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

In the matter of an Application for Leave to Appeal to the Supreme Court under and in terms of Section 31DD of the Industrial Disputes Act (as amended).

S.C. Appeal No. 99/2012
S.C. H.C. L.A. No. 38/2012
HCALT No. 118/10
L.T. No. 08/425/2010

The British High Commission,
No. 389, Bauddhaloka Mawatha,
Colombo 07.

Respondent-Respondent-Appellant

Vs.

Ricardo Wilhelm Michael Jansen
No. 62, Perakumba Mawatha
Kolonnawa.

Applicant-Appellant-Respondent

BEFORE : **MOHAN PIERIS. P.C.,CHIEF JUSTICE**

PRIYASATH DEP P.C., J

EVA WANASUNDERA P.C., J

COUNSEL	:	Nigel Hatch PC with Ms. S. Illangage for the Respondent-Respondent-Appellant. Thushani Machado with C. Hettiarachchi for the Applicant-Appellant-Respondent.
ARGUED ON	:	14.05.2013
DECIDED ON	:	10.07.2014

The case at bar raises issues of state immunity and the facts and circumstances that led to the instant appeal to this Court from the order of the Provincial High Court, Colombo could be adumbrated presently.

The Applicant-Appellant-Respondent (hereinafter referred to as "the Respondent") was employed by the Respondent-Respondent-Appellant the British High Commission, Colombo (hereinafter referred to as "the Appellant"), as a Security Assistant with effect from 02.04.2001. The Respondent was initially employed for a period of two years subject to performance. At the expiry of the said two years the services of the Respondent were extended for a further two years with effect from 02.04.2003. At the conclusion of this two year period the Respondent was made a permanent employee of the Appellant. By letter dated 03.02.2010 the services of the Respondent were terminated for alleged misconduct as it was found by the High Commissioner to be asleep whilst on guard duty. The said letter dated 3rd February 2010 further stated that the Respondent was in breach of the employment contract and Clause 36 of the Post Security Regulations/Instructions which declares that sleeping on duty is strictly forbidden.

The document marked by the Appellant as X brings forth the following. It was a condition of the Respondent's employment that his services may be terminated at any time without notice on grounds of willful misconduct and/or disobedience, neglect of duties or breach of any express or implied term of employment (paragraph 7 at page 26 of "X" and paragraph 13 at page 32 of "X").

The Respondent filed an application in the Labour Tribunal seeking relief against the alleged unlawful termination of his services.

It is apparent from the answer filed by the Appellant–**the British High Commission** that the position of the Appellant before the Labour Tribunal has been that "the British High Commission looks after the interests of the United Kingdom in Sri Lanka" and Sri Lankan laws do not apply to it. This averment makes clear that the plea was one of state immunity and not diplomatic immunity. Without prejudice to the jurisdictional objection, the Appellant further pleaded that the Respondent had had a bad prior record of service and the termination of the Respondent's services were justified and that he was not entitled to any reliefs. The Respondent sought to traverse the plea in bar of jurisdiction in his replication. The Replication filed by the Respondent, whilst admitting that the British High Commission looks after the interests of the United Kingdom in Sri Lanka, denied that Sri Lankan Laws do not apply to the Appellant and further averred that the contract of employment stipulated that the Appellant High Commission was subject to Sri Lankan Labour Law. Although the Appellant High Commission filed answer before the Labour Tribunal taking up the jurisdictional plea, it did not participate in the proceedings which were consequently held ex parte.

I wish to point out at the very outset that the traversal in bar of jurisdiction before the Labour Tribunal was premised on State Immunity rather than Diplomatic Immunity but it would appear that diplomatic immunity has been the bone of contention in both the Labour Tribunal and the Provincial High

Court of Colombo. It has to be noted that whilstthe Labour Tribunal upheld the objection on the mistaken assumption of diplomatic immunity, the Provincial High Court rejected it and proceeded to hold that the Labour Tribunal possesses the requisite jurisdiction to hear and determine the application filed by the Respondent.

It is pertinent to highlight the salient features of the respective judgments which seek to justify their reasoning.

Labour Tribunal Order dated 29th October 2010

The order dated 29th October 2010 of the President, Labour Tribunal sets out the following reasons for the holding that it is denuded of jurisdiction to hear and determine the application filed by the Respondent.

(a) If the Appellant (the British High Commission) is clothed with diplomatic immunity (sic), the institution and maintenance of an action against the Appellant and the consequent enforcement are questions that are of a mandatory nature to be borne in mind;

(b) The Diplomatic Privileges Act, No. 9 of 1996 (sic) accords immunity from suit to the British High Commission/or its consular personnel;

(c) Though the Respondent's contract of employment states that the conditions of service are subject to Sri Lankan Labour Law, what is in issue is whether legal proceedings could be instituted in the event of an alleged violation thereof;

(d) The Respondent has failed to show that the Appellant is not subject to diplomatic benefits and immunities;

(e) A legally binding order cannot be delivered against the Appellant and the Respondent cannot maintain an application against the Appellant;

Since the Respondent gave evidence before the Labour Tribunal in the ex parte proceedings, the President, Labour Tribunal made the following determinations on the merits.

(a) The Respondent has not established his case that he was ill and/or indisposed and that he had duly notified his superiors on the date in question which according to him prevented him from performing his duty;
(b) The Respondent has admitted in his evidence that he had slept whilst on duty;
(c) Neither in his application nor in the Replication does the Respondent state that he was suffering from a viral fever on the day in question; He had not even informed any officer that he was unwell and that he had failed to open the gate for the High Commissioner;

The Respondent workman preferred an appeal to the Provincial High Court in Colombo from the Order of the Labour Tribunal and the High Court had the benefit of written and oral submissions addressed to it on two pivotal questions albeit erroneously assumed. Can the Appellant British High Commission plead Diplomatic Immunity from suit in the Labour Tribunal when a Sri Lankan workman attached to the High Commission impleads it on an alleged infringement of his contract of employment? Does this plea avail it when the contract of employment contains a clause that the employee's conditions of service are subject to Sri Lankan Labour Law?

The Order of the Provincial High Court dated 27th March 2012

The Learned High Court Judge concluded in his order that the waiver of immunity must be express in relation to jurisdiction as well as enforcement and such waiver is apparent from the contractual provisions contained in the letters of appointment of the Respondent that the conditions of service of the Respondent are subject to Sri Lankan Labour Law.

According to the judgment of the Provincial High Court, such a declaration in the letters of appointment would amount to an express waiver of immunity. As regards the argument of the Appellant that the British High Commission is neither a natural nor a legal person and thus no institution of proceedings could be maintained against the British High Commission, the Provincial High Court takes the view that having filed an answer before the Labour Tribunal in opposition to the application, it does not lie in the mouth of the Appellant to contend that the application cannot be sustained and that the Labour Tribunal possesses the jurisdiction to hear and determine the application. In fact Diplomatic Immunity figured again in the Provincial High Court as they do in this Court but the distinction between State Immunity and Diplomatic Immunitydo not seem to have been appreciated by both Counselor the Learned High Court Judge. I will proceed to discuss this distinction in the course of this judgment.

The Appellant was granted leave on the following questions of law as itemized in the petition of appeal.

(a) Has the Learned High Court Judge erred in law in failing to construe and/or give effect **to the Diplomatic Privileges Act No. 9 of 1996 which incorporated into our domestic law the Vienna Convention on Diplomatic Relations 1961 to** which Sri Lanka was a signatory?

(b) Has the Learned High Court Judge misdirected himself in law by failing to construe and/or in not considering that under the principles of Public International Law and/or Diplomatic Privileges Act No. 9 of 1996, the British High Commission and inter-alia its members of the mission and/or members of the staff of the mission and/or diplomatic agents are entitled to sovereign immunity from inter-alia legal process and/or court proceedings in Sri Lanka?

(f) Has the Learned High Court Judge erred in law in construing the provision "Your conditions of service are subject to Sri Lankan Labour Law and in line with the Foreign and Commonwealth Office LE Staff Strategy and best practice" in the Letter of Appointment marked A6 and/or the payment of statutory benefits respectively to be tantamount to an express waiver of immunity?

(g) Has the Learned High Court Judge erred in law in holding that the said clause and/or payment of statutory benefits constitute the submission by the British High Commission to jurisdiction and/or that the statutory provisions and Labour Laws of Sri Lanka cannot be isolated for the Court machinery and enforcement machinery?

(h) Has the Learned High Court Judge erred in law in holding that the Labour Tribunal has the jurisdiction to hear and determine the application of the Respondent and/or enforce an award?

(l) Without prejudice to the aforesaid, has the Learned High Court Judge erred in law in allowing the appeal thereby granting the Respondent all the reliefs prayed for by the Respondent without

having considered the matter on the merits having particular regard tothe Respondent being a Security Guard at a foreign Diplomatic Mission?; and/ or

(m) Has the Learned High Court Judge erred in law in not stating what reliefs prayed for by the Respondent are allowed in appeal having regard to the Respondent having sought the reliefs of reinstatement with back wages and in the alternative a sum of Rupees Four Million (Rs 4,000,000/-) as compensation in lieu of reinstatement from the Labour Tribunal?

(n) Has the Learned High Court Judge erred in law in construing that the mere filing of an answer by the British High Commission constituted a waiver of objection to the defect in the Labour Tribunal application per se?

As I stated above, the case at bar hinges on sovereign immunity which does not engage the provisions of the Diplomatic Privileges ActNo. 9 of 1996. The Diplomatic Privileges ActNo. 9 of 1996 is Sri Lanka's response to its dualistpractice of enacting domestic legislation to give effect to its international obligations under the Vienna Convention on Diplomatic Relations of 1961 and I must observe that neither the Convention nor our domestic legislation is engaged in the case at bar. If one peruses the answer filed by the British High Commission-the Respondent before the Labour Tribunal the position taken by the High Commission becomes relevant. Paragraph 3 of that answer stated as follows :

"It is respectfully submitted that the Respondent British High Commission looks after the interests of the United Kingdom in Sri Lanka and the Sri Lankan lawsdo not apply to the Respondent."

By this averment no diplomatwas seeking any immunity from suit and the British High Commission was asserting nothing but the immunity of the United Kingdom from suit in the Sri Lankan Labour Tribunal on a contract of employment which had been entered into by an agent of the UK and the Respondent workman who functioned as a Security Officer. Interestingly enough the initial letter of appointment issued to the Respondent on 12 April 2001 states that his conditions of service are subject to Sri Lankan Labour Law and not British. This initial letter had been signed by one R.P.Morris, Management Officer of the British High Commission and the Respondent. Subsequent letters issued to the Respondent bearing several dates such as 5th October 2001 and 14th March 2003 incorporate the terms and conditions of the initial letter dated 12 April 2001 and the letter dated 22nd April 2009 which confirmed the Respondent in his position of "Security Assistant" at Grade V(b) also specifically refers to the fact that the Respondent's conditions of service are subject to Sri Lankan Labour Law and in line with the Foreign and Commonwealth Office's L.E Staff Strategy and best practice.

From the foregoing the following issues merit recapitulation. Whilst the letters of appointment of the Respondent subject the terms and conditions of employment to Sri Lankan Labour Law, the answer before the Labour Tribunal asserts state immunity. If one looks at the terms and conditions of employment, they traverse such areas as pay, bonus, EPF, ETF, gratuity, working hours etc. Under the rubric "Performance" -paragraph 13 of the terms and conditions is to this effect-"You may terminate your appointment at any time by giving one month's notice. We reserve the right to terminate your employment at any time without notice or payment in lieu ofnotice on grounds of willful misconduct and/or negligence and/or disobedience, neglect of duties or breach of any express or implied term of your employment".

The alleged termination took place through a letter dated 3rd February 2010 which was addressed to the Respondent by one Philip Nalden –Second Secretary of the Appellant. The letter alleged that on Saturday 23rd of January

2010 at about 14.50 hours it was reported by the British High Commissioner, Dr. Peter Hayes that the Respondent had been asleep whilst on an alert guard duty. The letter described the circumstances in which the Respondent was found to be asleep. The High Commissioner had driven up to the main gate of Westminster House to exit. As there was no response from the gatehouse, he stepped out of his vehicle and went to the gatehouse where he found the Respondent asleep. The letter further alleged that this conduct was in breach of his employment contract ((Neglect of Duty), and Post Security Regulations (Instructions for Security Assistants para 36 which states that sleeping on duty is strictly forbidden).

The letter further stated –"Based on the facts, and on your own admission that you had "dozed off", your employment with the British High Commission is hereby terminated with immediate effect."

It is consequent to this alleged letter of termination that the Respondent instituted Labour Tribunal proceedings by his application dated 25th March 2010. The Appellant's plea of immunity was denied by the Respondent in his replication but he admitted that his EPF and ETF contributions had been duly paid. As I alluded to before, the Appellant did not participate in the proceedings at which the Respondent testified on the merits denying the charges leveled by the High Commission and giving a different version of events. After having rejected this version presented by the Respondent in the witness box, the President of the Labour Tribunal has gone into the plea of immunity by undertaking an assay into the Diplomatic Privileges ActNo. 9 of 1996 on the mistaken assumption of its applicability to the issues before him-a course which was no doubt referable to the submissions of counsel before him.

The President of the Labour Tribunal also alludes to the paramount duty of delivering an order which is executable against a party and for that purpose it is a requirement of law that an application should be filed against a natural or legal person. On the facts the Labour Tribunal concludes that it cannot reach a

finding whether the British High Commission is a natural or legal person-(***The Superintendent, Deeside Estate Maskeliya v IllankaiTholarKazhakam* 70 NLR 279).**

In the end the President, Labour Tribunal concluded that the application cannot be instituted and maintained against the British High Commission.

The Learned High Court Judge fell into the same error of assuming that the provisions of the DiplomaticPrivileges ActNo. 9 of 1996 were engaged in the matter before him and he equated the express assertions in the letters of appointment that the terms and conditions of employment would be governed by Sri Lankan Labour law, to be express waivers of immunity and concluded that the President, Labour Tribunal had jurisdiction. In the end the appeal of the Respondent was allowed by the High Court Judge.

So much for the trajectory of the case. In the appeal before this Court only two issues loom large for resolution. Can the British High Commission assert state immunity on behalf of the United Kingdom having regard to the facts and circumstances of this case? Is there a waiver that defeats this plea of sovereign immunity?

It has to be borne in mind by all triers of fact that it is settled law that where a claim of immunity is raised by a state, that is to be treated as a preliminary issue, to be settled conclusively before the court addresses any aspects of the merits of the dispute (***Maclaine Watson v Department Trade*** (1988) 3 All ER 257 at 317, CA). I will proceed to answer the two issues now.

Pleaof Sovereign Immunity

Immunity by reason of the sovereign independent status of a state is only available when proceedings are initiated against a foreign state and is a preliminary plea taken at the commencement of the proceedings. It serves a very important purpose; It debars the court of the State where proceedings are brought (the forum Court or national Court) from exercising jurisdiction to

inquire further into the claim; so a plea of immunity is a technique of avoidance of jurisdiction of a Court of one State and such a denial of jurisdiction is said to arise out of international comity. The Latin maxim '*par in parem non habet imperium'* (one equal cannot exercise authority over another) neatly summarizes the justification for sovereign immunity. Specific legislation has been enacted by states to deal with the subject and its challenges and one needs only to advert to UK's State Immunity Act of 1978 and Australia's Foreign State Immunity Act of 1985. It has to be noted that there is no domestic legislation specifically dealing with the question of State or Sovereign Immunity in Sri Lanka and we have to look for guidance from customary international law or other jurisdictions whenever a plea of immunity is raised before us.

There is today a distinction between absolute immunity and restricted immunity. Whereas the immunity was once absolute, the pendulum has since swungtowards restrictive immunity. With the dramatic increase in state involvement in commercial contracts and trading activities, not many States are now willing to apply the doctrine of absolute immunity in granting exemptions from legal process to foreign sovereigns and States. Even those States which were applying the doctrine in its full vigour have attempted to create certain exemptions in the matters of private contracts undertaken by the foreign State. So States have moved towards a position of accepting only a restricted doctrine of immunity. States did this by providing that a state has immunity for only a limited class of acts. The distinction is between acts *jure imperii* (A State acting in a public or sovereign capacity) and acts *jure gestionis* (A State acting in a private capacity). The purpose of distinction is to ensure that the state is treated as a normal litigant when it behaves like one, and as a sovereign when it exercises sovereign power**.** In the United Kingdom itself, the doctrine of absolute immunity was clearly abandoned in commercial transactions in the **Philippine Admiral** case (1976) 1 All ER 71 (PC) (action *in rem*) and **Trendex Trading Corporation v Bank of Nigeria** (1977) QB

529(action *in personam*) also gave effect to the emerging doctrine of restrictive immunity. In **Trendex Trading Corporation,** Lord Denning M.R stated-

> "If a government department goes into the market places of the world and buys boots or cement, as a commercial transaction that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods."

It has to be remembered that both the **Philippine Admiral** case and **Trendex Trading Corporation** were decided before the UK enacted State Immunity Act, 1978 and in fact **Trendex** did highlight the need for legislation. The conclusion that Lord Denning reached in Trendex was followed in the House of Lords in **I Congreso del Partido**(1983)AC 244 and the case becomes relevant to the issues before this Court having regard to the test propounded by Lord Wilberforce in the case to untangle the knotty issue of determining whether a particular act of a State is *jure imperii* or*jure gestionis*.

Lord Wilberforce's test becomes relevant because the distinction between public or sovereign acts (*juraimperii*) and private acts (*juragestionis)* is not easy to draw. This distinction is important because restrictive immunity restricts immunity to sovereign acts (*juraimperii*), whilst commercial and private acts (*juragestionis*) do not enjoy immunity at all. In **I Congreso del Partido,** the House of Lords developed a two-stage test in order to distinguish between acts *jure imperii* and acts *jure gestionis*for disputes arising under English common law. The case concerned two ships (*The Playa Larga*and *The Marble Islands*) carrying sugar to Chile, both of which were diverted elsewhere on the orders of the Cuban Government after a new Government came to power in Chile. An action *in rem* was brought by the Chilean owners of the cargo against ***I Congreso,*** another ship owned by Cuba. Cuba claimed state immunity.

In order to determine whether Cuba was entitled to state immunity, the House of Lords held that the distinction between acts *jure imperii* and acts *jure*

*gestionis*depended on whether the relevant acts of Cuba were acts of private law or acts done by virtue of governmental authority. In a much cited passage Lord Wilberforce formulated the test-

> "The court must consider the whole context in which the claim against the State is made, with a view to deciding whether the relevant acts on which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character. Or whether the relevant activity should be considered as having been done outside the area within the sphere of governmental or sovereign activity."

Employment in foreign embassies has quite frequently engaged this distinction and there have been a slew of cases that have grappled with this distinction in order to arrive at a decision whether a particular activity attracts immunity or not. The test was relied upon in the UK in **Senguptav Republic of India** 65 ILR 325 (1983) ICR 221, **Littrell v United States of America (No 2)** (1994) 2 All ERand **Holland v Lampen Wolfe (2000) 1 WLR 1573.**

In**Sengupta v Republic of India** 65 ILR 325 a decision prior to the 1978 State Immunity Act, the Employment Appeal Tribunal held on the basis of customary law that immunity existed with regard to a contract of employment dispute since the working of the mission in question constituted a form of sovereign activity.The Supreme Court of Canada decided **United States of America v The Public Service Alliance of Canada and others**(***Re Canada Labour Code***)94 ILR 264 and held that the conduct of labour relations at a foreign military base was not a commercial activity so that the US was entitled to sovereign immunity in proceedings before a Labour Tribunal. One has to take cognizance of the underlying rationale. The closer the activity in question was to undisputed sovereign acts, such as managing and operating an offshore military base, the more likely it would be that immunity would be recognized. In **Kuwait Airways Corporation v Iraqi Airways Co** (1995) 1 WLR 1147, Lord

Goff, giving the leading judgment in the House of Lords, adopted Lord Wilberforce's statement of principle in **Congreso** and held that-

> "the ultimate test of what constitutes an act *jus imperii*is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform".

Drawing in aid the rationale of these cases before me, I turn to the question, which side of the divide the contract of employment that the UK government entered into with theRespondent as a Security Assistant falls? Is it an act jure imperii or jure gestionis? In my view, the employee's duties in this case (the Respondent's duties as a Security Assistant to the premises of the UK High Commission) were not only to provide security butalso to maintain the inviolability of the Embassy premises. The maintenance of security in the mission could not be classified as merely auxiliary but in my view since the duties of the Respondent were integral to the core sphere of sovereign activity, the contract of employment was not effected in the capacity of a private citizen and the functions of the Respondent were enlisted in the interest of the public service of the UK Government and on these premises I am irresistibly drawn to the inescapable conclusion that immunity becomes applicable in the instant case.

In **Holland v Lampen Wolfe (supra)**the House of Lords considered the case of a US citizen who was a teacher on a US base in the United Kingdom. The plaintiff was arguing that a memorandum written by her superior was libel. The House of Lords granted immunity to the United States, contending that the act concerned took place in the context of the provision of education on a military base, which was an activity serving the needs of US military and therefore a sovereign act.This case also cited with approval the **Littrell v United States of America (No 2) –**a case which held that military treatment for US personnel on a US base in the United Kingdom was a sovereign activity.

Thus one could see that the whole tenor of these decisions was to look at the whole context of the activity carried on and if the sovereign performed an act in the exercise of sovereign authority for the purpose of maintaining an efficient fighting force, that activity attracted immunity in these cases. By the same token, the contextual approach of analyzing the Respondent's employment in terms of its purpose and nature-the twin facets of Lord Wilberforce's test fortify me with the conclusion that the contract of employment with the Respondent to provide and maintain security services could not be a private or commercial activity and it bespeaks nothing but a sovereign activity. So having regard to the facts and circumstances of this case, the Respondent would not be able to initiate legal proceedings against the UK in our courts based on the above principles which no doubt derive provenance from customary international law. I arrive at this conclusion having regard to the nature and purpose of the contract of employment which the Respondent had with the appellant. In the end applying the same principles I hold that immunity applies in this case to the act complained of as well but it remains to be seen whether this restrictive immunity has been waived. I hold that when the Respondent was appointed as Security Assistant and confirmed later in his position, it was an act *jure imperii*that attracts immunity. Diplomatic Privileges Act No. 9 of 1996 was not meant to give effect to restrictive State Immunity but as its preamble quite eloquently demonstrates it was -

> "An Act to give effect to the Vienna Convention on Diplomatic Relations; to provide for the grant of immunities and privileges to the officers, agents and property of certain international organizations; and to provide for matters connected therewith or incidental thereto."

Nowhere does any of its provisions give effect to the restrictive State Immunity I have discussed above and which British High Commission claims in this case. Having thus disposed of the first issue in the case –whether immunity exists

having regard to the facts and circumstances of this case, I now proceed to examine whether there has been a waiver of state immunity.

Waiver of Sovereign Immunity

It has to be borne in mind that the doctrine of restrictive immunity operates subject to waiver.It has been recognized for a State to waive its immunity from the jurisdiction of the Court. As I turn to guidance from customary international law or other jurisdictions, I observe that some principles of law have crystallized on waiver. Courts have oftentimes held that the entering into an arbitration agreement by a State amounts to a waiver of immunity-see **Libyan American Oil Company (Lamco) v Socialist Peoples Libyan Arab Jamahirya** (1981)Ybk Comm.Arb 89 and **International Tin Council v Amalgamated Inc**(1988) NYS 2d 1971. The authors of that seminal work on International Arbitration Redfern and Hunter) observe at page 667 of their 5th Edition (2009)-

> "During the course ofan arbitration proceeding to which a State is a party, the distinction between absolute and restrictive immunity should be of no relevance. The arbitration can only proceed validly on the basis that the State concerned has agreed to arbitrate; and such an agreement is generally held to be a waiver of immunity. This is also taken to extend to the jurisdiction of the relevant court at the seat of arbitration to supervise the arbitration taking place in its territory."

In the instant case we are not concerned with such a waiver in an arbitration agreement: One has to recall that the Learned High Court Judge treats the contractual provision of subjecting the terms and conditions to Sri Lankan Labour Law as a waiver. It has to be pointed out that there are dicta to the effect that express waiver of immunity from jurisdiction must be granted by an authorized representative of the State and I do not find such a waiver anywhere in the contract that the Respondent had with the appellant.

In **R v Madhan(1961) 2 QB 1,** the defendant was employed in the Passport Office of the Indian Mission in England and was entitled to diplomatic immunity. He was charged and convicted for obtaining a season ticket and attempting to obtain money by false pretenses. The Deputy High Commissioner wrote to the Commonwealth Relations Officer that in order not to impede the course of justice**, the High Commissioner** was prepared to waive the defendant's immunity. Thus one could see that it was the Head of the Mission that waived immunity. Although this was a case on diplomatic immunity which preceded the 1964 Diplomatic Privileges Act incorporating the Vienna Convention on Diplomatic Relations, 1961, the English Court of Appeal in **Aziz v Republic of Yemen (2005) EWCACiv 745, para 48,** held the statement to be of general application, including with regard to a consideration of the waiver of state immunity under the 1978 Act.

I find further case law fortifying the position that all waivers must be made by the head of the State's Diplomatic Mission-see **Malaysian Industrial Redevelopment Authority v Jeyasingham (**1998) ICR 307. In **Egypt v Gamal-Eldin**(1996) 2 All ER 237 a letter sent to an employment tribunal by the Medical Officer of the Egyptian Mission did not, as a matter of interpretation, constitute a waiver or submission to jurisdiction. Likewise in **Ahmed v Government of the Kingdom of Saudi Arabia** (1996) 2 All ER 248 a Solicitor's letter advising the Government that employees might have certain employment rights in UK Law could not be interpreted as a "written agreement to waive immunity under Section 2 of the UK's State Immunity Act 1978".

Even the Sri Lankan Diplomatic Privileges Act No. 9 of 1996 specifically refers to the mandatory requirement of **the High Commissioner** renouncing immunity on behalf of a state. Section 2 (3) of the Sri Lankan Act states-

> "For the purposes of Article 32 of the Vienna Convention, a waiver by the Head of Mission of any State or any person for the time being performing his functions, shall be deemed to a waiver by that State."

Though copious arguments revolved around the Sri Lankan Diplomatic Privileges Act albeit erroneously, the important provision of law namely Section 2(3) of that Act had gone a begging and as a result the Learned High Court Judge too fell into an error into assuming that a Junior Officer of the British High Commission who enters into a contract of employment with the Respondent could waive state immunity in the letter of appointment. I take this general proposition, namely that the Head of the Mission should waive state immunity on behalf of the State, to represent the correct statement of law and as such a waiver is wanting in the relationships between the parties or before the Tribunal, I hold that there is no waiver of restrictive immunity.

There is another principle of law that negatives the assumption of the High Court Judge that a reference to Sri Lankan Labour Law in the terms and conditions of the contract had the effect of waiver. Such a provision that the Sri Lankan Labour Law would apply to the terms and conditions was nothing more than an assertion that Sri Lankan Labour Law was the governing law of the terms and conditions. Such an assertion would not constitute an express waiver of state immunity. In fact the case of **Ahmed v Government of the Kingdom of Saudi Arabia** (supra) a Solicitor's letter advising the Government that employees might have certain employment rights in UK Law could not be interpreted as a "written agreement to waive immunity under Section 2 of the UK's State Immunity Act 1978".

In fact the mere recitation that Sri Lankan Labour Law will apply to the terms and conditions of the contract of employment is not be understood as a submission to jurisdiction as in an arbitration agreement -see **Mills v USA 120 ILR p.162.** In the circumstances I hold that the covenant in the letter of

appointment that Sri Lankan Labour Law will apply to the terms and conditions is not to be regarded as a submission to jurisdiction and there is thus no waiver of immunity on that score.

In the circumstances I dispose of the two important issues by holding that –

a) the nature and purpose of the contract in the case enables a plea of state immunity to be taken in the instant case; and

b) such immunity has not been lost by any waiver.

In view of the forgoing holding which is sufficiently dispositive of the issues in the case I do not deem it necessary to answer all questions of law some of which have been formulated*ex abuntanticautela,* albeit on the mistaken assumption of the applicability of the Diplomatic Privileges Act No. 9 of 1996. I would now proceed to amend the relevant questions of law in order to answer them on the propositions of law that have been adumbrated above.

(a) Has the Learned High Court Judge erred in law in failing to construe and/or give effect **to the Diplomatic Privileges Act No. 9 of 1996 which incorporated into our domestic law the Vienna Convention on Diplomatic Relations 1961 to** which Sri Lanka was a signatory?

This Court would not answer this question as it is premised on an erroneous basis as pointed out in the judgment.

(b) Has the Learned High Court Judge misdirected himself in law by failing to construe and/or in not considering that under the principles of Public International Law **and/or Diplomatic Privileges Act No. 9 of 1996,** the British High Commission **and inter alia its members of the mission and/or members of the staff of the mission and/or diplomatic agents** are entitled to

sovereign immunity from inter alia legal process and/or court proceedings in Sri Lanka?

This broad formulation does not take into account the fact that absolute immunity is a thing of the past and as such it is amended as follows and answered accordingly in consonance with the holding in the case.

Amended question

Has the Learned High Court Judge misdirected himself in law by failing to construe and/or in not considering that under the principles of Public International Law the UK Government is entitled **to sovereign immunity for acts juraimperii?**

Answer-yes

Question of Law (f) as amended

(f) Has the Learned High Court Judge erred in law in construing the provision "Your conditions of service are subject to Sri Lankan Labour Law and in line with the Foreign and Commonwealth Office LE Staff Strategy and best practice" in the Letter of Appointment marked A6 to be tantamount to an express waiver of immunity?

Answer-Yes

Question of Law (g) as amended

(g) Has the Learned High Court Judge erred in law in holding that the Labour Tribunal has the jurisdiction to hear and determine the application of the Respondent ?

Answer-Yes

Question of Law (h) as amended

(h) Has the Learned High Court Judge erred in Law in holding that the Labour Tribunal has jurisdiction to hear and determine the application of the Respondent?

Answer-Yes

Question of Law (l)

(l) Without prejudice to the aforesaid, has the Learned High Court Judge erred in law in allowing the appeal thereby granting the Respondent all the reliefs prayed for by the Respondent without having considered the matter on the merits having particular regard to the Respondent being a Security Guard at a foreign Diplomatic Mission?;

Answer-Yes

Question of Law (m)

(m) Has the Learned High Court Judge erred in law in not stating what reliefs prayed for by the Respondent are allowed in appeal having regard to the Respondent having sought the reliefs of reinstatement with back wages and in the alternative a sum of Rupees Four Million (Rs. 4,000,000/-) as compensation in lieu of reinstatement from the Labour Tribunal?

In view of the aforesaid finding the requirement to answer this question does not arise.

However the Court wishes to formulate another question of law in consonance with its holding in the case.

Has the High Court Judge erred in law by failing to appreciate the proposition that having regard to the facts and circumstances of this case, sovereign immunity applies to the UK?

Answer-Yes

Thus I proceed to affirm the order of the Labour Tribunal dated 29th October 2010 to the extent of its holding that the Tribunal had no jurisdiction to embark into an inquiry having regard to the facts and circumstances of the case and set aside the judgment of the Learned High Court Judge dated 27th March 2012for the reasons set out above in the judgment.

Accordingly I allow the appeal of the Appellant but with no costs.

MOHAN PIERIS, P.C., C.J.

CHIEF JUSTICE

PRIYASATH DEP P.C., J

I agree.

JUDGE OF THE SUPREME COURT

EVA WANASUNDERA P.C., J

I agree.

JUDGE OF THE SUPREME COURT