IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

R.L.P. Nihal,
No. 303C, Bai Watte,
Nivandana North,
Ja-Ela.

Applicant

SC (Appeal) No.182/2012

SC (HC) LA 70/12

SC (Revision) Application

No. HCRA/86/2010

LT Application No. 2/1619/2008

Vs.

1. Board of Directors,
   Salacine Television,
   Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

2. Niranga Hettiarachchi,
   Chairman/Executive Officer,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

3. Lester S. Rupasinghe,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

4. Lakshitha Jayawardhana,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

Respondents.

AND THEN BETWEEN

In the matter of an application In terms of section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 154 P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Niranga Hettiarachchi,
   Chairman/Chief Executive Officer,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo07

2. Lester S. Rupasinghe,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

3. Lakshitha Jayawardhana,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

Respondent-Petitioners

Vs.

1. R.L.P. Nihal,
   No. 303C, Bai Watte,
   Nivandana North,
   Ja-Ela.

Applicant-Respondent

2. Board of Directors,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

Respondent-Respondent

AND NOW BETWEEN

In the matter of an application under and in terms of section 31DD of the Industrial Disputes Act (as amended) read with section 9 of the High Court of the Provinces Special Provisions Act No. 19 of 1990 for Special Leave to Appeal.

1. Niranga Hettiarachchi,
   Chairman/ Chief Executive Officer,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

2. Lester S. Rupasinghe,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

3. Lakshitha Jayawardhana,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

Respondent-Petitioners-Petitioners.

Vs.

1. R.L.P. Nihal,
   No. 303C, Bai Watte,
   Nivandana North,
   Ja-Ela.

   Applicant-Respondent-Respondent.

2. Board of Directors,

   Salacine Television Institute,

   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

   Respondent-Respondent-Respondents.

BEFORE: Chandra Ekanayake J
Rohini Marasinghe J
Buwaneka Aluwihare P.C.J

COUNSEL: Uditha Egalahewa P.C with Amaranath Fernando for the Respondent-Petitioner –Petitioner -Appellant

D.M.G Dissanayake with Upali Lokumarakkala for the Applicant-Respondent-Respondent

J.B.S Perera with Pathum Wickramarathne for the Respondent - Respondent

ARGUED ON: 03/02/2014

WRITTEN SUBMISSIONS: 20th February2014

DECIDED ON: 30th July 2015

Aluwihare J

The Applicant Respondent (hereinafter referred to as the Respondent) filed an Application against the Respondent Petitioners Appellants (hereinafter referred to as Appellants) before the Labour Tribunal on the basis that the services of the Respondent were terminated wrongfully.
When the matter was taken up for inquiry before the learned President of the Labour Tribunal two preliminary objections were raised on behalf of the Appellants as to the maintainability of the impugned action before the Tribunal.
The learned President of the Labour Tribunal overruled the preliminary objections raised and being aggrieved by the said order, the Appellants moved by way of revision before the High Court. The learned High Court judge having considered

the preliminary objections that were raised on behalf of the Appellants affirmed the order of the Labour Tribunal.

The appellants are now canvassing the said order of the High Court relating to the said preliminary objections, in these proceedings.
This court granted leave on the following questions of law referred to paragraph 17 of the Petition of the Appellants dated 31st July 2012

(a) Did the learned judge of the High Court err in law, having concluded that the Petitioners ceased to hold any post in the said Salacine Television Institute and thereby failing and/or neglecting to set aside the order of the learned President of Labour Tribunal.

(b) Did the judge of the High Court err in law by directing the Labour Tribunal to continue with the inquiry when the Labour Tribunal lacked jurisdiction in terms of Section 31B read with Section 49 of the Industrial Disputes Act.

The facts relating to this matter in brief, are as follows:-

The Respondent was employed as a camera technician with the Salacine Television Institute (herein after referred to as "Salacine") from 1st March 1988 and it is alleged that his services were terminated wrongfully. The Appellants filing answer before the Labour Tribunal took up the position that the termination of the services of the Respondent was due to serious acts of misconduct which were established sequel to a formal disciplinary inquiry.

In deciding the questions of law in respect of which leave was granted, it would be pertinent to refer to the sequence of events that transpired before the Labour Tribunal for reasons I will be dealing with, later in this order.

On 6th March 2009, the Appellants raised an objection before the Labour Tribunal to the effect that the Appellants are neither natural nor juristic persons and for that reason the application cannot be maintained. This objection was based on the decision of this court in The *Superintendent, Nakiyadeniya Group, Nakiayadeniya V. Cornelishamy 71 N.L.R 142,* which followed the decision in *Superintendent Deeside Estate Maskeliya Vs. I.T Kazakam 70 N.L.R 279,* wherein the court held that "inasmuch as the application failed to name a natural or legal person as an employer, the order of compensation was not an enforceable order".

The learned President of the Labour Tribunal afforded an opportunity for the parties to tender written submissions and counter submissions had also been filed by the Appellant. In their written submissions Appellants raised both questions of law on which leave was granted by this court.

The learned Labour Tribunal President made order over ruling the preliminary objections raised by the Appellants solely based on written submissions and it appears to me that the material placed before the Labour Tribunal was insufficient to arrive at a definite finding on the issues raised, particularly in view of the decisions handed down by this court in relation to the scope of section 49 of the Industrial Disputes Act.

I wish to deal with the second question of law initially for the reason that I am of the view that the said issue is the one that is pivotal in deciding the possibility or otherwise of the continuation of the inquiry before the Labour Tribunal.

It is the contention of the Appellants that the Labour Tribunal is not vested with jurisdiction to inquire and determine the Application filed by the Respondent by virtue of Section 49 of the Industrial Disputes Act (Hereinafter the Act).

Section 49 of the said Act states thus:-

> "Nothing in this Act shall apply to or in relation to the State or the Government, in its capacity as an employer, or to or in relation to a workman in the employment of the state or the Government"

It is the position of the Appellants that they were merely members of a body called and known as "Salacine Television Institute" (Hereinafter "Salacine") which is the media arm of the Ministry of Media and Media Information (hereinafter the "Ministry"). The Appellants have also contended that the salaries of the Respondent were paid from the monies advanced to "Salacine" from the funds of the Ministry. In this context, it was contended by the Appellants that the State or the Government is the employer of the Respondent and for that reason, by virtue of Section 49 of the Act, the Respondent cannot seek redress under the provisions of the said Act, in other words Industrial Disputes Act does not apply to the Respondent.

Before I deal with the facts relevant to the issues before this court, I wish to consider the decisions in the case of *Coconut Research Board V. Subramaniam 72 N.L.R 422*

and the case of Colombo Gas and Water Company Workers Union V. Government of Sri Lanka 1986 CALR Vol. III 169.

In the case of the Coconut Research Board, Justice Weeramanthri held, that a Corporation such as the Coconut Research Board, depending on and controlled by the Government, may nevertheless be the employer of persons in its services, within the meaning of the definition of "employer" in the Industrial Disputes Act. In such a case, such Government control does not bring the Corporation within the scope of the exemption provided by the Section 49 of the Industrial Disputes Act. The rational for this conclusion by Justice Weeramanthri was that, dependence on the Crown for funds does not have the effect, by itself, of making a Corporation a Government institution or a Government undertaking, nor does Government control necessarily render a Corporation a servant or agent of the Crown.

In the case referred to, Justice Weeramanthri observed that "though dependent on Government funds, the Board (Coconut Research Board) has full power and authority generally to govern, direct and decide on all matters connected with the appointment of its officers and servants and the administration of its affairs.

Thus, I am of the view that in deciding an issue of the nature that has arisen in the instant case requires the Labour Tribunal to apply the *control test* as in the case of the Coconut Research Board and a duty is cast on the tribunal to inquire into the aspects referred to by Justice Weeramanthri and arrive at a finding. The relevant aspects would be as to *who had the full power and authority generally to govern, direct and decide on all matters connected with the appointment of its officers and servants and the administration.*

In the instant case it is common ground that "Salacine" is not a body corporate in contrast to the Coconut Research Board. However, no material was placed before the Labour Tribunal as to who exercised authority to govern, direct and decide on matters connected as to the appointment and dismissal of its officers and servants. The only material, if one can call it that, is the letter of appointment issued to the Respondent.

The Appellants, in their written submissions filed before the Labour Tribunal have contended that "Salacine" is not a corporate body, but merely the media unit of the Ministry and is a section of the Ministry. The Appellants further contend in the

written submissions that "Salacine" is neither a Government Corporation, a corporate body, nor a legal entity and cannot sue and be sued in its name.

I also have given my mind to the decision in the case of *Colombo Gas and Water Company Workers Union V. Government of Sri Lanka (Successor to the Business Undertaking of) Colombo Gas and Water Company Ltd. 1986 CALR Vol. III 169,* which also addressed the very issue.

In the case of Colombo Gas and Water Company, the applicant trade union filed action before the Labour Tribunal on behalf of a workman for alleged wrongful termination. The said Company, a private entity was vested in the Government under the provisions of Business Undertakings (acquisition) Act No 35 of 1975. As a result, since February 1975 the Company became an entity owned by the Government yet maintaining its corporate veil. In this case too, the scope of Section 49 of the Industrial Disputes Act came in to review as an objection was raised as to the maintainability of the application before the Labour Tribunal in view of the fact that the Government now is the owner- employer of the Colombo Gas and Water Works Company.

Having considered the issue Justice Bandaranayke in delivering the order of the Court of Appeal expressed the view that in resolving this issue i.e. the application of Section 49, one needs primarily to consider two aspects. Is it a situation where the Government was the owner of a business and running it? Or on the other hand, although the Government was the owner, the actual running of the business was in the hands of a third party. In the latter case, Justice Bandaranayke held that the employer- employee relationship would exist with the third party and the workman and not between the Government and the workman. In applying this test Justice Bandaranayke held that, with the vesting, all employees became employees of the State and the preclusive clause found in Section 49 of the Industrial Disputes Act applies to the workman and he now being an employee of the State, is excluded from seeking the protection of the Industrial Disputes Act.

Both judgements referred to above propounded tests for determining the question whether an agency may claim State or Government's privilege. Considered views expressed on the matter, both by the Supreme Court and the Court of Appeal make it abundantly clear that in deciding the issue, one must necessarily examine the degree of control exercised by the Government through the provision of finance or

some other means and thereafter decide the issue as to whether the workmen is a State or a Government employee or not. This question depends on the independence and control enjoyed by the recruiting authority in the appointing of its employees, administration and discontinuation of services of an employee, while the dependence on the state funding is not the sole deciding criteria.

Close examination of, whether the employer is the State or the Government becomes all the more significant in view of the views expressed by Samarakoon CJ in the case of Dahanayake Vs. De Silva 1978-79 1 SLR 41 wherein he held "that even if the entity in question is an agent of the State, it is not however necessary that it is ipso facto an alter ego of the State so that such agents could enter into ordinary contracts of service with their employees without being deemed public servants.

In this context, it was incumbent on the labour Tribunal to inquire into these aspects. However neither the learned Labour Tribunal President nor the learned High Court judge had addressed their minds as to whether the employer- employee relationship existed between the Respondent and the Government or was it between the Respondent and a third party. As this issue is pivotal to the proceedings, I am of the view that the learned Labour Tribunal President ought to have inquired into this matter fully rather than relying purely on written submissions, which is inadequate in deciding on an issue of this nature.

In this regard, Section 31C (1) of the Industrial Disputes Act is significant. The said Section stipulates that "Where an application is made to a Labour Tribunal, it shall be the duty of the Tribunal to make all such inquiries into that application and hear all such evidence as the Tribunal may consider necessary…. This I find a very salutary provision and the labour Tribunal appears to have lost sight of this Section, in deciding the issue as to who exactly is the employer of the Respondent. In the case of Dharmadasa vs. P.H. Wilfred De Silva, SC 24/ 69, it was held by G.P.A de Silva S.P.J that the Labour Tribunal has a duty to make all inquiries and lead all necessary evidence before making an order as to the applicability of Section 49 of the Industrial Disputes Act. Thus the learned Labour Tribunal President, instead of merely relying on the written submissions ought to have inquired in this issue in order, not only to ascertain who the employer of the Respondent was but the status of "Salacine" as well.

When one considers the attendant circumstances, it is apparent that the learned labour Tribunal President has arrived at his decision without sufficient material and his findings in my view are not safe to be allowed to stand. I further hold that the findings of the Labour Tribunal on the issue of applicability of section 49 ought to be set aside.

The other legal issue raised on behalf of the appellant was that the learned High Court judge having arrived at the conclusion that the Appellants have ceased to hold office, erred by his failure to set aside the order of the learned President of the Labour Tribunal. The question of law referred to by the Appellants arise in the following manner.

Subsequent to the termination of the services of the Respondent, the Appellants have ceased to be Directors of Salacine Television institute and they have been replaced by three others who had been cited as 5th, 6th and 7th Respondents in the application before the Labour Tribunal by the Respondent workman to the instant Appeal. The issue before this court is, in view of the developments referred to above, whether the Appellants can remain as Respondents in the application before the Labour Tribunal.

Section 31 (B) (6) of the Industrial Disputes Act deals with this very situation. The said provision reads thus:-

" Notwithstanding that any person has *ceased to be an employer*, -

(a) an application claiming relief or redress form such person may be made under subsection (1) in respect of any period during which the workman to whom the application relates was employed by such person, and proceedings thereon may be taken by a labour tribunal,

(b) if any such application was made while such person was such employer, proceedings thereon may be commenced or continued and concluded by a labour tribunal, and

(c) a labour tribunal may on such application order such person to pay to that workman any sum as wages in respect of any period during which that workman was employed by such person, or as compensation as an alternative to the reinstatement of that workman, and such order may be enforced against such person in like manner as if he were such employer :"

Bandaranayke J considered this issue in the case of Albert v Gunesekara and others (CA 729/83).

This was a case where Albert, who was employed as a Bar keeper at the Colts Cricket Club, an unincorporated social club for the promotion of sports, had come before the Labour Tribunal seeking reinstatement or compensation for wrongful termination. Having recorded the evidence of the workman the learned President of the Labour Tribunal made an order, that as the members of the committee that had employed Albert were no longer committee members of the club at the time of the inquiry and that he cannot make an order capable of execution because the respondents were now not holding office as committee members and therefore should not be treated as employers.

Having considered Section 31 (B) (6) of the Industrial Disputes Act, Bandaranayke J held that the "respondents as former members of the Committee of managements in office at the time of termination of services come within the definition of "employer" under the Industrial Disputes Act. In this context the learned President of the Labour Tribunal as well as the Learned Judge of the High Court in my view have not erred in holding that the Appellants can be treated as "Employers" in terms of Section 31 (b) (6) of the Industrial Disputes Act , as far as the Appellants of this case are concerned and that the inquiry can be proceeded with, by adding the incumbent chairman and directors of "Salacine" as respondents.

When one considers the nature of the preliminary issue that has been raised, it is not in my view an issue that can be resolved purely based on oral and written submissions but an issue that can only be resolved upon recording evidence.
As to the question of law referred to in paragraph 17 (b) of the Petition of the appellant, this court directs the President of the labour Tribunal to *inquire,* as required to do so, under Section 31 (1) (c) of the Industrial Disputes Act to ascertain as to whether the jurisdiction of the Labour Tribunal is ousted in terms of Section 49 of the said Act as far as "Salacine" is concerned **as part of the main inquiry.** In order to facilitate this process the orders made by the Learned President of the Labour Tribunal and the High Court as to the application of Section 49 of the Industrial Disputes Act is hereby set aside.

This court is mindful of the fact that some Labour Tribunals are burdened with a heavy workload and necessarily the issue arises in one's mind as to how practice it would be to inquire into such preliminary issues exhaustively.

However, one needs to bear in mind that preliminary issues of this nature are so pivotal to the maintainability of applications before the Tribunals and there is no alternative other than to inquire into such issues applying the criteria spelt out both in the case of *Colombo Gas and Water Company Workers Union V. Government of Sri Lanka (Successor to the Business Undertaking of) Colombo Gas and Water Company Ltd.* as well as in the case of *Coconut Research Board V. Subramanian.*

At the commencement of the hearing of this appeal Counsel representing the parties to this case intimated to the court that they are representing the parties in connected cases, namely case numbers SC Appeal 183/12, SC Appeal 184/12 and SC Appeal 185/12, and further the questions of law as well as the facts and circumstances of those cases are identical to the instant case. The counsel further contended that they would abide by the decision in this case in respect of those three cases as well and there is no necessity to argue them separately.

Accordingly the learned labour Tribunal President is further directed to comply with the directions given in this order in respect of the Labour Tribunal Applications connected to case nos. SC Appeal 183/12, SC Appeal 184/12 and SC Appeal 185/12.

Judge of the Supreme Court

Chandra Ekanayeke J

I agree

Judge of the Supreme Court

Rohini Marasinghe J

I agree

Judge of the Supreme Court