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

SC Appeal No.100/15
SC/SPL.LA/HC/254/14
High Court.
No.96/2014/PC/HCCA/KY
/RA
Kandy LT No. LT/88/2013

By way of Application of Special Leave to Appeal to set aside the order delivered on the 07/11/2014 by the Provincial High Court Holden of Central Province of the Democratic Socialist Republic of Sri Lanka sitting in Kandy, for Revisionary Action bearing No. 96/14/CP/HCCA/KY/(R/A)

U. B. Heenkenda
No. 77, Peralanda Road,
Pandiwatte,
Kundasale.

APPLICANT

V.

H. B. S. Motors (Private)
Limited
37, Cross Street,
Kandy

EMPLOYER

H. B. S. Motors (Private)
Limited
37, Cross Street,
Kandy

EMPOYER-PETITIONER-

V

U. B. Heenkenda
No. 77, Peralanda Road,
Pandiwatte,
Kundasale.

APPLICANT-PRESPONDENT-

B. M. Wipularatna Banda
No.106/1
Harnakahawa,
Kandy.

RESPONDENT

And Now Between

H. B. S. Motors (Private)
Limited
37, Cross Street,

EMPLOYER-PETITIONER-APPELLANT

V.

U.B. Heenkenda,
Pandiwatte,
Kundasale.

APPLICANT-RESPONDENT-RESPONDENT

B.M.Wipularatna Banda
No.106/1
Harnakahawa,
Kandy.

RESPONDENT-RESPONDENT

BEFORE: Aluwihare P.C., J
Gooneratne J. &
Perera J.

COUNSEL: E. B. Atapattu for the Employer-Petitioner-Appellant

Nimal Hippola for the Applicant-Respondent-Respondent

ARGUED ON: 23.06.2016

DECIDED ON: 02. 08. 2016

Aluwihare PC.J

The Employer-Petitioner-Appellant (hereinafter referred to as the employer) being aggrieved by the order handed down by the Provincial High Court of the Central Province holden in Kandy had sought special leave from this Court.

When the matter was supported on the 10th June 2015, special leave was granted on the questions of law set out in paragraph 18 (I) – (iv) and (vii) of the petition of the Appellant dated 1st December, 2014.

Applicant-Respondent-Respondent (hereinafter referred to as the applicant) who was an employee under the employer (a business establishment) filed an application in the Labour Tribunal of Kandy in terms of Section 31B of the

Industrial Disputes Act No.43 of 1950, alleging unjust termination of his employment and claiming various reliefs.

The inquiry commenced on 22nd January, 2014 and proceeded on several dates thereafter. On all those dates both the employer as well as the applicant was represented by their respective attorneys. When the matter was taken up for further inquiry on 2nd October, 2014 Mr. Gamini Samarathunga, Attorney-at-Law had appeared for the employer and one Wipularatna Banda (Respondent-Respondent to the instant application) represented the employer. An objection was raised by the counsel for the applicant that the representative of the employer, the aforesaid Wipularatne was not a proper person to represent the employer and the Learned President of the Labour Tribunal, having upheld the objection raised on behalf of the applicant, postponed the inquiry.

For ease of reference the questions of law on which leave was granted by this court are reproduced below.

18 (I) Whether the order dated 7/11/2014 of his lordship of the High Court of Kandy in the Central Province is contrary to law.

(II) Did his Lordship failed to correctly consider the provisions 46 (1) of the Industrial Disputes Act No. 43 of 1954 as amended.

(III) Did his Lordship failed to correctly consider the provisions 46 (2) of the Industrial Disputes Act No. 43 of 1954 as amended.

(IVI) Did his Lordship failed to correctly consider the provisions 1866 (1) of the Companies Act No. 7 of 2007

(VII) Did his Lordship failed to correctly consider and understand whether a member of the Board of Directors of a company invariably need not be present at the Labour Tribunal while an application under 31 (B) of the Industrial Disputes Act No.43 of 1950 as amended is being heard, when the Employer has appointed an attorney-at-Law to represent the Employer.

It is common ground that Wipularatne was neither a director nor an employee of the business establishment concerned. It would be pertinent to reproduce the relevant portion of the order of the learned President of the Labour Tribunal in relation to the objection referred to above.

"වගඋත්තරකාර නීතීඥ මහතා පෙන්වා සිටි පරිදි ආයතනයක් වෙනුවෙන් පෙනී සිටීමට , ආයතනයේ සේවයේ නිරත වන යම්කිසි පුද්ගලයෙකුට නෛතික හිමිකමක් පැවරීමට යම් ආයතනයක අධ්‍යක්ෂ මණ්ඩලයට හෝ පරිපාලනයට හැකියාව ඇත. නමුත් අද දින පැමිණ සිටින මෙම පුද්ගලයා මෙම වගඋත්තරකරුගේ ඥාතියෙකු බව ප්‍රකාශ කරයි. එවැනි පුද්ගලයෙකු නෛතික පුද්ගලභාවයක් ඇති අයෙකු ලෙස සලකා බැලිය නොහැකිය. එබැවින් ඉල්ලුම්කරු ප්‍රකාශ කර සිටින එකී විරෝධතාවය පිළිගනිමි. වගඋත්තරකරු හෝ වගඋත්තරකරු වෙනුවෙන් අධිකරණයට පිළිගත හැකි **නෛතික පුද්ගලයෙකු** ඉදිරිපත් නොවීම මත , මෙම නඩුවට, විභාගයට දිනයක් ලබා දෙමි."

For all intents and purposes, to my mind Wipularatne is a natural person. In short, the learned President of the Labour Tribunal has postponed the inquiry due to non-appearance of a "Legal Person" (නෛතික පුද්ගලයෙකු) acceptable to the Tribunal, on behalf of the Employer.

Although I am at a loss to understand what the learned President of the Labour Tribunal meant by the words "Legal Person" (නෛතික පුද්ගලයෙකු) acceptable to the Tribunal, I visit this issue on the basis that what the learned President of the Labour Tribunal presumably had in mind was that Wipularatne had no "*locus standi*" to represent the employer. Thus, the issue before this court is who could represent parties before a Labour Tribunal.

The order of the learned President of the Labour Tribunal, however, is not based on any legal provision. The applicable provision which is Section 46 of Industrial Disputes Act as amended is reproduced below:

46. Representation and appearance.

(1)Any party to any proceeding under this Act taken by or before any authorised officer, arbitrator, Industrial Court or ***Labour Tribunal*** *or the Commissioner may and shall if required so to do by*

such officer, arbitrator, court or tribunal, or the Commissioner, through representatives of the party.

(2) In any proceedings under this Act other than proceedings before the Commissioner or an authorized officer, an attorney-at-law may appear on behalf of any party to such proceedings or the representative of such party.

(3) The person or persons who shall represent a party for the purposes of this Act shall-

(a) where the party is a trade union , or consists of two or more trade unions, be an officer of such union, or of each such union;

(b) where the party consists partly of any trade union or unions and partly of employers or workmen who are not members of any such union , be an officer of such union or of each such union and a prescribed number of persons nominated in accordance with regulations by such employers or workmen ; and

(c) where the party consists of employers or workmen, be a prescribed number of persons nominated by such employers or workmen. (Emphasis added)

Section 46 of the Industrial Disputes Act confers on trade union officials, employer representatives and other para-professionals, an equal right of representation along with licensed practitioners. If that be the case, when the employer is represented by a lawyer, the contention that a person nominated by the employer cannot present himself at the inquiry to assist the counsel on behalf of the employer is illogical.

In the instant case, the counsel who represented the employer had submitted that the employer is a juristic person. He had submitted further that Wipularatne is representing the company sequel to a Board resolution passed by the Board of Directors of the Employer Company (P13). It was brought to the notice of the learned President of the Labour Tribunal that Wipularatne had been granted with written authority to represent the Employer before the Labour Tribunal.

In terms of Section 186 of the Companies Act No.7 of 2007 a Board of a company is empowered to delegate powers to a person and this person need not be an employee or a person who has some connection to the company.

Considering the above, it is clear that the objection raised by Attorney-at-Law Mr. Sumathipala on behalf of the applicant, is absolutely without any legal basis and had the Labour Tribunal President only paid attention to Section 46 of the Industrial Disputes Act, I am certain the order would have been different. This process has only led to procrastination of proceedings.

The criteria to be observed when a court exercises revisionary jurisdiction is, the legality of the order. When the order in question was clearly illegal, it is incomprehensible why the learned judge of the High Court did not exercise that jurisdiction and revised it. The reason given that exceptional circumstances are required, is specious at best and tantamount to refusal and reluctance to exercise its jurisdiction, whereas the order in question should have shocked the conscience of the court.

It is unfortunate that the President of Labour Tribunal herself has lost sight of the provisions of the Industrial Disputes (Hearing & Determination of Proceedings) Special Provisions Act No.13 of 2013.

The above Act had been enacted as the Legislature had noted the inordinate delay in disposing of applications made to Labour Tribunals and had thought it fit to enact a law to ensure expeditious disposal of such applications.

Section 3 of the Act reads thus:-

> ***Tribunal to proceed in the absence of any party.***
> *Where without sufficient cause being shown, a party to an application before a Labour Tribunal fails to attend or* ***is not represented at any hearing*** *of such tribunal the tribunal* ***may proceed with the hearing*** *and determination of the matter,* ***notwithstanding the absence of such party or any representative of such party.*** (emphasis added)

Hence, when the counsel for the employer resisted a postponement and sought permission to continue with the cross-examination of the applicant, the Labour Tribunal President, even assuming that she was not satisfied with the representation on behalf of the employer, ought to have proceeded with the inquiry in view of the clear wording of the Act.

When the Revision Application was supported before the High Court, the learned counsel for the Petitioner (the employer) had drawn the attention of the court to the relevant statutory provisions embodied in the Industrial Disputes Act as well as the Companies Ordinance. However the learned High Court Judge had refused to exercise the revisionary jurisdiction on the basis that the Petitioner (the employer) had not shown any exceptional circumstances.

It is trite law that "revision" being a discretionary remedy, a court exercising revisionary jurisdiction need not rectify every illegality to which the attention of the Court is drawn, in the order that is being canvassed before the court.

However, if the order that is being canvassed had been made in total disregard of the applicable statutory provisions, then the court must exercise its discretion in favour of the party that seeks redress, especially as the President of the Labour Tribunal in making her order, had manifestly fallen into error.

Considering the above, I hold in the affirmative, the questions of law raised in sub paragraphs (I) to (IV) and (VII) of paragraph 18 of the Petition of the Appellant.

Accordingly, both orders, that is the order of the learned High Court Judge dated 7th November, 2014, although the order, presumably due to inadvertence, is dated 7th October, 2014 and the order of the Labour Tribunal President dated 14th October, 2014 are set aside.

I hold further that there is no legal impediment for Wipularatne to represent the employer at the inquiry before the Labour Tribunal.

I make further order directing the Labour Tribunal President to give effect to Section 3 of the Industrial Disputes (Hearing and Determination of Proceedings) Special Provisions Act and to conclude the instant inquiry expeditiously.

Appeal allowed.

In the circumstances of this case I order no costs. Registrar of this court is directed to communicate this decision, both to the Provincial High Court of Kandy and the Labour Tribunal Kandy, forthwith.

JUDGE OF THE SUPREME COURT

Justice Anil Gooneratne

I agree

JUDGE OF THE SUPREME COURT

Justice H.N.J Perera

I agree

JUDGE OF THE SUPREME COURT