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

In the matter of an Appeal from an **Order of the Court** of Appeal.

N.L.D. Ariyaratne,
No. 21/3, 2nd Lane,
Galpotte Road,
Nawala.

Petitioner

SC APPEAL No. 182/16
CA (Writ) No. 139/2012 (Writ)
Arbitration Case No. A 2832

Vs

1. P.B.P.K. Weerasingha,
   The Commissioner of
   Labour, Labour Secretariat
   P.O.Box 575, Kirula Road,
   Narahenpita,
   Colombo 5.
2. D.A.Wijewardena,
   Arbitrator,
   Labour Secretariat,
   P.O. Box 575, Kirula Road,
   Narahenpita,
   Colombo 5.

3. Kahawatte Plantation Ltd.,
   No. 52, Maligawatte Road,
   Colombo 10.

Respondents

AND NOW BETWEEN

Kahawatte Plantation Ltd.,
No. 52, Maligawatte Road,
Colombo 10.

3rd Respondent Petitioner

Vs

N.L.D. Ariyaratne,
No. 21/3, 2nd Lane,
Galpotte Road,
Nawala.

Petitioner Respondent

1. P.B.P.K. Weerasingha,
   The Commissioner of
   Labour, Labour Secretariat
   P.O.Box 575, Kirula Road,
   Narahenpita,
   Colombo 5.

2. D.A.Wijewardena,
Arbitrator,
Labour Secretariat,
P.O. Box 575, Kirula Road,
Narahenpita,
Colombo 5.

Respondent Respondents

BEFORE **: S. EVA WANASUNDERA PCJ,**
SISIRA J DE ABREW J &
ANIL GOONERATNE J.

COUNSEL : Ms. Manoli Jinadasa for the 3rd Respondent Petitioner instructed by Sudath Perera Associates .
Ajantha Athukorala with V.K.Choksy for the Petitioner Respondent.
Ms. Chaya Sri Nammuni, Senior State Counsel for the 1st Respondent Respondent.

ARGUED ON : 09.05.2017.
DECIDED ON : 29.06.2017.

S. EVA WANASUNDERA PCJ.

The 3rd Respondent Petitioner in the case in hand , has made this Appeal to this Court **from an interim order of the Court of Appeal** rejecting the preliminary objection taken up by the said 3rd Respondent stating that 'the Petition before the Court of Appeal was flawed and the Petition should be dismissed in limine'.

To consider the question of law before this Court in this matter, the background to the arising of this matter has to be considered to a certain extent so that the

facts pertaining to the case can be seen as the back drop to be born in mind. Therefore I would like to narrate the same before taking up the task of deciding on the question of law.

N.L.D. Ariyaratne had commenced his carrier as an Assistant Superintendent on 1.1.1972 in the Pooranuwa Estate. Then he became a Superintendent in 1980 and thereafter he was appointed as Group Manager in charge of nine estates of Kahawatte Region by the State Plantations Corporation. The 3rd Respondent Petitioner, Kahawatte Plantations Ltd., after the privatization of the estates confirmed by letter that Ariyaratne's employment with the company would continue until he reached 60 years of age. On 1st of June, 1995 he was promoted as Deputy General Manager in charge of Kahawatte and Nawalapitiya Regions comprising of 21 estates.

Forbes Plantations Pvt. Ltd. took over the management of Kahawatte Plantations Ltd. in 1997 and then Ariyaratne was directed to report for duty at the Colombo Head Office from Oct. 1997. His good vehicle was withdrawn and a non road worthy vehicle was given to him. When that vehicle was broken it was taken back and not repaired and no vehicle was given to him from the company.

Kahawatte Plantations Ltd. the 3rd Respondent Petitioner, made an application dated 2nd November,1999, to the Commissioner of Labour **seeking approval to terminate the services of Ariyaratne** who is the Petitioner Respondent in this case, **on the basis of redundancy**. An Inquiry commenced on 21st of September, 2000 and while the inquiry was pending the 3rd Respondent Petitioner Company withdrew several monthly benefits amounting to Rs. 22500/- which had been granted to Ariyaratne. The Ceylon Planter's Society wrote to the Commissioner of Labour , on behalf of Ariyaratne, that such withdrawal of benefits amounts to **constructive termination.** At this point, the 3rd Respondent Petitioner withdrew the Application seeking approval to terminate the services of Ariyaratne by letter dated 6th December, 2000 stating that the Petitioner Respondent Ariyaratne had admitted termination and therefore stopped paying any salary with effect from 1.12.2000.

It is only then that Ariyaratne made an Application to the Commissioner of Labour for **reinstatement with back wages** and benefits against the 3rd Respondent Petitioner on the basis that **his services were terminated illegaly.** Ariyaratne was

then 53 years old and he had 7 years more to work, according to the letter of appointment.

After hearing the evidence and submissions the Asst. Commissioner of Labour made order awarding compensation in lieu of reinstatement in a sum of Rs. 640000/- which was calculated for 50 months on the basic salary of Rs. 12800/-. The Applicant Ariyaratne then invoked the jurisdiction of the Court of Appeal under case number CA 787/2004 for enhancement of compensation on the basis that in computation of the compensation, the allowances had not been taken into account and the compensation formula as published in the gazette and revised in 2005. The said **Court of Appeal case No. 787/2004** was concluded prior to 12.05.2010, with the consent of parties with an order from the Court of Appeal directing the Commissioner of Labour to re - calculate the compensation awarded to Ariyaratne taking into consideration the basic salary, cost of living allowance or any other similar allowances in terms of the prevailing law that gives the formulation for compensation. The Commissioner was further directed to **hold a limited inquiry into the matter expeditiously**. Accordingly, the Commissioner of Labour held an inquiry having re-opened Inquiry TEU/C/28/2001. Then, by a written communication to Ariyaratne, it was informed that an order awarding Rs. 2,071,000/- was awarded to him on **12.05.2010**. There was already Rs. 640,000/- deposited according to the first award and therefore the **balance amount of Rs. 1,431,000/-** had to be deposited by the 3rd Respondent Appellant, the employer company.

The 3rd Respondent Appellant, the employer was dissatisfied with **the new order** of the Commissioner of Labour and came before the Court of Appeal by way of an Application for a **Writ of Certiorari and Mandamus** to quash the Order of the Commissioner of Labour and to compel him to make order according to the prevailing law contained in the Gazette Notification as amended. That matter was considered under **Court of Appeal Application No. 449/2010**. The same was decided on 16.03.2012 quashing the award made by the Commissioner of Labour dated 12.05.2010 and **awarding a reduced sum of Rs. 5,79,880/-.**

Ariyaratne, the workman had appealed to the Supreme Court against that order in SC (Spl) Leave to Appeal Application No. 85/2012 and this Court had **refused** Special Leave to Appeal on 25.07.2012. I have verified the same from the said case record. I opine that the grievances that Ariyaratne had, on which he litigated

all this time with regard to his services as a workman having been terminated, has come to a closure.

However, In the year 2000, on 07.11.2000, the registered Trade Union , Ceylon Planters Society had made an application on behalf of Ariyaratne, to the Minister of Labour to refer the dispute between Ariyaratne and the Kahawatte Plantations Ltd. to an Arbitrator for Arbitration. The Minister referred the matter for arbitration on 14.12.2000. Inquiry before the Arbitrator had commenced on 23.02.2002 and proceeded till 25.07.2005. On 01.12,2000, the employer company brought to the notice of the Arbitrator that Ariyaratne had filed a Writ Application under case No. **CA 787/2004** challenging the quantum of compensation granted by the Commissioner of Labour for wrongful termination and prayed that the Arbitration proceedings be **laid by**, until the Court of Appeal case is over. The Arbitrator gave an **order laying by the Arbitral proceedings on 19.01.2006**. In his order which is in the brief, under the numbered paragraph 5, he specifically mentions thus**: "** Thus it would appear if the Writ Application succeeds, most of the relief sought would have been obtained by the Applicant. On the other hand, if this Writ Application is by any chance **dismissed**, the Arbitrator would be placed in a difficult situation as to making a decision as to **granting of the identical relief**, if necessary, which has been denied by a Superior Court. The question of **Res Judicata may also come up for consideration, then."**

In fact that matter under **CA 747/2004** was concluded directing that compensation be re-calculated. The Commissioner of Labour re-calculated the same and granted an enhanced amount. Then the employer moved the Court of Appeal for a writ again under **CA 449/2010** stating that it was done wrongly. The Court of Appeal heard the case and awarded a reduced amount fixing the same as Rs. 579880/-. The employee, Ariyaratne moved the Supreme Court to grant special leave against the judgment of the Court of Appeal but it was refused on 25.07.2012. Finally Ariyaratne had to be satisfied with that amount.

Yet, I observe that he had made an Application on 09.09.2008 to resume the Arbitration inquiry which was laid by. That application had been made after the conclusion of CA 747/2004 in the Court of Appeal and before the re-calculation was done by the Commissioner of Labour. It is obvious that after many postponements of the hearing of the Arbitration (which was ordered by the Minister at the request of the employee, Ariyaratne), when the Arbitration

proceedings actually commenced on 25.11.2011, the Court of Appeal had concluded the proceedings on the same matter on the same complaints and similar pleadings with regard to the same subject matter. The fact that the grievances of Ariyaratne had already been decided upon and concluded finally by the Court of Appeal , had not been brought to the notice of the Arbitrator at that time. It seems to me that the employer, the 3rd Respondent Appellant could have raised the position as 'res judicata' at that time but it had not been done.

The Arbitrator proceeded to hear the matter and the witnesses of Ariyaratne had been led and thereafter the employer's witness concluded his evidence and he was cross examined on 24.02.2011 and the matter was postponed for further hearing on 19.04.2011. According to the Appellant's pleadings in this case in hand, on that day, the Registrar had informed that the Arbitrator would not be coming and the inquiry was postponed for 10.05.2011. Thereafter as the date was not suitable for both parties, further hearing was put off for 30.05.2011. The employer Appellant had moved for another date by way of a motion and that date for hearing was fixed for 04.07.2011. On that day when Ariyaratne went there the Registrar had informed him that the Arbitrator had a personal difficulty and that the inquiry would be postponed and it is alleged that the Registrar had said that the next date will be informed to the parties after having consulted the Arbitrator. It is alleged that the hearing had been fixed for 19.07.2011 ; the Registrar had not informed the employee Ariyaratne; inquiry had been taken up on 19.07.2011 and the Application was dismissed as the Petitioner to the said Application was not present or represented notwithstanding the fact that the Registrar had sent a notice under registered cover by post. The said Order is before this Court marked as **P5.** The request to resurrect the Arbitration was made to the Commissioner General on 17.04.2012 was also turned down.

The narration of facts by me comes to an end at this juncture.

The employee, Ariyaratne had come before the Court of Appeal praying to set aside the order of the Arbitrator marked **as P5**. The employer had submitted as a **preliminary objection** that the Application before the Court of Appeal cannot be maintained due to many reasons. The Court of Appeal had made an order rejecting the preliminary objections and held that **substantive merits of the Application must be gone into and therefore the matter should proceed to be fixed for argument.**

The 3rd Respondent Appellant had sought Special Leave to Appeal from that order of the Court of Appeal and Special Leave was granted by this Court on 10.10.2016 on one question of law as narrated in paragraph 14(a) of the Petition dated 22.10.2015. which reads as follows:

" Has the Court of Appeal erred in law by rejecting the preliminary objection that the Application is fatally flawed by the failure of the 1st Respondent to make the Honourable Minister a party to this Application ? "

The Industrial Disputes Act provides for the Minister to refer a **minor dispute** for settlement by arbitration in Sec. 4(1) of the Act. Section 4(1) reads as follows:-
" 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 that the parties to such dispute or their representatives do not consent to such reference. "

When the Ceylon Planter's Society a registered Trade Union made an application to the Hon. Minister to refer the matter for arbitration, on behalf of the workman Ariyaratne , the Minister on 14.12.2000 made order to refer the matter to arbitration. There was no consent between parties for this reference. Ariyaratne applied and the Minister made order.

The workman Ariyaratne had sought relief from the Court of Appeal against an order made by the Arbitrator on 19.07.2011 dismissing the Application before him for non appearance and for not having diligently prosecuted the same before the Arbitrator by the workman Ariyaratne. He had prayed mainly for two reliefs, i.e. to " grant a mandate in the nature of a Writ of **Certiorari quashing the decision** and/or Award of the 2nd Respondent Arbitrator dated 19.07.2011 contained in P5 " and to "grant a mandate in the nature of a Writ of Mandamus directing the **1st Respondent** to re-commence the Arbitral proceedings de novo with a **new Arbitrator** ".

The 2nd Respondent in the Court of Appeal is the Arbitrator who dismissed the workman Ariyaratne's application on 19.07.2011 marked P5. If that decision is quashed, then, the 1st Respondent, the Commissioner of Labour cannot on his

own re-commence proceedings **because another Arbitrator has to be appointed by the Minister.** Without the Minister as a party to the case, the Commissioner of Labour has no power to re-commence with a new Arbitrator. The workman Ariyaratne has not secured any relief when the decision is quashed because there is no way that the Commissioner of Labour can get another Arbitrator appointed as the Minister is not made a party to the case and the 2nd Respondent will not be available even to continue with the Arbitration.

In the case of **Rawaya Publishers and Others Vs Wijedasa Rajapakse and Others 2001, 3 SLR 213,** it is mentioned thus with regard to Writ Applications: " In the context of writ applications, a necessary party is one without whom no order can be effectively made." In the case of **Gnanasambanthan Vs Rear Admiral Perera and Others 1998, 3SLR 169**, it was held that it is both the law and practice in Sri Lanka to **cite necessary parties** to applications for Writs of Certiorari and Mandamus. Failure to make REPIA , the divesting authority to divest the Petitioner's property to the Petitioner, a party to that writ application was held to be a fatal irregularity.

Where the necessary parties have not been made a party in any application, it is fatal to the reliefs sought for and it is liable to be dismissed. It was so held in **Ramasamy Vs Ceylon State Mortgage Bank 78 NLR 510**. In that case the Bank made a determination which was challenged before Court whilst the vesting order was made by the Minister. The Court held that even though in the provisions of the Finance Act No. 33 of 1968, the Minister is interposed merely for making of the Vesting Order, it is however that Order which affects the rights of parties and enables the aggrieved person to come to Court. Accordingly an attack on the determination of the Bank alone is insufficient without the presence of the Minister also as a party to the application for relief. **In British Ceylon Corporation Vs C.J.Weerasekera and Others 1982, 1 SLR 180** where the Award as well as the reference to arbitration by the Minister was being challenged the Supreme Court held that the Minister was a necessary party to the application and the failure to make the Minister a party was fatal to the application.

When the Minister, Alavi Mowlana made the reference to the Arbitration in the case in hand under Sec. 4(1) of the Industrial Disputes Act, he appointed the 2nd Respondent, Wijewardena as the Arbitrator with a direction that the dispute be settled by arbitration. If a new Arbitrator is to be appointed and the Arbitration is

to be held de novo, a fresh reference is necessary. The Minister who has the power to do the reference should be a party to the case when specifically the relief sought is for a fresh arbitration setting aside the order of the Arbitrator.

In the case of **Central Cultural Fund Vs Lanka General Services Union and three others 2008, BLR Vol. XIV Part II pg. 269**, a writ of certiorari was sought to quash the award of an Industrial Arbitrator on the premise that the Award was unreasonable. It was the Award and not the reference to Arbitration that was challenged. The Minister who referred the dispute to Arbitration was not made a party to the case. The Court of Appeal held that the failure to make the Minister a party was fatal to the Application.

The reasons given in this case, by the Court of Appeal Judges for not agreeing with the preliminary objection taken up by the 3rd Respondent Petitioner have to be considered. The Court of Appeal states that no relief is sought against the Minister, regarding his exercise of powers in the past or future and that no relief is sought against the Minister to make a reference a second time and therefore the Court of Appeal had held that the failure to make the Minister a party is not fatal to the Application before Court.

I observe that the primary relief sought in the Application before the Court of Appeal was for a writ of Mandamus to recommence the Arbitration de novo with a new Arbitrator. To recommence the proceedings, the Commissioner has no power under the provisions of the Industrial Disputes Act. It has to go through the hands of the Minister because it is the Minister who has the power to appoint an Arbitrator. The Application before the Court of Appeal was to grant a writ of Mandamus on the Commissioner of Labour. If Court grants a writ of mandamus directing him to recommence the proceedings, that would be futile since he cannot act in commencing the fresh arbitration without power conferred on him by any of the provisions of the Act. The Court can issue a writ of mandamus only to the Minister to recommence arbitration proceedings afresh. When the Minister is not a party to the case, granting a mandate in the nature of a writ of mandamus to the Commissioner of Labour is legally incorrect. So, the workman Petitioner's application before court was improper without the Minister as a party. The relief is wrongly set down in the prayer. No writ will be issued by Court to result in futility.

However, in addition to what was argued before this Court as mentioned above, at the hearing of this case, I observe that the workman Ariyaratne had gone through litigation regarding his grievances about termination of his services by the employer company under the provisions of the Industrial Disputes Act and contested in two Court of Appeal cases and finally made an Application to the Supreme Court seeking special leave to appeal against the amount of compensation granted to him in lieu of reinstatement which was refused. He cannot make use of the provisions of the Industrial Disputes Act once again to get any further relief legally before any forum. He is **estopped in law from seeking any other relief from the Arbitration** which was initiated by the then Minister at his request which was done simultaneously at the same time he was going through the inquiry before the Commissioner of Labour on **one and the same subject matter** , which is his termination of services unreasonably by the employer. The concept of res judicata applies in this matter.

I answer the question of law raised as mentioned above in the affirmative in favour of the 3rd Respondent Petitioner and against the Petitioner Respondent. The Minister of Labour was a necessary party before the Court of Appeal and should have been made a party to the Application before the Court of Appeal in the Writ Application. The Court of Appeal had erred in its order rejecting the preliminary objection raised by the 3rd Respondent Petitioner. I set aside the interim Order of the Court of Appeal dated 10.09.2015. I dismiss the Writ Application filed by the Petitioner Respondent in the Court of Appeal due to the aforementioned reasons.
The Appeal is allowed. However I order no costs.

Judge of the Supreme Court

Sisira J De Abrew J.
I agree.

Judge of the Supreme Court

Anil Gooneratne J.
I agree.

Judge of the Supreme Court