2003 is justified and if not, to what relief he is entitled".

Arbitration commenced. Petitioner was giving evidence before the arbitration when the Counsel appearing for the Respondent Company passed away. Thereafter a new Counsel who appeared for the Respondent Company raised two legal objections as follows:-

1. Whether there had been a valid reference of an Industrial Dispute within the meaning of the Industrial Disputes Act? and
2. Whether the arbitrator lacked jurisdiction to entertain, hear and determine the purported industrial dispute referred to him?

The Arbitrator dismissed these objections and directed the arbitration to proceed. The said order is marked P6. It is dated 21.12.2005 and signed by T. Piyasoma, the Arbitrator who is the 3rd Respondent-Respondent to this case before this Court.

The Respondent Company who is the Petitioner-Respondent before this Court sought Writs of Certiorari and Prohibition against this order P6, from the Court of Appeal. The Court of Appeal, by P7, the judgment of the Court of Appeal dated 06.12.2010 set aside the order of the arbitrator and dismissed the arbitration. The Appellant sought Special Leave to Appeal against P7 from this Court and Special Leave was granted on 30.01.2012 on the aforementioned questions of law.

It was an admitted fact by both parties that the Appellant joined another Finance Company, namely LB Finance Ltd. with effect **from 10.12.2003**, accepting the post of Director in that Company.

The Minister referred the 'Industrial Dispute' between the Appellant and the Respondent to the Arbitrator **on 16.12.2003**. Therefore it is apparent that the reference of the Industrial Dispute was done after the Appellant accepted the new occupation. I observe that it is correct to state that the Appellant having accepted the Director Post at LB Finance Ltd., had by himself terminated his services with the Respondent and/or repudiated his contract of employment with the Respondent, **on 10.12.2003**. Therefore, at the time of the Industrial Dispute reference to the Arbitrator, the employment that the Appellant was complaining of, had ended. It is alleged that there was no 'dispute' pending between the employer and the employee on 16.12.2003 to be looked into and given orders to be corrected and/or settled by the arbitrator at the inquiry.

It was also submitted that there is an application before the Labour Tribunal which is still pending which was filed by the Appellant against the Respondent on 25.03.2004 under application No. 1/A/111/04 alleging constructive termination by the Respondent with effect **from 31.12.2003 which date does not seem to be realistic**, as the Appellant was transferred on 04.04.2003; he complained to the Commissioner General of Labour and the Minister referred the matter to the arbitration on 16.12.2003 and he accepted the Director Post in LB Finance Ltd., on 10.12.2003, according to the documents in this brief.

As the arbitrator dismissed the two legal objections taken up by the new counsel of the Respondent company, Mercantile Investments Ltd. , the said Respondent sought to get the order of the arbitrator quashed by way of a writ of certiorari by the Court of Appeal. The Court of Appeal quashed the said order and set it aside and dismissed the arbitration. The Appellant, Mr. Adihetty has come before this Court against the said decision of the Court of Appeal.

The main issue to be resolved seems to be whether the dispute that was referred to arbitration is a 'live dispute' or not in terms of the Industrial Disputes Act. The counsel for the Appellant argued that the dispute can be categorized as a 'live dispute' and the counsel for the Respondent argued that it is not.

The Appellant submitted that **the existence of an employer – employee relationship at the time of the reference to arbitration**, is immaterial for the arbitrator to adjudicate the dispute which arose between the Appellant and the Respondent and that the fact that the dispute arose at the time it occurred was good enough for the arbitrator to decide on the dispute. The Appellant contended that **there should have been a dispute between the employer and the employee at the time the matter was referred to arbitration**. Since the employee was employed with another rival company of the employer at the time of reference of the dispute to the arbitrator the Appellant submitted that it was not possible for the arbitrator to arbitrate as the contract of employment had been brought to an end by the employee himself by that time.

The Industrial Disputes Act which came into existence on the 1st of September, 1951 was amended many times. The title to the Act reads that “it is an Act to provide for the prevention, investigation and **settlement** of Industrial Disputes and for matters connected therewith or incidental thereto”.

Section 2 reads:-

Functions of Commissioner in regard to Industrial Disputes.

Where, upon notice given to him or otherwise, the Commissioner is satisfied **that any industrial dispute exists** or is apprehended, it shall be the function of the Commissioner to make such inquiries into the matters in dispute, and to take such other steps, as he may think necessary with a view to promoting a settlement of the dispute, whether by means referred to in this Act or otherwise.

Section 3 reads:-

Powers of Commissioner in regard to Industrial Disputes.

- (1) Where the Commissioner is satisfied that **an industrial dispute exists** in any industry, he may
 - (a) if arrangements for **the settlement of disputes** in that industry have been made in pursuance of any agreement between organizations
 - (b) **endeavour to settle** the industrial dispute by conciliation or

(c) refer the industrial dispute to an authorized officer **for settlement** by conciliation
or

(d) if the parties to the industrial dispute or their representatives consent, refer that
dispute by an order in writing **for settlement by arbitration**.....

As can be seen from the aforementioned quoted sections as well as many other sections of the Act, it is my view that the Industrial Disputes Act in totality has been brought about to serve the community involved in industries when they are troubled by some dispute or other. The whole purpose of the act seems to be to resolve the matters by way of attempting to settle disputes which exist between the employer and the employee. The provisions of the Act shows concern about the well being of the workers employed in industries. Most of all, the purpose is **to bring about settlements** between the parties in dispute.

Section 4 reads:

Powers of the Minister in regard to Industrial Disputes.

(1) The Minister may, **if he is of the opinion** that an industrial dispute **is a minor dispute**, refer it, by an order in writing , **for settlement by arbitration** to an arbitrator appointed by the Minister or to a Labour Tribunal, notwithstanding.....

I observe that the Minister had categorized the dispute between the Appellant and the Respondent as **a minor dispute** and referred the matter for arbitration on 16.12.2003. I also endorse the Minister's decision that it is a minor dispute. The question is whether even the minor dispute reference is legally valid.

It is seen from the proceedings before the arbitrator that the Appellant had not divulged that he is re-employed in the rival company of the employer at the time he participated in the arbitration. He had suppressed that fact and had gone on with the arbitration until the new counsel for the Respondent who appeared after the death of the Respondent's former counsel raised the issue that there is no valid reference to the arbitrator done by the Minister as there was no existing dispute to be resolved between the employer and the employee who had repudiated the contract of employment before the reference was done by the Minister.

The argument by the Appellant was that the Respondent has no right to claim that the reference was not valid because he had already participated in the proceedings before the arbitrator. By acquiescence, would an invalid reference be taken as legally valid? Supposing an award was made what is the effect of it? Section 19 is relevant in this regard.

Section 19 reads:-

Effect of an award of an arbitrator.

Every award of an arbitrator made in an industrial dispute and for the time being in force shall for the purposes of this Act, be binding on the parties, trade unions, employers and workmen referred to in the award in accordance with the provisions of Sec. 17(2); and **the terms of the award shall be implied terms in the contract of employment between the employers and workmen** bound by the award.

It is obvious that when an award is made, the terms of the award becomes implied terms attached to the contract of employment. **So, there should be an existing contract of employment for the award to take effect at the time of making the award** at the end of the arbitration. This section presupposes the existence of a valid contract between the employee and the employer.

I find that there was a live dispute to be gone into from the date of the transfer to the time and date on which the Appellant joined another company because the Appellant could be regarded as an employee who wanted to resolve that dispute having resorted to the provisions of the Industrial Disputes Act. The moment that the Appellant joined another company, the dispute that was arisen between the employer Respondent and the employee Appellant and existed till that time, takes a different turn because it cannot be settled between the parties as provided for in the Act. The dispute is not 'live' any more because then the employee is not an employee any more and the relationship between them comes to an end. There is no possibility of 'an award to be taken as implied terms of the contract of employment', according to Sec. 19 of the Act.

The employee will not be without a remedy. He can make an application to the Labour Tribunal for wrongful termination or constructive termination by the employer if it is the

dispute which made him go for employment into another place. In the instant case, the Appellant has filed an application before the Labour Tribunal and it is only laid by until the arbitration comes to an end. This matter cannot be gone into by the arbitrator under dispute resolution since it cannot be settled and an award cannot be implemented as provided for in the Act.

I have considered the case law referred to by the Appellant, namely,

1. Ceylon Printers Vs. Eksath Kamkaru Samithiya (SC. 31/88-SC. Minutes of 11.11.1988),
2. S.B. Perera Vs. Standard Chartered Bank and Others (1992) 1 SLR 73 at Pgs. 83 and 94,
3. Ranin Kumar, Proprietor, Messers Chemie Vs. State Pharmaceuticals Corporation (2004) 1 SLR 277,
4. De Costa Vs. ANZ. Grindlays Bank (1996) 1 SLR 307.

I have also considered the case law referred to by the Respondent, namely,

1. Sunderalingam Vs. State Bank of India (1971) 73 NLR 514,
2. Ceylon Bank Employees Union Vs. Yatawara (1962) 64NLR 49,
3. Upali Newspapers Limited Vs. Eksath Kamkaru Samithiya (1999) 3 SLR 205,
4. Colombo Apothecaries Ltd. Vs. Commissioner of Labour (1998) 3 SLR 320.

I do not want to analyze each and every case since each decision had considered facts totally different to the case in hand.

Being possessed of the facts of this case and the case being a transfer of a person holding a very high post in a Finance Company and that person having gone into another Finance Company, again to a very high post prior to the date of reference to the arbitrator, to decide “whether such transfer is justified and if not what relief he is entitled to”, I hold that there was no existing dispute to be looked into since the reference to the arbitrator was dated later than the date the Appellant joined the new Finance Company. Having gone through the judgment of the Court of Appeal, I find that the Court of Appeal has considered all relevant matters and applicable legal principles in

the judgment. It is a lengthy judgment giving good reasons for every argument before that Court. I answer the questions of law in the negative .

On the aforesaid reasoning, I affirm the judgment of the Court of Appeal dated 06.12.2010 in CA. (Writ) Application No. 99/2006. Appeal is dismissed. However I order no costs..

Judge of the Supreme Court

Upaly Abeyratne, J

I agree.

Judge of the Supreme Court

Anil Gooneratne, J.

I agree.

Judge of the Supreme Court