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

Joseph Kumar De Silva,
8-5/4, Golf Wing,
Trillium Residencies,
153, Elvitigala Mawatha,
Colombo 08.
Applicant

SC APPEAL NO: SC/APPEAL/65/2021
SC LA NO: SC/HCCA/LA/88/2020
HCA/RA NO: 123/2018 (F)
LT NO: LT/08/188/2017

Vs.

1. Etihad Airways PJSC,
   P.O. Box 35566, Abu Dhabi,
   United Arab Emirates.
   And also of
   752, Dr. Danister De Silva Mawatha,
   Ground Floor, Rigel Building,
   Orion City, Colombo 09.
2. R.H. Douglas,
   Cluster General Manager,
   Etihad Airways PJSC, Level 3,
   East Tower,
   World Trade Center,
   Echelon Square,
   Colombo 01.
   Respondents

AND BETWEEN

Joseph Kumar De Silva,
8-5/4, Golf Wing, Trillium Residencies,
153, Elvitigala Mawatha,
Colombo 08.
Applicant-Petitioner

Vs.

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Respondent-Respondents

AND NOW BETWEEN

Joseph Kumar De Silva,
8-5/4, Golf Wing,
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   Orion City, Colombo 09.
   Respondent-Respondent-Respondents

Before: Buwaneka Aluwihare, P.C., J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: Nigel Hatch, P.C., with Shiroshini Illangage for the Applicant-Petitioner-Appellant.
Uditha Egalahewa, P.C., with Amaranath Fernando for the 1st Respondent-Respondent-Respondent.

Argued on : 01.12.2022

Written submissions:
by the Applicant-Petitioner-Appellant on 16.08.2021 and 20.12.2022.
by the 1st Respondent-Respondent-Respondent on 09.06.2022 and 10.01.2023.

Decided on: 09.11.2023

Samayawardhena, J.

The appellant's services as the Country Manager in Sri Lanka of Etihad Airways were terminated by Etihad Airways by letter dated 03.07.2017. He filed an application dated 11.12.2017 in the Labour Tribunal of Colombo in terms of section 31B(1) of the Industrial Disputes Act, No. 43 of 1950, as amended, primarily seeking compensation and gratuity on the basis that the termination of his employment was unlawful. Although he filed the application against both Etihad Airways and its Cluster General Manager, at the time of supporting the application, it was informed to this Court that he would not proceed against the Cluster General Manager.

The Minister of Labour acting in terms of section 4(1) of the Industrial Disputes Act referred this dispute for settlement by arbitration by letter dated 28.12.2017. According to P7(a)-(e), the registrar for the arbitrator informed this to the appellant by letter dated 05.01.2018. The appellant surrendered to the jurisdiction of the arbitrator and filed the statement of facts dated 06.02.2018. The respondent Etihad Airways filed a preliminary statement/objection dated 20.03.2018 before the arbitrator seeking dismissal of the proceedings *in limine* on the basis that parallel proceedings cannot be maintained before both the Labour Tribunal and the arbitrator seeking the same relief. The appellant then filed answer dated 20.04.2018 reiterating that the arbitrator has jurisdiction to proceed with the matter and grant him relief.

In the meantime, the respondent filed answer in the Labour Tribunal dated 24.01.2018 and moved *inter alia* to dismiss the application of the petitioner *in limine* in terms of section 31B(2)(b) of the Industrial Disputes Act. The appellant filed answer in reply dated 23.02.2018 reaffirming that the Labour Tribunal has jurisdiction to proceed with the matter and grant him relief. Both parties made oral submissions followed by written

submissions on this preliminary objection. In the written submissions dated 09.07.2018 the appellant concluded that "*Therefore the applicant submits that the objection of the said respondents that this application be dismissed under section 31B(2)(b) be rejected and instead it be suspended under section 31B(3)(a) of the Industrial Disputes Act No. 43 of 1950 as amended with costs to the applicant.*"

The Labour Tribunal by order dated 12.09.2018 upheld the preliminary objection and dismissed the application of the appellant except for the relief on gratuity. The Labour Tribunal based its decision on section 31B(2)(b) and further concluded that section 31B(3)(a) is inapplicable to the facts of this case. The revision application filed against the said order of the Labour Tribunal was dismissed by the High Court of Colombo by judgment dated 27.08.2020. The appellant filed this application before this Court seeking leave to appeal against the said judgment of the High Court. This Court granted leave to appeal to the appellant on four questions of law as formulated by the appellant. They have been reproduced with answers at the end of this judgment.

The respondent relies on section 31B(2)(b) to have the application before the Labour Tribunal dismissed whereas the appellant relies on section 31B(3)(a) to have the application before the Labour Tribunal suspended until the proceedings before the arbitrator are concluded. This is the crux of the matter.

Section 31B(2)(b) reads as follows:

> *A labour tribunal shall-*
>
> *where it is so satisfied that such matter constitutes, or forms part of, an industrial dispute referred by the Minister under section 4 for settlement by arbitration to an arbitrator, or for settlement to an*

> *industrial court, make order dismissing the application without prejudice to the rights of the parties in the industrial dispute.*

In the case of *Upali Newspapers Ltd. v. Eksath Kamkaru Samithiya and Others* [1999] 3 Sri LR 205, the Court of Appeal in interpreting section 31B(1)(b) held "*this provision would apply only to an application made to a Labour Tribunal subsequent to a reference made by the Minister to an arbitrator or to an industrial court for settlement*." In other words, if the application was made to the Labour Tribunal before the Minister referred the dispute for settlement by arbitration, section 31B(1)(b) would not apply and the Labour Tribunal could proceed with the application.

On appeal, the Supreme Court affirmed this judgment of the Court of Appeal – *vide Eksath Kamkaru Samithiya v. Upali Newspapers Ltd.* [2001] 1 Sri LR 107. In the course of the judgment of the Supreme Court, Ismail J. (with the agreement of M.D.H. Fernando J. and Wijetunga J.) held at 108 "*I accordingly hold that the Court of Appeal has not erred in the interpretation of Article 116(1) of the Constitution and that the Minister had no power to refer the dispute regarding the termination of services for compulsory arbitration when applications in respect of the said dispute were pending in the Labour Tribunal*." No question of law was raised to reconsider this conclusion of the Supreme Court, and no full submissions were heard in this regard during the course of the argument. The veracity and implications of the said conclusion can be fully explored in a future case.

In my view, there is no necessity for a confrontation between the Labour Tribunal and the Minister on these references. According to section 4(1), the Minister can refer a dispute "*for settlement by arbitration to an arbitrator appointed by the Minister or to a labour tribunal*". If the dispute is already before a Labour Tribunal, the question of further reference by the Minister does not arise. In terms of section 3(1)(d), even the

Commissioner General of Labour can refer such disputes for settlement by arbitration to a Labour Tribunal. In general terms, what practically happens is that when the dispute is referred for settlement by arbitration, the Commissioner General of Labour or the subject Minister is unaware that an application has already been filed by the employee before the Labour Tribunal. This seems to be the case in the instant matter as well. The application was filed by the appellant before the Labour Tribunal on 11.12.2017. As seen from the letter found at page 61 of the appeal brief, the Commissioner General of Labour formulated the question to be tendered to the Minister on 19.12.2017. It appears that they were unaware of the application before the Labour Tribunal. Neither the Commissioner General of Labour nor the Minister is a party to the application before the Labour Tribunal.

Be that as it may, the Labour Tribunal and the High Court are bound by the Supreme Court judgment in *Eksath Kamkaru Samithiya v. Upali Newspapers Ltd.* However, both the Labour Tribunal and the High Court state that this judgment is inapplicable to the facts of the instant case because the application was not "pending" before the Labour Tribunal when the Minister referred the dispute for settlement by arbitration. The learned President of the Labour Tribunal in his order clarified that the Minister had referred the dispute for arbitration before the case was called in open Court (although in point of fact the application before the Labour Tribunal had been filed prior to the said reference).

I have no hesitation in concluding that this is a wrong interpretation. In the context of this appeal, "pending" means "awaiting decision". This begins not from the date the application is called in open Court but from the date the application is filed in the Labour Tribunal (in this case on 11.12.2017) and ends after the satisfaction of the order of the Labour

Tribunal (not even after its pronouncement). *Cf. Ponniah v. Rajaratnam* (1964) 68 NLR 127, *Abeysinghe v. Gunasekara* (1962) 64 NLR 427.

Ideally, the matter should have been laid to rest there. However, it did not happen due to another argument strenuously put forward by learned President's Counsel for the appellant. He argues that, if the Minister referred the dispute for arbitration after the application was filed before the Labour Tribunal, in terms of section 31B(3)(a), the Labour Tribunal shall suspend its proceedings until the proceedings before the arbitrator are concluded. This argument in my view is both unnecessary and unsustainable. This has rightly been rejected by the Courts below.

Section 31B(3) reads as follows:

> *Where an application under subsection (1) [of section 31B] relates-*
>
> *(a) to any matter which, in the opinion of the tribunal, is similar to or identical with a matter constituting or included in an industrial dispute to which the employer to whom that application relates is a party and into which an inquiry under this Act is held, or*
>
> *(b) to any matter the facts affecting which are, in the opinion of the tribunal, facts affecting any proceedings under any other law,*
>
> *the tribunal shall make order suspending its proceedings upon that application until the conclusion of the said inquiry or the said proceedings under any other law, and upon such conclusion the tribunal shall resume the proceedings upon that application and shall in making an order upon that application, have regard to the award or decision in the said inquiry or the said proceedings under any other law.*

Section 31B(3)(a) cannot be invoked to suspend the proceedings before the Labour Tribunal when the same dispute between the same parties is before the arbitrator and the Labour Tribunal. If the Minister's reference for arbitration precedes the application filed in the Labour Tribunal, in terms of section 31B(2)(b), the application before the Labour Tribunal shall be dismissed; if the Minister's reference for arbitration follows the application filed in the Labour Tribunal, the Labour Tribunal can proceed with the application.

If the argument of learned President's Counsel is accepted, for instance, after a long *inter partes* inquiry, if the arbitrator decides to dismiss the application of the employee on the ground that the termination is justifiable, the Labour Tribunal can thereafter commence a fresh inquiry to decide whether the termination is in fact justifiable. This is patently unacceptable on first principles and is debarred by section 31B(5).

Section 31B(5) reads as follows:

> *Where an application under subsection (1) is entertained by a labour tribunal and proceedings thereon are taken and concluded, the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which that application relates, and <u>where he has first resorted to any other legal remedy, he shall not thereafter be entitled to the remedy under subsection (1)</u>.*

Vide Ceylon Tobacco Co. Ltd. v. J. Illangasinghe, President, Labour Tribunal and Others [1986] 1 Sri LR 1.

As learned President's Counsel for the respondent correctly points out, section 31B(3)(a) caters for a situation where, for instance, services of several employees have been terminated by the same employer in relation to a specific incident, and an inquiry against some of them is pending

before an arbitrator while others are before the Labour Tribunal, the Labour Tribunal is required to suspend its proceedings until the inquiry before the arbitrator is concluded. The outcome of that inquiry should then be considered in deciding the matter before the Labour Tribunal. In both forums, the dispute and the employer remain the same or identical but the employees may be different. Under section 31B(2)(b), in both forums, the dispute, the employer and the employee are the same.

The finding of the Labour Tribunal, which was affirmed by the High Court, that there is no applicability of section 31B(3)(a) to the facts of this case is flawless.

High-flown technical objections and hair-splitting arguments should as much as possible be avoided in matters that fall under the purview of the Industrial Disputes Act, the purpose and object of which, as repeatedly pointed out by this Court, is the maintenance and promotion of industrial peace. Industrial law is founded on social justice.

The respondent cannot on the one hand say that *Eksath Kamkaru Samithiya v. Upali Newspapers Ltd.* has wrongly been decided before the Labour Tribunal (on the interpretation of section 31B(2)(b)) and on the other hand say that it has rightly been decided before the arbitrator (to say that the Minister has no power to refer the dispute for arbitration when the dispute is pending before the Labour Tribunal for determination) to non-suit the appellant employee. The submission of the appellant is no better. The appellant wants the Labour Tribunal proceedings to be suspended and the arbitration proceedings to be continued. The appellant does not seek a direction to the Labour Tribunal to continue with the proceedings. I cannot be a party to non-suit an employee who says his services were unjustly terminated.

What will then be the outcome of this appeal? If the Labour Tribunal cannot dismiss the application under section 31B(2)(b) and it also cannot suspend the proceedings under section 31B(3)(a), the Labour Tribunal shall proceed with the whole matter without confining the dispute only to the payment of gratuity.

The questions of law upon which leave to appeal was granted and the answers thereto are as follows:

Q: Has the High Court misdirected itself in law in failing to consider that the petitioner's application before the Labour Tribunal was filed on 11.12.2017 prior to the reference to arbitration by the Minister of Labour which was made on 28.12.2017 under section 4(1) of the Industrial Disputes Act, No. 43 of 1950 (as amended)?

A: Yes.

Q: Has the High Court misdirected itself in law in construing sections 31B(2)(b) and 31B(3)(a) of the Industrial Disputes Act having regard to the reference to arbitration being made after the application to the Labour Tribunal?

A: In respect of the first part of the question, i.e. the construction of section 31B(2)(b), the answer is "Yes"; and in respect of the second part of the question, i.e. the construction of section 31B(3)(a), the answer is "No".

Q: Has the High Court misdirected itself in law in failing to apply and/or failing to follow the judgment of the Court of Appeal in *Eksath Kamkaru Samithiya v. Upali Newspapers Ltd and Others* [1999] 3 Sri LR 205 affirmed by the Supreme Court in [2001] 1 Sri LR 105 where it was held that section 31B(3)(a) of the Industrial Disputes Act applies where the reference to arbitration by the Minister is made subsequent to the application filed before the Labour Tribunal which is what transpired in this instance?

A: Those two judgments have not held so.

Q: Has the High Court erred in law in determining that section 31B(3)(a) of the Industrial Disputes Act does not apply to the application of the petitioner and failing to hold that the proceedings before the Labour Tribunal must be suspended until the conclusion of the arbitration proceedings and resumed before the Labour Tribunal thereafter?

A: No.

The judgment of the High Court on the question of the applicability of section 31B(2)(b) is set aside, and the appeal is partly allowed. The Labour Tribunal is directed to hear the application of the appellant in its entirety. The proceedings before the arbitrator shall stand terminated. Let the parties bear their own costs.

Judge of the Supreme Court

Aluwihare, P.C. J.

I had the advantage of reading judgements in a draft of their Lordships, Hon. Justice Gamini Amarasekara and Hon. Justice Mahinda Samayawardhena. His Lordship Justice Amarasekara has arrived at the conclusion that the concurrent findings reached in the case of **Eksath Kamkaru Samithiya v. Upali Newspapers Ltd and Others**, by the Court of Appeal [1999 - 3 SLR 205] and The Supreme Court [2001 – 1 SLR 105] are not correct, in particular the finding that section 31B(2) of the Industrial Disputes Act applies only to applications filed after the reference for arbitration by the Minister.

The focus of the arguments before us were on the four questions of law on which leave to appeal was granted. Sub-paragraphs (a), (b), (c) and (e)

of Paragraph 18 of the Petition. The only question of law that directly touched the reference in issue is the question of law referred to in sub paragraph (c) of Paragraph 18 which is reproduced below;

"Has the High Court misdirected itself in law in failing to apply and/or failing to follow the judgement of the Court of Appeal in ***Eksath Kamkaru Samithiya v. Upali News Papers Ltd. and Others*** *(1999) 3 SLR 205 affirmed by the Supreme Court in (2001) 1 SLR 105, where it was held that Section 31B (3) (a) of the Industrial Disputes Act No. 43 of 1950 (as amended) applies where the reference to arbitration by the Minister is made subsequent to the Application filed before the Labour Tribunal which is what transpired in this instant?"*

Although reference was made to the decision in **Upali News Papers** [supra] In the course of the argument neither party made any serious challenge the decision of the said case that it was decided incorrectly and if that was the case, there would have been a specific question of law on the issue and followed by an in depth argument on the correctness or otherwise of the judgement. I find that the ratio in judgement in issue had been consistently applied over the years and I am of the view that from the standpoint of the parties to this case, it would have been more appropriate had they been put on notice of the issue and the decision in **Upali News Papers** [supra] deliberated fully before arriving at a conclusion.

With all due deference to his Lordship Justice Amarasekara, who had embarked on an analysis of the decision in **Upali News Papers** and had expressed his views of that decision, I take the view that, for the reasons referred to here, it would not be pertinent for me to express my views on the issue.

Having considered the judgement of His Lordship Justice Samayawardhena, I am inclined to agree with his Lordship's conclusion that the appeal should be partially allowed and the Labour Tribunal should be directed to hear the application of the Applicant-Appellant.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I had the opportunity of reading the judgment written by His Lordship Justice Samayawardhena in its draft form. With all due respect to his lordship's views, I expect to express a dissenting view as demonstrated below.

His Lordship in his draft judgment has referred to the Court of Appeal judgment in **Upali Newspapers Ltd v Eksath Kamkaru Samithiya and Others** as well as to the Supreme Court judgment in **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others** which confirmed the said Court of Appeal Judgment, reported in **(1999) 3 Sri LR 205** and **(2001) 1 Sri LR 105** respectively. With all due deference to the views expressed by their Lordships who decided **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others**, I am of the opinion that it was not correctly decided as explained below in this judgment.

In the Court of Appeal case reported in (1999) 3 Sri L R 205, it was held that;

"The combined effect of the provisions of Articles 170, 114, 116 is that the proposition that the Minister has unlimited powers under s. 4 (1) which would enable him to refer a dispute which is pending before Labour Tribunal to an Arbitrator for settlement, is incorrect. A contrary

interpretation would necessarily infringe and violate the principle of independence of the judiciary enshrined in Article 116 of the Constitution which is the paramount law."

In appeal, while confirming the said decision, the Supreme Court as reported in (2001) 1 Sri L R 205 held as follows;

"that the Court of Appeal has not erred in the interpretation of Article 116(1) of the Constitution and that the Minister had no power to refer the dispute regarding the termination of services for compulsory arbitration when applications in respect of the said dispute were pending in the Labour Tribunal."

It appears that such interpretation was reached in the aforesaid case on the premise that such reference for arbitration, while an application made to the Labour Tribunal is pending, interferes with the judicial process of the Labour Tribunal and therefore, is obnoxious to the independence of the Judiciary.

However, in my view, an interference with the judicial process by reference of an industrial dispute for an arbitration by the Minister arises only if following circumstances are established.

a) If the Minister knows that there is a pending application before Labour Tribunal at the time of the reference for arbitration is made; and,
b) The intention of the Minister to refer for compulsory arbitration is none other than to disrupt the proceedings before the Labour Tribunal.

If the intention of the Minister is bona fide and not to disrupt the proceedings before the Labour Tribunal but relates to the best interests of the parties and the community at large as discussed later in this

judgment, it cannot be considered as interference with the judicial process.

Thus, considering the mere reference of disputes for arbitration as causing infringement and a violation of the principle of the independence of the judiciary in the said decision cannot be viewed as correct since such a conclusion cannot be made in general terms but such a conclusion may have to depend on the facts of each case.

The Industrial Dispute Act provides a number of mechanisms to prevent and resolve industrial disputes. Collective agreements, settlement by conciliation and settlement by voluntary arbitration (by reference with the consent of the parties by the Commissioner of Labour), compulsory arbitration and settlement in terms of Section 4 of the Industrial Disputes Act (by reference to arbitration or settlement by the Minister) and filing an application before Labour Tribunal based on alleged unjust termination are among them.

For compulsory arbitration, parties' consent is not necessary. It is necessary to understand why this power is given to the Minister.

It appears that compulsory State intervention in industrial disputes was first introduced to Sri Lanka as a war time measure during the second world war through regulations. Compulsory settlement through a reference to an Industrial Court by an order of the Minister was introduced in a permanent form by section 4 of the Industrial Dispute Act of 1950 as amended by Act no 25 of 1956[1].

The said section read as follows;

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[1] See page 185 A General Guide to Sri Lanka Labour Law by S. Egalahewa and Parliamentary Debates (Hansard), Senate Official Report, Volume 4, 1950-1951 June 20, 1950 to March 28,1951 page 228 Speech of Senator, Hon. Mr. Wijeyeratne (Minister of Home Affairs and Rural Development)

"4. *The Minister may, by an order in writing, refer an industrial dispute to an industrial court for settlement if such dispute in an essential industry or if he is satisfied that such dispute is likely to prejudice the maintenance or distribution of supplies or services necessary for the life of the community or if he thinks that it is expedient to do so.*"[2]

Further, acts in furtherance of any lockout or strike after such reference to an Industrial Court had been made punishable[3].

The said section itself indicates that the said compulsory settlement was introduced concerning the interests of the community at large as some disputes may affect the essential services and supplies and services needed for the life of the community at large.

However, with the amendments introduced in 1957, Section 4 of the Industrial Dispute Act now reads as follows;

"*4. (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 that the parties to such disputes or their representatives do not consent to such reference.*

(2) The Minister may, by an order in writing, refer any Industrial Dispute to an Industrial Court for settlement."

The amendment made in 1957 has made the powers of the Minister to refer disputes for arbitration apparently much wider since the present section 4, unlike the previous one, does not directly refer to dispute in essential industry or dispute that affects the maintenance or distribution of supplies or services necessary for the life of the community. However,

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[2] See section 4 of Industrial Dispute Act of 1950 as amended by Act No. 25 of 1956
[3] See section 40 of the same Act

the disputes whether minor or otherwise as contemplated in the present section may necessarily include disputes that relate to supplies and services of essential services and which are necessary for the life of the community.

When compulsory settlement and/or arbitration was introduced in a permanent manner in 1950 or further amended giving wider powers in 1957, number of members of parliament, especially the left-wing members opposed to it on the premise that it was obnoxious to the rights of the working class to stage strikes and it dilutes the bargaining powers of the workers. However, the relevant Minister of Labour who held the office at the relevant time, whether it was in 1950 or 1957, during the relevant debate has indicated that the compulsory arbitration is necessary to serve the interest of the community at large and/or the national interest[4].

In interpreting a statute, a Court cannot presume that the legislature intended to cause harm to the rights of any one or any group of the society such as working class. Thus, it can be understood that this provision for compulsory arbitration was introduced to preserve and balance the interests of the parties involved in the dispute as well as the interests of the community at large. It must also be noted that the compulsion caused by section 4 and the relevant punishments contained in section 40 of the Industrial Dispute Act apply not only to the employee but to the employer as well.

Thus, such powers were given to the Minister not merely to take steps to resolve the dispute between the parties but also to minimize the effect of such disputes on the community at large. An application before the

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[4] See the Parliamentary Debates (Hansards), House of Representatives 1950-51 Vol 8, 20.06.1950to 18.08 1950, and Parliamentary Debates (House of Representatives) 1957-58 Vol 30 Sept,3 to Dec, 20, 1957 Part 1. Also see Á General Guide to Sri Lanka Labour Law by S. Egalahewa pages 203 and 204

Labour Tribunal may resolve a dispute between an employer and employee whose employment has been terminated but such process may not address the effect of such dispute that may have been caused on the community at large which requires immediate attention and speedy solutions.

Certain industrial disputes may cause hardship to community at large. For example, if an employer terminates employment of a trade union leader, on an application made to Labour Tribunal, the Labour Tribunal may decide whether the termination is justified or not, and may provide relief on just and equitable grounds. However, such a dispute may trigger a strike action not only within the relevant institution that the trade union leader was employed, but also in other institutions where the same trade union or supporting trade unions have branches. Such a situation may develop to a situation that disrupts the economy and essential needs of the community at large and it may affect the interests of the investors including foreign investors compelling them to withdraw from their investments. The effect of such strike or chain of strikes may harm the interests of community at large. Similarly, even employers can stage lockouts to suppress upcoming trade union activities causing hardships to many employees and their families and even to the community at large. On the other hand, if the interpretation given in the aforesaid case **Eksath Kamkaru Samithiya v Upali News Papers Ltd** is considered as correct, an employer or a trade union with ulterior motives needs only a little bit of pre-planning to impede the minister using his powers for compulsory arbitration. An employer who wants to suppress trade union activities can stage a lockout while getting one of his stooges get involved, thereafter sack him along with few others and getting him to file an application before the Labour Tribunal. Similarly, a trade union with other political motives can stage a chain of strikes to disrupt the economy just after filing an application in the Labour Tribunal. Thus, in my view,

whether the reference for compulsory arbitration is an interference with the independence of the Judiciary or to safeguard the interests of the community at large has to be evaluated depending on the facts pertaining to each occasion.

In my view, the power given to the Minister to refer disputes for compulsory arbitration is interrelated to the needs of life of the community at large. However, I do not intend to say that the Minister has unlimited or absolute power in this regard. If the Minister uses his power arbitrarily, irrationally or illegally, other remedial measures such as writs may be available. However, in the backdrop explained above, in my view, it is illogical to think that such power is vested with the Minister only to use prior to the filing of an application before the Labour Tribunal.

Therefore, it is my view that mere reference for Arbitration by the Minister cannot be considered as an interference with the judicial process, even if there is any application already filed by an employee before Labour Tribunal prior to the reference for compulsory arbitration.

The Section 31B(2)(b) of the Industrial Disputes Acts reads as follows;

"A labour tribunal shall where it is so satisfied that such matter constitutes, or forms part of, an industrial dispute referred by the Minister under section 4 for settlement by arbitration to an arbitrator, or for settlement to an industrial court, make order dismissing the application without prejudice to the rights of the parties in the industrial dispute".

The plain reading of the said Section does not indicate that the reference by the Minister for compulsory arbitration has to be made prior to the filing of an application before the Labour Tribunal. Even the section 4 of the Industrial Dispute Act quoted above does not limit the power of the Minister to disputes that are not pending before Labour Tribunals.

In the book **Maxwell on The Interpretation of Statutes** (11th Edition) [1962] page 2 states;

"If the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature"

In **N.S. Bindra's Interpretation of Statutes** (12th Edition) [2017] page 317 states that;

"If the words of the section are plain and unambiguous, then there is no question of interpretation or construction. The duty of the court then is to implement those provisions with no hesitation".

To give such an interpretation to say that, to dismiss an application, the reference for arbitration has to be done prior to the filing of the application before the Labour Tribunal, one has to add such words giving that meaning to at least to one of the aforesaid sections in the Industrial Dispute Act.

Therefore, it is my view that it is not correct to view that such power is given to the Minister only to use prior to the filing of an application before the Labour Tribunal.

Outcome of the decisions made by Court of Appeal and the Supreme Court in **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others** indicates that due to Articles 114 and 116 of the Constitution, the section 4(1) has to be interpreted to mean that such reference of the dispute for compulsory arbitration can validly be done only when there is no application pending before the Labour Tribunal. As explained before, unless the Minister refers the dispute for arbitration with an intention of disrupting the proceedings before the Labour Tribunal, it is

difficult to say that it is an interference by the Minister as contemplated by then Article 116 (now Article 111C). The Minister even may not be aware of any pending application before the Labour Tribunal when he decides to refer a dispute for compulsory arbitration. With the reference for Arbitration, it is the law of the country contained in section 31B(2)(b) that requires the application before the Labour Tribunal be dismissed. When the factual position whether there is an interference with the judicial process or not depends on the circumstances of each case as explained above, I do not think relevant sections in the Industrial Dispute Act should be read with necessary adjustments as contemplated by Article 168(1) of the Constitution.

Thus, in my view, conclusion reached in the decision of **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others** that a reference for compulsory arbitration by the Minister in terms of section 4(1) of the Industrial Dispute Act while an application to a Labour Tribunal is pending, is bad in law is not correct unless there are specific facts revealing that such reference was intended to disrupt the proceedings before the Labour Tribunal.

It appears that the only point raised in appeal in the said **Eksath Kamkaru Samithiya Case** was whether the Minister has the power to refer to an industrial dispute for arbitration in terms of said section 4(1) when there is an application pending in the Labour Tribunal. As such, any view expressed stating that section 31B(2)(b) would apply only to an application made to Labour Tribunal subsequent to a reference made by the Minister to an Arbitrator or to an Industrial Court for settlement has to be considered as obiter. The refusal of the request made to revive the dismissals made in the Labour Tribunal in the said **Eksath Kamkaru Samithiya case** further strengthens the fact that the matter that was under consideration in the said case was not the application of section

31B(2)(b) but the validity of the reference for arbitration by the Minister. The Appellant has also referred to the decision in **W.K.P.I Rodrigo Vs Central Engineering Consultancy Bureau SC Appeal No. 228/2017 SC Minutes 02.10.2020.** However, the contents of the decision show that, even though there is reference made to section 31B(2)(b) in the said judgment, the issue in that case also was not related to the application of section 31B(2)(b) but to section 31B (5). Thus, what is stated there referring to section 31B(2)(b), without analyzing section 31B(2)(b) and its application as a matter in issue, also has to be considered as obiter.

The plain reading of the Section 31B(2)(b) indicates that the said section does not contemplate the time at which the relevant application is filed in the office/secretariat of the Labour Tribunal. It contemplates the time the Labour Tribunal take cognizance of the application. In other words, the time at which the President of the Labour Tribunal considers the application. If the President of the Labour Tribunal finds that there is a pending arbitration as per section 4 of the Industrial Dispute Act, the President of the Labour Tribunal has to dismiss the application.

One may argue that the learned High Court Judge as well as the President of the Labour Tribunal were bound to follow the decision of **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others.** It appears from the decision of the learned High Cort Judge that the Learned High Court Judge distinguished the decision in **Eksath Kamkaru Samithiya** stating that the matter in issue in that case was whether the Minister had the power to refer an industrial dispute for arbitration in terms of section 4(1) of the Industrial Dispute Act when there were applications pending in the Labour Tribunal. In other words, the learned High Court Judge identified the matter in issue in the **Eksath Kamkaru Samithiya case** was whether the reference for arbitration by the Minister was valid and not as one relating to the application of section

31B(2)(b). It must be noted that the Counsel for the Appellant in the written submissions dated 20.12.2022 indirectly invites this court to reconsider the correctness of said decision in **Eksath Kamkaru Samithiya** case – vide para 16 – 21. The Counsel for the Respondents also in his written submissions dated 09.06.2022 submits that the views expressed in the said case in relation to section 31B(2)(b) of the Industrial Dispute Act was merely obiter- vide item 4, under the topic Stare Decisis- Section 31B(2)(b) of the Industrial Dispute Act.

However, when the decision of the High Court is challenged in appeal and taken up before this court, this court is not bound to follow the said decision in **Eksath Kamkaru Samithiya** case, if it is not correctly decided and this court has to apply the law as it sees as correct law. In my view, as per the law, dismissal of the application by the learned President of the Labour Tribunal and its confirmation by the Learned High Court is correct as I do not see the said decision in **Eksath Kamkaru Samithiya** case as correct in law and what is relevant is whether the dispute had been referred for arbitration or settlement by industrial court by the Minister when the application was considered by the President of the Labour Tribunal.

His Lordship Justice Samayawardhena has correctly pointed out that section 31B(3)(a) has no relevance to the facts of this case. It applies only for instances where similar or identical dispute exists where the same employer is a party but not to instances where another inquiry is pending on a similar or identical dispute between same parties. If it is interpreted to say that it applies even where another inquiry is pending on a similar or identical dispute between same parties, namely same employer and employee, section 31B(2)(b) may become redundant. Section 31B(3)(b) also has no relevance to the circumstances of this case as that section contemplates proceedings or inquiries pending in terms of any other law.

Compulsory arbitrations are done under the provisions of the same Industrial Dispute Act. My brother judge, honourable Justice Samayawardhena has referred to section 31B (5) in his draft Judgement. In my view, first part of section 31B (5) applies where the dispute has been referred to and concluded by the Labour Tribunal. On such instances, the workman is not entitled to any other remedy. In fact, if the dispute has been attended and concluded by the Labour Tribunal, there cannot be an existing dispute to ask for any other remedy other than an appeal over the decision of the Labour Tribunal. Second part of section 31B (5) refers to instances where the workman has resorted to a different legal remedy other than filing of an application before the Labour Tribunal in terms of section 31B (1). Filing of an action in the District Court may fall within that part but as reference for compulsory arbitration can be done without the consent of the parties, I doubt whether such remedy can be considered as one resorted by the workman. In any case, if the dispute has been referred for compulsory arbitration, application before the Labour Tribunal on the same dispute has to be dismissed in terms of section 31B(2)(b). Anyway, I do not see any relevance of section 31B (5) to the circumstances of this case.

Even though, section 31B(2)(a) of the Industrial Dispute Act has no relevance to the present case before us, as it contemplates concurrent discussions between the employer and the trade union of which the applicant to Labour Tribunal is a member, it is pertinent to note that if the thinking behind the decision of **Eksath Kamkaru Samithiya case** referred above applies to this section, one can argue that such discussions interfere with the judicial process and such suspension of proceedings as contemplated in that section is not warranted. In my view, irrespective of the pending case before the Labour Tribunal, law provides for discussions with the employer through the trade union which has a better bargaining power since solution based on settlement is more

effective than one reached through litigation as far as industrial peace and harmony is concerned.

It appears that the Respondent has taken preliminary objections before Labour Tribunal as well as before the Arbitrator. In my view, it should not be taken as an attempt to nonsuit a party at this moment. A vigilant lawyer may take up such objections in both forums since if he raises his objection only before one forum and fails, his client may have to face two inquiries based on the same dispute before two forums. On the other hand, if the objection before the Arbitrator is that two separate proceedings cannot be maintained on the same issue, it cannot be proceeded with if the Labour Tribunal dismisses the application on the objection raised.

On the other hand, whether the objection before the arbitrator is to nonsuit the appellant or whether it is the correct legal position taken up as a preliminary objection has to be decided when the order relevant to that objection is made and challenged and not in an appeal based on a decision made by a different forum.

Thus, in my view the questions of law have to be answered in the following manner.

Q. Has the High Court misdirected itself in Law in failing to consider that the petitioner's application before the Labour Tribunal was filed on 11.12.2017 prior to the reference to arbitration by the Minister of Labour which was made on 28.12.2017 under section4(1) of the Industrial Dispute Act, No.43 of 1950 (as amended)?

A. Since I view that **Eksath Kamkaru Samithiya** Case was not correctly decided, I answer this in the Negative as what is relevant is whether there is a pending arbitration in terms of section 4 of the Industrial Dispute Act when the application is being considered by the Labour Tribunal.

Q. Has the High Court misdirected itself in Law in construing sections 31B(2)(b) and 31B(3)(a) of the Industrial Dispute Act No. 43 of 1950 (as amended) having regard to the reference to Arbitration being made after the application to the Labour Tribunal?

A. No

Q. Has the High Court misdirected itself in law failing to apply and/or failing to follow the Judgment of the Court of Appeal in **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others (1999) 3 Sri LR 205** affirmed by the Supreme Court in **(2001) 1 Sri L R 105** where it was held that section 31B(3) (a) of the Industrial Dispute Act No.43 of 1950 (as amended) applies where the reference to arbitration by Minister is made subsequent to the application filed before the Labour Tribunal which is what transpired in this instance?

A. The said judgments do not relate to section 31B(3)(a). Even if reference to section 31B(3)(a) is a typographical error and it has to be considered as section 31B(2)(b), the learned High Court Judge has distinguished the issue that was in question in the said **Eksath Kamkaru Samithiya** case from the case at hand. It appears that the position of the Learned High Court judge was that the said case was to challenge the validity of the Reference of the dispute in that matter for Arbitration, and since there is no writ issued in this matter the Labour Tribunal's decision to dismiss the present application before the Labour Tribunal is correct.

Q. Has the High Court erred in law in determining that section 31B(3)(a) of the Industrial Dispute Act No.43 of 1950(as amended) does not apply to the application of the petitioner and failing to hold that the proceedings before the Labour Tribunal must be suspended until the conclusion of the arbitration proceedings and resumed before the Labour Tribunal thereafter?

A. No. However, it could have been prudent to suspend the proceeding in relation to the gratuity but not the application in toto, as the result of the Arbitration proceedings may have a bearing on the terminal benefits.

For the reasons stated above this appeal is dismissed. No Costs.

Judge of the Supreme Court