

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

*In the matter of an Application for Special  
Leave to Appeal in terms of Section 9 of the  
High Court of the Provinces (Special  
Provisions) Act No. 19 of 1990 against the  
Judgement of the High Court of the  
Western province holden in Colombo  
dated 22.06.2022*

D. R. P. Abeyasinghe,  
No. 80/6, Temples Road,  
Mount Lavinia.

**APPLICANT**

**SC APPEAL 91/2023**

SC SPL LA 202/22

HC Case no. HC ALT/21/2021

LT Colombo Case No: 2/907/2019

vs

Canwill Holdings Private Limited,  
No. 116, Galle Road,  
Colombo 3.

**RESPONDENT**

**AND NOW**

*In a matter of an appeal under Section 31D  
of the Industrial Dispute Act No. 43 of  
1950 as amended*

Canwill Holdings Private Limited,  
No. 116, Galle Road,  
Colombo 3.

**RESPONDENT-APPELLANT**

vs

D. R. P. Abeysinghe,  
No. 80/6, Temples Road,  
Mount Lavinia.

**APPLICANT-RESPONDENT**

***AND NOW BETWEEN***

D. R. P. Abeysinghe,  
No. 80/6, Temples Road,  
Mount Lavinia.

**APPLICANT-RESPONDENT-APPELLANT**

vs

Canwill Holdings Private Limited,  
No. 116, Galle Road,  
Colombo 3.

**RESPONDENT-APPELLANT-RESPONDENT**

**BEFORE** : **S. THURAIRAJA, PC, J**  
**KUMUDINI WICKREMASINGHE, J,**  
**ACHALA WENGAPPULI, J.**

**COUNSEL** : Ms. Shamalie De Silva for the Applicant-Respondent-Appellant  
Mr. Ruwantha Coorey with Ms. Keshara Hewavissa Instructed by  
Marian Chambers for the Respondent- Appellant-Respondent.

**WRITTEN SUBMISSIONS** : Written submissions on behalf of the Applicant-Respondent-  
Appellant on 20<sup>th</sup> June 2023.  
Written submissions on behalf of the Respondent-Appellant-  
Respondent on 14<sup>th</sup> July 2023.

**ARGUED ON** : 07<sup>th</sup> February 2024

**DECIDED ON** : 17.07.2024

**S. THURAIRAJA, PC, J.**

The instant case concerns an application to the Labour Tribunal on 15<sup>th</sup> August 2019, against the alleged termination of employment of the Applicant-Respondent-Appellant namely Don Rajendra Prasad Abeysinghe (hereinafter sometimes referred to as the "Appellant"), by the Respondent-Appellant-Respondent abovenamed Canwill Holdings Private Limited (hereinafter sometimes referred to as the "Respondent Company"). Upon such application, an inquiry was held, thereafter which the President of the Labour tribunal by Order dated 20<sup>th</sup> January 2021 found the termination of employment to be wrongful and unjust, and awarded compensation of One Million and Six Hundred Thousand rupees (Rs.1,600,000/-) to the Appellant. The Respondent Company being dissatisfied with the said order preferred an appeal to the High Court, wherein, the Learned Judge of the High Court, by Judgement dated 22<sup>nd</sup> June 2022 allowed the appeal and vacated the order made by the President of the Labour

Tribunal. Being aggrieved with the said Judgment of the High Court, the Appellant appealed to the Supreme Court which granted leave on 03<sup>rd</sup> February 2023 on two questions of law, which have been reproduced below for ease of reference:

*“(i) Did the learned High Court Judge err in law in determining that there was no employer-employee relationship between the Petitioner and Respondent?”*

*“(ii) Did the Learned High Court Judge err in law by failing to appreciate that any termination of employment of the Petitioner by the Respondent must be on lawful and/or just grounds independent of any removal as a Director of the Respondent?”*

### **Factual Matrix**

The Appellant submits that by virtue of the Letter from Secretary to the Ministry of Finance dated 25<sup>th</sup> March 2015<sup>1</sup>, he was appointed as the Managing Director of the Respondent Company, and that on 23<sup>rd</sup> July 2019 the Respondent Company had terminated his services without justful cause.<sup>2</sup> It was also submitted that at the time of the alleged termination of employment, the Appellant was paid a monthly salary of Rs.650,000. Subsequently, the Appellant filed an application to the Labour Tribunal on 15<sup>th</sup> March 2019 seeking *inter alia* the following reliefs, namely a declaration that the termination of employment was illegal and unjust, compensation for termination, and back wages.

The Respondent Company in its Answer dated 10<sup>th</sup> September 2019 stated that the Appellant was not an employee of the Respondent Company since he was appointed as a Director and not employed under a contract, thereby the Labour Tribunal had no jurisdiction over this matter since this application did not fall within the ambit of s.31B(1) of the Industrial Disputes Act. Accordingly, the Appellant was removed from the position of Director by the Board of Directors at an Extraordinary General Meeting having followed due process, and thus, it was not an unlawful termination of employment. The Appellant in his response stated that the

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<sup>1</sup> vide top pg.16 of the High Court brief, letter marked as “A1”

<sup>2</sup> vide top pg.19 of the High Court brief, letter marked as “A2”

positions of Managing Director and Director were distinct and entirely independent of each other, and that he was only removed from the Board of Directors on 06<sup>th</sup> August 2019.

The Labour Tribunal by its Order dated 20<sup>th</sup> January 2021 held in favour of the Appellant and stated that the Appellant was an employee within the ambit of s.31B(1) of the Industrial Disputes Act, and that the Respondent Company had wrongfully terminated his employment. The Appellant was also awarded the sum of Rupees One Million and Six Hundred Thousand (Rs. 1,600,000/-) as compensation for the wrongful termination.

Being aggrieved by the Order of the Labour Tribunal, the Respondent Company preferred an Appeal to the Civil Appellate High Court holden in Colombo. The Learned High Court Judge by his Judgement dated 22<sup>nd</sup> June 2022 set aside the Order of the Labour Tribunal and held that an employer-employee relationship did not exist between the Appellant and the Respondent Company, and that the termination of the Appellant's employment as the Managing Director was predicated on the removal of the Appellant as the Director. Therefore, the Appellant was not wrongfully terminated by the Respondent Company. Being aggrieved by the Judgement of the High Court, the Appellant has appealed to the Supreme Court. Having done a thorough examination of the aforementioned questions of law in light of the facts and circumstances of the instant case, there are three factual issues to be considered. First, whether the Appellant would be categorized as an "employee" within the purview of the Industrial Disputes Act. Second, that in the instant case, the removal of the Appellant from the post of Managing Director is predicated on his removal as Director, thereby, upon the Appellant being removed as a Director of the Respondent Company on 06<sup>th</sup> August 2019, his post of Managing Director is inevitably ceased. Third, the removal of the Appellant from his directorate is not wrongful nor is it unlawful, for three reasons. First, due process for removal was followed, second, the cessation from his directorship was not in contravention of his terms of appointment, and third, the Appellant was not prejudiced as a result of his removal as director.

In addressing the first factual issue, the legal definition of a "workman" or employee is provided under s. 48 Industrial Disputes Act, as reproduced below.

" workman " means any person who has **entered into or works under a contract with an employer** in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated.

*[Emphasis added]*

Further definitions can be found from amongst the plethora of case law on the subject, of which I have merely cited two. In **Ready Mixed Concrete Ltd. (Southeast) v Minister of Pensions**<sup>3</sup> uses a three-criterion test to identify a servant or workman.

*"(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service, he will be subject to the other's control in sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a **contract of service.**"*

*[Emphasis added]*

An alternate definition was provided in **Ceylon Electricity Board v De Abrew**<sup>4</sup> whereby the relationship between the employer and employee was described as follows.

*"It is clear that the General Manager has a contract of employment with the Board; although some parts of the contract may be controlled by the statutory provisions contained in the Act, the relation between the Board and the General Manager cannot be explained on any other hypothesis than on a contractual one"*

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<sup>3</sup> (1976) 78 NLR 79

<sup>4</sup> (1969) 2 QB 173

From the above definitions, it can be understood that an employee enters into work under an agreement or contract to provide some services to the employer to whom he will be answerable to. It is on this premise that the Appellant claims that the Letter dated 25<sup>th</sup> March 2015<sup>5</sup> was a letter of appointment by which he was bestowed the office of Managing Director. Having perused the said letter, I find this letter by the Secretary to the Ministry of Finance to be addressed to the Company Secretary of Sri Lanka Insurance Corporation Ltd, who has a duly registered shareholding of 45.95% in the Respondent Company<sup>6</sup>. Accordingly, this letter by the Ministry of Finance amounts to a communication to Sri Lanka Insurance Corporation Ltd that the Appellant is nominated to be appointed as the Managing Director of the Respondent Company. The appointment itself was confirmed by way of Letter of Confirmation of appointment dated 28<sup>th</sup> March 2015<sup>7</sup>. This letter refers to several Board meetings which resolved to appoint the Appellant as the Managing Director, which has been reproduced below.

*"We refer to following documentation and wish to confirm your appointment as Managing Director of Canwill Holdings (Pvt) Ltd, Sinolanka Hotels & Spa (Pvt) Ltd & Helanco Hotels & Spa (Pvt) Ltd with effect from 20th January 2015.*

- *Dr R. H. S Samaratunga, Secretary to the Treasury letter ref; MF2/3/BOD/SLIC dated 24/03/2015 confirming the appointment as at 20/01/2015.*
- *Dr R. H. S Samaratunga, Secretary to the Treasury letter ref; MF2/258A/CANWILL dated 25/03/2015 confirming the appointment of Managing Director.*
- *Board meeting of Canwill Holdings (Pvt) Ltd held on 26th February 2015 confirming the appointment of Managing Director.*

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<sup>5</sup> vide top pg.16 of the High Court brief, letter marked as "A1"

<sup>6</sup> vide top pg.25 of the High Court brief, letter dated 15<sup>th</sup> July 2019

<sup>7</sup> vide pg.124 of the Court brief letter marked "A2"

- *Board meeting of Sinolanka Hotels & Spa (Pvt) Ltd held on 11th March 2015 confirming the appointment of Managing Director.*
- *Board meeting of Helanco Hotels & Spa (Pvt) Ltd held on 11th March 2015 confirming the appointment of Managing Director.*
- *Board meeting of Canwill Holdings (Pvt) Ltd held on 28th May 2015 on approval of the remuneration”*

Therefore, the alleged Letter of appointment submitted by the Appellant is not a letter of appointment or contract of employment as claimed by the Appellant but only a communication to the Respondent Company via Sri Lankan Insurance Corporation Ltd with regards to the nomination of the Appellant.

A further factual observation in the instant case is that the Appellant was not paid a salary, nor did he contribute to any EPF/ETF payment as a regular workman. Instead, he was granted a director’s fee inclusive of allowances. This is evidenced by the Letter of confirmation<sup>8</sup> which sets out the terms and conditions of the Appellant’s appointment, to which the Appellant has agreed and accepted by signature. I draw my attention to the 1<sup>st</sup> clause of these conditions which been reproduced below.

*(1) You will be paid an **all-inclusive allowance** net of taxes of Four Hundred Thousand only (Rs. 400,000/-) per month.*

*[Emphasis added]*

The clause abovementioned does not refer to the Appellant being paid a “salary” but an “allowance”. This allowance was approved by the Board of Directors of the Respondent Company at the Board Meeting held on 28<sup>th</sup> May 2015<sup>9</sup>. In addition to the above monthly allowance, the Appellant was also entitled to a transport allowance of Rs. 150,000/- a month, which can be seen in the Appellant’s payment slip for July 2019<sup>10</sup>. This was further admitted by

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<sup>8</sup> vide top pg.19 of the High Court brief, letter marked as “A2”

<sup>9</sup> vide pg.2 of the Order of the Labour Tribunal dated 20<sup>th</sup> January 2021

<sup>10</sup> vide pg.128 of the High Court brief, document marked as “A4”



the Appellant himself at the cross-examination, the admission of which has been reproduced below along with an approximate translation<sup>11</sup>.

“ප්:- මම ඇහුවේ නමින්ගේ ඔය රුපියල් ලක්ෂ 4, රුපියල් ලක්ෂ 6යි ගානක් වුනේ කොහොමද කියලා?”

උ:- ඒකට රුපියල් ලක්ෂ 4ට අමතරව වාහන දීමනාවක් ලැබුනා. ඒ කරලා ඒකට ආදායම් බදුත් එකතු කරලා තමයි මේ සැලරි ස්ලිප්වල මගේ සැලරි එක හැටියට පෙන්වන්නේ. මේ සැලරි ස්ලිප් එකේ සම්පූර්ණයෙන්ම පෙන්වනවා ස්වාමිණි”

“Q: I asked you, how did this 4 lakhs become 6 lakhs plus?

A: A vehicle allowance, received in addition to the 4 lakhs, is included in my salary slips, along with the income tax for my salary. This salary slip indicates all of it.”

It is noted that at all times this payment was referred to by the Appellant himself as “දීමනාවක්” (allowance), and not a “වැටුපක්” (a salary). Therefore, the Appellant was paid a total director allowance of Rs. 650,000/- subject to Rs,100,000/- as tax.

Furthermore, the Appellant was aware that he would not be entitled to any EPF or ETF payments since it was not provided for under his terms of appointment as Managing Director<sup>12</sup>. This can be verified by his payment slip for July 2019<sup>13</sup> which does not include any contributions such as EPF or ETF. Furthermore, the Public Enterprises Circular No.58(2) dated 13<sup>th</sup> September 2011<sup>14</sup> does not provide for any deductions of EPF/ETF under privileges afforded to a Managing Director/Executive Chairman. While being aware that he was not paid any EPF/ETF and was not entitled to the same, the Appellant did not raise any complaints to the Respondent Company during his tenure as Managing Director.

From the above factual and legal analysis, it can be deduced that the Appellant does not classify as an “employee” within the meaning of s.48 Industrial Disputes Act. Accordingly, this would disentitle the Appellant from maintaining a cause of action at the Labour Tribunal, since s. 31B(1)(a) of the Industrial Disputes Act provides as follows.

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<sup>11</sup> vide pg.20 of the Cross-examination report dated 12<sup>th</sup> March 2020

<sup>12</sup> vide top pg. 19 of the High Court brief, letter marked as “A2”

<sup>13</sup> vide top pg. 142 of the High Court brief, document marked “R1”

<sup>14</sup> vide pg.144 of the High Court brief, document marked as “R2”

(1) A **workman** or a trade union on behalf of a workman who is a member of that union, may make an application in writing to labour tribunal for relief or redress in respect of any of the following matters:- (See section 7 of Act No. 32 of 1990 relating to pending actions (set out in Annexure to this Chapter). See also Act No. 19 of 1990 in this connection.)

(a) the termination of his services by his employer;

Hence, the Labour Tribunal possesses jurisdiction over relief or redress sought by a workman, which the Appellant in the instant case is not. The present action by the Appellant is challenging the decision of the Respondent Company to remove the Appellant from the board of Directors, as was held by the Labour Tribunal, which is provided below along with an approximate translation<sup>15</sup>.

*"මෙම නඩුවේ ඉල්ලුම්කාර ඩී. ආර්. පී. අබේසිංහ යන අය අයදුම් පත්‍රයක් ගොනු කරමින් තමන්ව 2015.03.25 දින සිට ඉහත වග උත්තරකාර ආයතනයේ කළමනාකාර අධ්‍යක්ෂක ලෙස සේවයට බඳවා ගන්නා ලද බවත්, එසේ සේවය කරමින් සිටියදී 2019.07.23 වන දින කිසිදු හේතුවක් නොදන්නා තමන්ගේ සේවය අවසන් කරන ද බවත්, අවසාන වශයෙන් රුපියල් 650000/-ක වැටුපක් ලැබූ බවත් සඳහන් කරමින් ඉහත සේවය අවසන් කිරීම නීති විරෝධී සහ අයුක්ති සහගත බැවින් නැවත සේවය හෝ වන්දි මුදලක් අයැද ඇත."*

*"The Applicant, namely D.R.P. Abesinghe, mentioned in his application: that he was recruited to the post of Managing Director with effect from 25.03.2015; while he was serving in this capacity, his employment was terminated on 23.07.2019, without any stated reason; at the time of his dismissal, he was receiving a salary of Rs. 650000/- and requested either to be reinstated or compensated, claiming that the termination of his service was illegal and unjustifiable. The Application to the Labour Tribunal does not concern any alleged rights as an employee, as seen above."*

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<sup>15</sup> vide pg.2 of the Order of the Labour Tribunal dated 20<sup>th</sup> January 2021

The office of a Director is distinct to that of any ordinary workman or employee, by the undeniable legal reality that a Director is appointed pursuant to the provisions of the Companies Act, and not hired or employed as is required under the Industrial Disputes Act.

As stipulated under s.204(2) Companies Act, all subsequent directors upon incorporation of the Company are to be appointed by way of Ordinary Resolution. On the contrary, pursuant to s.48 of the Industrial Disputes Act a "workman" enters into or works under a contract of employment with an "employer". Therefore, it can be construed that a "workman" who is entitled an application in the Labour Tribunal under s.31B(1) Industrial Disputes Act must be employed under a contract of employment, whereas a director is appointed by way of an ordinary resolution in accordance with the provisions of the Companies Act. Having perused the evidence submitted by the Appellant, it appears that his appointment as Managing Director was by nomination and was resolved at several board meetings as stated above and thus appointment of the Appellant was in compliance of s.204(2) of the Companies Act. Further, as per the Letter from the Ministry of Finance dated 24<sup>th</sup> March 2015<sup>16</sup>, the Appellant was initially appointed as a Director of the Respondent Company prior to being appointed as the Managing Director. Even in this instance, he was never employed by the Respondent Company under a contract to perform duties as an employee but has been appointed as a member of the board of directors of the Respondent Company. Hence, without being employed under a contract of employment, such an employer-employee relationship cannot exist.

However, I acknowledge that there is judicial literature which establishes a Director as a person of dual capacity, both as workman and director. The distinction is nowhere better illustrated than in the decision of the Privy Council in **Lee v Lee's Air Farming Ltd**<sup>17</sup>. In this case Lee was the sole governing Director and principal shareholder of a one-man company. Company's business was air farming for which purpose they used an aeroplane. He entered into a contract with the company as sole pilot of the company and died while flying the aeroplane. Lee's widow claimed compensation from the company. The question was whether he was a

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<sup>16</sup> vide top pg. 142 of the High Court brief, document marked "R1"

<sup>17</sup> (1960) 3 All ER 420

workman within the meaning of New Zealand Workers' Compensation Act which defined a 'worker' as any person who entered into or works under a contract of service with an employer, whether by way of manual labour, clerical work or otherwise and whether remunerated by wages, salary or otherwise. It was considered material to determine whether at the time of death the deceased was acting in his capacity as servant (i.e. as pilot) or as sole governing director. It was held that that he was acting as a servant and was thus a workman for the purpose of the Act. Lord Morris stated that it was well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company.

This dual capacity of a director was also recognized in the Sri Lankan case **Collette's Ltd v Commissioner of Labour and Others**<sup>18</sup> where it was held;

*"That a Managing Director has a dual capacity of being an employee of the company and also at the same time takes part in the management of the company. The fact that as a Managing Director or as a Group Managing Director he takes part in the affairs of the company does not deprive him of his other capacity as an employee of the said company"*

Also, in **Ceylon Meat Products Ltd V Mrs. C. Fernando**<sup>19</sup> it was held that;

*"The mere fact that someone is a Director of a company is no impediment to his entering into a contract to serve the company; a Director can hold a salaried employment or an office in addition to his Directorship and so be an employee or servant"*

This concept has been further explained by **S. Egalahewa**<sup>20</sup> which has also been cited in Order of the Labour Tribunal date<sup>21</sup> which provides as follows.

*"Persons with dual capacities - A person in one capacity can be a workman and in another not be a workman. A case in point is a director of a company who, in*

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<sup>18</sup> (1986) 2 SLR 6

<sup>19</sup> (1989) 2 SLR 305

<sup>20</sup> "Labour Law" 2nd Edn (2020) pages 774-776

<sup>21</sup> Vide top pg. 181 of the High Court brief

addition to being a director, may have a contract of service as an executive with the company.

The relationship between a company and its director is not one of master and servant. There are Company Directors who also function as working Directors or Managing Directors. S.R.de Silva citing Palmer's states:

"Directors are not, as such, employees of the Company or employed by the Company; nor are they servants of the company, or members of the staff... A director can, however, hold a salaried employment or an office in addition to that of his directorship which may, for these purposes, make him an employee or servant, and in such a case he would enjoy any right given to employees as such; **but his directorship and his rights through that directorship are quite separate from the rights as employee"**

**The relationship between the company and its Director is not one of master and servant, and thus qua Director a person cannot seek relief under the Industrial Disputes Act since he is not a workman as defined.** However, since the law recognizes distinct and divisible capacities, the same person qua executive would be a workman as defined in the Industrial Disputes Act and could accordingly seek relief under the Act. The legal basis of this distinction lies in the fact that a company has no physical but only a legal existence and the management of its affairs are entrusted to Directors whose exact position with the company though hard to defined are not considered 'servants'."

[Emphasis added]

The facts and circumstances of the instant case differ from the case law cited above insomuch that the Appellant claims to hold the position of both Managing Director and Director and not a dual capacity as Managing Director/Director and a workman as in the case of **Lee v Lee's Air Farming Ltd**<sup>22</sup>. Therefore, at present the question is not with regards to the Appellant's dual capacity as both director and workman but whether such employer-employee

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<sup>22</sup> vide pg.124 of the Court brief letter marked "A2"

relationship existed between the Appellant and the Respondent Company so as to allow the Appellant to claim relief for the alleged termination of his employment. Thus, there is no such employer-employee relationship since the Appellant was nominated and resolved to be appointed as the Managing Director and was not hired or employed under a contract as required under s.48 of the Industrial Disputes Act.

Therefore, in light of the factual and legal analysis above, the Appellant was not an employee of the Respondent Company for the purposes of the Industrial Disputes Act. Thereby, I answer the first question of law negatively, and hold that the Learned High Court Judge did not err in law in determining that there was no employer-employee relationship between the Appellant and the Respondent.

In turning to the second factual issue, the Respondent Company in denying the averments of the Application of the Appellant before the Labour Tribunal took up the position that the Appellant was appointed and removed from the post of Director of the Respondent Company in compliance with the procedure set out in the Companies Act, and that the Appellant, by the operation of law, ceased to be the Managing Director upon being removed from the board of directors<sup>23</sup>. The Appellant in response submitted that the post of Managing Director and Director are two different positions and led evidence in this regard. While the position of the Appellant was upheld at the Labour Tribunal, the Learned High Court Judge held otherwise, stating that the removal of the Appellant as the Managing Director is predicated on his removal as Director. Thereby, upon the Appellant being removed as a Director of the Respondent Company on 06<sup>th</sup> August 2019, his post of Managing Director is inevitably ceased, and as a result would not therefore constitute a wrongful termination.

The Appellant himself admits during the cross-examination that his appointment as Managing Director is contingent on him being appointed as member of the board of directors of the Respondent Company, which I have produced below along with an approximate translation<sup>24</sup>.

*“ප්‍ර:- දැන් අධ්‍යක්ෂකවරයෙක් වීම මත නේද කළමනාකාර අධ්‍යක්ෂක තනතුර ලැබෙන්නේ?”*

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<sup>23</sup> Vide pg. 30 of the High Court brief, Answer dated 10<sup>th</sup> September 2019

<sup>24</sup> vide pg.29 of the cross-examination report dated 12<sup>th</sup> May 2020

උ:- එහෙමයි.

ප්‍ර:- අධ්‍යක්ෂකවරයෙක් නොවූ නමුත් ඒක ලැබෙන්නේ නෑ, කළමනාකාර අධ්‍යක්ෂක වරයෙක් වශයෙන් පත් වෙන්න හිමිකමක් ලැබෙන්නේ නෑනේ, අනිවාර්යයෙන් අධ්‍යක්ෂකවරයෙක් විය යුතුයි කළමනාකාර අධ්‍යක්ෂක වරයෙක් වෙන්න?

උ:- එහෙමයි”

“Q: The post of Managing Director is obtained upon becoming a director, isn't it?

A: Yes

Q: It doesn't entitle anyone other than the Director. It doesn't give entitlement to be a Director. One must compulsorily be a Director to be a Managing Director.

A:Yes”

It for this reason that the Appellant was first appointed as a director of the Respondent Company and thereafter appointed as the Managing Director<sup>25</sup>. Both parties seem to place significant weightage on whether the post of the Appellant has satisfied the legal criteria for a “workman” as stipulated under the Industrial Disputes Act. While I have ventured on a judicial excursion to address this issue, at the very essence of the instant case lies the simple truth that one ought to be a member of the Board of Directors to hold the post of Managing Director. Therefore, it can be construed that a pre-requisite for being appointed as the Managing Director is to be a member of the board of directors, and thereby being removed as director would mean that the Appellant would cease to hold office as Managing Director.

In considering the third factual issue, the removal of the Appellant from his directorate was not wrongful nor is it unlawful for three reasons namely, first, due process was followed, second, the cessation from his directorship was not in contravention of his terms of appointment, and third, the Appellant was not prejudiced as a result of his removal as director.

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<sup>25</sup> Letter dated 24<sup>th</sup> March 2015 marked “R1”

It should be noted that the legal procedure for the removal of directors is not found in the Industrial Disputes Act but in the Companies Act, whereby **s.206(1) of the Companies Act** provides that a director may be removed from office by ordinary resolution passed at a meeting called for the purpose of the removal of the director.

By way of letter dated 10<sup>th</sup> July 2019 from the Ministry of Finance<sup>26</sup>, the Appellant was nominated to be ceased from the post of Managing Director. Following this communication from the Ministry, the Respondent Company gave notice to all the members of the board of directors including the Appellant on 22<sup>nd</sup> July 2019 of a Board meeting scheduled to take place on 23<sup>rd</sup> July 2019 at the Ministry of Finance. The said notice indicates that the purpose of this meeting *inter alia* was to discuss the position of the Appellant in lieu of the direction received from the Ministry of Finance with regards to his removal from office<sup>27</sup>. As indicated in the Minutes of the said meeting<sup>28</sup>, the Appellant was present at this meeting and still held the post of Managing Director of the Respondent Company. At this meeting, the Appellant tabled his Letter dated 22<sup>nd</sup> July 2019 at this meeting which is reproduced below for ease of reference<sup>29</sup>.

*"I write with reference to your notice dated 22nd July 2019 calling for a Board Meeting **at a location other than the registered office of the Company** calling for my removal from the Board of Directors of Canwill Holdings (Pvt) Ltd.*

*I wish to place on record that by notice issued by the Mr, H.G. Sumanasinghe, Additional Secretary of the Ministry of Finance bearing reference number MF 1/05/16/317-CH/01 dated 10th July 2019 I have been nominated to be ceased from the Post of Managing Director of the Board of Directors of the Canwill Holdings (Pvt) Ltd with immediate effect in breach of the terms and conditions of my Contract of Employment with Canwill Holdings (Pvt) Ltd, Despite being arbitrarily and orally being informed that I will be terminated by Mr. B. M. D. B*

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<sup>26</sup> vide pg.126 of the High Court brief, document marked "A3"

<sup>27</sup> vide pg. 21 of the High Court brief

<sup>28</sup> vide pg.153 of the High Court brief, document marked "R4"

<sup>29</sup> Vide: top pg. 153 of the High Court brief, at pg. 2 of the document marked as "R4" to the Written Submissions of the Respondent Company at the Labour Tribunal



*Basnayake, Chairman of the Board of Directors of Canwill Holdings (Pvt) Ltd. I note that no formal letter has been issued to me apart from the aforesaid letter dated 10th July 2019 by the Ministry of Finance, sent to me today 22nd July 2019 at 10.27 am by the Company Secretaries, P R Secretarial Services (Pvt) Ltd of, 9, Gregory's Road, Colombo 07.*

*[Emphasis added]*

The Minutes provide that the Chairman of the Respondent Company had informed the Appellant that his appointment as the Managing Director was upon the instructions of the Ministry of Finance, and it is the same Ministry which has now advised the Respondent Company that he cease to be Managing Director<sup>30</sup>. Thus, it was resolved that in following such instructions of the Ministry of Finance, that the Appellant be removed from the post of Managing Director but will remain as a Director of the Respondent Company until he be so removed by the Shareholders. This can be substantiated by two facts namely, first, the Appellant was paid his monthly allowance until the end of July, as indicated by his pay slip<sup>31</sup>, and second, in the Minutes of the meeting dated 06<sup>th</sup> August 2019 the Appellant is still recognized as the Managing Director of the Respondent Company under the list of attendees<sup>32</sup>.

At this same meeting it was resolved that another meeting be convened on 06<sup>th</sup> August 2019 at the registered premises of Sri Lanka Insurance Corporation Ltd. The meeting was for the purpose of the shareholders of the Respondent Company exercising their right to remove directors. The Resolution has been reproduced below<sup>33</sup>.

*"THAT Mr. Don Rajendra Prasad Abeysinghe be and is hereby removed from the office of Director of Canwill Holdings (Pvt) Lid, including the position of the Managing Director, under and in terms of section 206 of the Companies Act No 7 of 2007 read with Article 25 (4) of the Articles of Association of the Canwill*

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<sup>30</sup> Vide pg. 154 of the High Court brief, Meeting minutes dated 23<sup>rd</sup> July 2019, marked as "R4"

<sup>31</sup> vide pg.128 of the High Court brief, document marked as "A4"

<sup>32</sup> vide pg.151 of the High Court brief

<sup>33</sup> vide pg.151 of the High Court brief, document marked "R3"

*Holdings (Pvt) Ltd, subject to allowing 14 days for the Director to be removed to make representation as allowed by section 206 (3) of the Companies Act.”*

The Appellant was not present at the Meeting dated 06<sup>th</sup> August 2019. The Chairman recorded that the Appellant had sent his excuses, that he will not be attending the Meeting which was to be held at a location other than at the registered address of the Company. The resolution was passed as an ordinary resolution, and on 06<sup>th</sup> August 2019 the Appellant ceased to be a Director of the Respondent Company.

Notwithstanding the issues at hand, it should be noted that while the Appellant expressed his displeasure to attend a meeting to be held at a location other than the registered premises of the Respondent Company, he has in fact attended the meeting dated 23<sup>rd</sup> July 2019 held at the Ministry of Finance.

Thus, it can be further construed from the above facts and circumstances that the Appellant was not an employee and was appointed to the post of Director and subsequently the Managing Director. The due process to be followed with regards to the removal of the Appellant as a director is provided for under s.206 of the Companies Act. Therefore, the Appellant remained as the Managing Director until 06<sup>th</sup> August 2019, on which day the shareholders resolved to remove him from the board of directors by way of an ordinary resolution passed at the Extraordinary General Meeting on the said date. In addressing the second reason abovementioned, the Appellant alleges that his removal from the post of Managing Director was contrary to the terms of his employment, and thereby amounts to a wrongful termination<sup>34</sup>. However, first, as established above there was no contract of employment but a letter of confirmation which confirms his nomination by the Ministry of Finance to be appointed to the post of Managing Director, and second, this letter sets out as follows with regards to the appointment of the Appellant<sup>35</sup>.

*“(1) You will be paid an **all-inclusive allowance** net of taxes of Four Hundred Thousand only (Rs. 400,000/-) per month.*

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<sup>34</sup> Vide pg.154 of the High Court brief, Meeting minutes dated 23<sup>rd</sup> July 2019, marked as “R4”

<sup>35</sup> vide pg.142 of the High Court brief, document marked “A2”

*(2) You will be entitled to this payment until you relinquish the position of Managing Director/ Chief Executive Officer of the said Companies. **However, at the end of the Project your service will be ceased without any payment of any compensation.***

*(3) You will be required to serve this Company and its' subsidiaries as directed by the Board of Directors and will be responsible for the day-to-day management of the affairs of the Company and its' subsidiaries."*

*[Emphasis added]*

It is observed from the above terms that he is bound by the decisions of the board of directors and will be liable to be ceased from his post without any compensation. The Appellant has in fact read, understood and agreed to the above terms by signature.

In addressing the third reason above mentioned, the Appellant was not prejudiced in anyway by such cessation of his post, for the reasons provided below. First, even though he was nominated to be removed from the post of Managing Director on 10<sup>th</sup> July 2019, he was allowed to remain as the Managing Director until 06<sup>th</sup> August 2019, on which date he ceased to be director. This is apparent by the fact that the Minutes of the meeting at Sri Lanka Insurance Corporation Ltd on 06<sup>th</sup> August 2019 make note of the position of the Appellant as being the Managing Director. Second, as it appears from his July Payslip<sup>36</sup>, he has been paid his full director fee plus allowance for the month of July without calculating pro-rata up until 10<sup>th</sup> July 2019, which was the date on which he was nominated to cease to be Managing Director. Further, I wish to make note of the fact that contrary to the Public Enterprises Circular<sup>37</sup>, the Appellant was paid the monthly director fee equivalent to that of the Chairman, and not the fee granted to the Managing Director which was Rs. 250,000 plus allowance. Third, during his tenure as Managing Director of the Respondent Company, the Appellant simultaneously held the position of Managing Director and was a Shareholder of another company namely Hydro Mac International. The Appellant himself admits that he did not resign

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<sup>36</sup> vide document marked "A4", pg.128 of the High Court brief

<sup>37</sup> vide pg.144 of the High Court brief, document marked as "R2"

from his post even after being appointed as the Managing Director of the Respondent Company and remained in this post even at the time of filing this application. Under these circumstances the Appellant cannot claim that him not being made aware of his removal was in contravention of the terms and conditions of his appointment. Hence, there was no wrongful termination of employment and the Appellant was removed from the post of director having followed due process.

Therefore, for the reasons stated above, the removal of the Appellant from his directorate is not wrongful nor is it unlawful.

### **Conclusion**

The allegations of the Appellant seem to be founded on the premise that his termination of contract of employment was on unlawful and unjust grounds without being given sufficient reason or notice of such termination. I would like to formally note the surprising nature of the Appellant's allegations, given his position as Managing Director of not one but two companies and possessing 35 years of executive management experience. It is concerning that such a seasoned professional appears to be unfamiliar with fundamental distinctions between an employee and a director, as well as the associated protocols. If the Appellant was so aware, he would have known that the any such relief to be sought with regards to removal from directorate is beyond the jurisdiction of the labour tribunal. While I do applaud the efforts of the Counsel for the Appellant Ms. Shamalie De Silva in drafting a well-researched written submission, the facts of the instant matter is to her misfortune for this very reason.

In conclusion, I will now answer both questions of law that were placed before this court having regard to the factual and legal analysis provided above.

In addressing the first question of law, the Appellant was appointed to the post of Managing Director and was not employed under a contract of employment. Since the Appellant does not constitute an employee within the meaning of the Industrial Disputes Act, no such employer-employee relationship exists between the Appellant and the Respondent Company. Therefore, the Learned High Court Judge did not err in law in determining that there was no employer-employee relationship between the Appellant and Respondent.

In addressing the second question of law, putting aside the fuss and frills of semantics, the post of Managing Director is predicated on being a Director, thereby once the Appellant is removed from the board of directors, he by default ceases to hold the post of Managing Director. It is for this reason that the Appellant remained as the Managing Director until he was removed from his Directorate on 06<sup>th</sup> August 2019. Therefore, cannot amount to unlawful or unjust grounds for termination as the Appellant was aware of this fact. Further, the Appellant was not prejudiced in anyway by his removal from directorate. Therefore, the Learned High Court Judge did not err in law by failing to appreciate that any termination of employment of the Appellant by the Respondent must be on lawful and/or just grounds independent of any removal as a Director of the Respondent.

### **Decision**

In light of the facts and circumstances of the instant matter, I hereby the affirm the Judgement of the High Court Judge dated 22<sup>nd</sup> June 2022. Considering all reasons stated above, I am inclined to disallow the appeal and dismiss the same awarding no costs.

***Appeal dismissed with no costs.***

**JUDGE OF THE SUPREME COURT**

**KUMUDINI WICKREMASINGHE, J**

I agree.

**JUDGE OF THE SUPREME COURT**

**ACHALA WENGAPPULI, J**

I agree.

**JUDGE OF THE SUPREME COURT**