

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

In the matter of an application under Section
31 D D(1) of the Industrial Disputes Act as
amended by Act No. 32 of 1990.

Vimal Jayathilake Wijesekara
Nikathenna, Puwakdheniya
Kegalla

SC Appeal No. 03/2010

APPLICANT

SC. Special Leave to Appeal
Application No: 187/2009

Vs.

High Court Kandy Case No.
HC Appeal 44/2008

National Institute of Co-operative
Development
Polgolla

LT. Kandy Case No. 03/118/2003

RESPONDENT

And between

National Institute of Co-operative
Development
Polgolla

RESPONDENT-APPELLANT

Vs.

Vimal Jayathilake Wijesekara
Nikathenna, Puwakdheniya
Kegalle

APPLICANT-RESPONDENT

And now between

National Institute of Co-operative
Development
Polgolla

**RESPONDENT-APPELLANT-
PETITIONER**

Vs.

Vimal Jayathilake Wijesekara
Nikathenna, Puwakdheniya
Kegalle

**APPLICANT-RESPONDENT-
RESPONDENT**

Before :- Chandra Ekanayake, J
Wanasundera, PC, J &
Aluwihare, PC, J

Counsel :- M. Gopallawa, SSC for the Respondent-
Appellant-Appellant
Manohara de Silva, PC with
A.Wijesurendra for the Applicant-
Respondent-Respondent

Written submissions
tendered on : By the Respondent-Appellant-Appellant on
27.09.2010.

By the Applicant-Respondent-Respondent on
28.09.2010.

Decided on : 28.03.2016.

CHANDRA EKANAYAKE, J.

The Respondent-Appellant-Petitioner by its petition dated 26.08.2009 (filed together with an affidavit of its Director General) had sought inter alia, Special Leave to appeal against the judgement of the learned High Court Judge dated 23.07.2009 and to set aside the same. When this application was supported on 15.01.2010, this Court had granted special leave to appeal on the questions of law set out in sub paragraphs 10 (I) to (V) of the above petition. At the commencement of the hearing of this appeal a preliminary objection was raised on behalf of the Applicant-Respondent-Respondent with regard to the maintainability of this appeal namely :-

“This appeal has been filed on the basis that the Respondent-Appellant-Appellant is not the employer of the Applicant-Respondent-Respondent and therefore it lacks status in terms of section 31 DD (1) of the Industrial Dispute Act as amended by Act No: 32/1990 in so far as a right of appeal thereby conferred to a workman, trade union or an employer”.

With regard to the above preliminary objection parties have made oral submissions and also tendered written submissions.

The Applicant-Respondent-Respondent (hereinafter sometimes referred to as

'Respondent') had been employed as a lecturer from 15/06/1981 in the Cooperative Development School – (Polgolla) of the Respondent-Appellant-Appellant (hereinafter sometimes referred to as the 'Appellant') on the letter of appointment issued by the Secretary of Food and Co-operatives. After assumption of duties as a lecturer in the Appellant Institute following events appear to have taken place :-

- (a) The respondent had been released at the request of the Ministry of Urban Development, Construction and Public Utilities to serve as a Public Relations Officer in that Ministry.
- (b) By letter dated 1.10.2001 of the Senior Assistant Secretary on behalf of Secretary to the Ministry of Urban Development Construction and Public Utilities he had been released from the said Ministry with effect from 21-09-2001.
- (c) the Appellant Institute was thereafter incorporated as the National Institute of Co-operative Development by Act No: 01 /2001 with effect from 21-03 -2001 and by virtue of the provisions of section 2 (1) of the said Act the Appellant Institute was established.
- (d) Thereafter a vacation of post notice was issued to the Respondent by the Commissioner and Registrar of Co-operative Development on the basis of having vacated his post from 21-09-2001.
- (e) As per the averments in the application to the Labour Tribunal, the Respondent had been sent on compulsory retirement with effect from 21-01-2003 by the Public Service Commission.

The basis of the respondent's application to the Labour Tribunal dated 11-06-2003 had been, that due to sudden illness he suffered on his way when reporting for work at the Appellant-Institute he was unable to report. Although same was brought to the notice of the Head of the Institute by registered post together with relevant medical certificates, the Institute having totally disregarded the documents he submitted, he was considered as having vacated the post with effect from 21.09.2001, (as per the vacation of post notice dated (A 23)). He contends that this amounts to constructive termination of his employment. He had sought the reliefs claimed in the application on the above footing.

The Appellant Institute by its answer dated 26-08-2003 whilst taking up the same preliminary objection raised before this Court among others, had moved for a dismissal of the application of the respondent. Learned President of the Labour Tribunal by the order dated 24-01-2008 having concluded that the termination was unlawful, had proceeded to order a sum of Rs.217,200/- (being 24 months salary) to be paid as compensation in lieu of reinstatement. This order was impugned in the High Court of the Central Province by HC/Appeal No. 44/2008 and HC/Appeal No.45 2008 by both parties. Both appeals were consolidated and heard together. Thereafter Learned High Court Judge by the order dated 23.07.2009-(Y) had proceeded to order reinstatement with back wages. This is the order this special leave to appeal application was preferred from.

In view of the preliminary objection raised it would be pertinent to consider the provisions in Section 31 DD (1) of the Industrial Disputes Act as amended by Act No. 32/1990.

The above sub section thus reads as follows:-

“31DD(1) Any workman, trade union or employer who is aggrieved by any final order of a High Court established under Article 154P of the Constitution, in the exercise of the appellate jurisdiction vested in it by law or in the exercise of its revisionary jurisdiction vested in it by law, in relation to an order of a Labour Tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained.”

According to the above sub-section any employer who is aggrieved by any final order of a High Court established under Article –154P of the Constitution, in the exercise of appellate or revisional jurisdiction vested in it, may appeal from an order of a Labour Tribunal to the Supreme Court.

In the case at hand the main basis of the objection raised by the respondent (applicant) is that the appellant was not his employer at the relevant time. Thus the appellant does not have the status in terms of section 31DD(1) of the Industrial Disputes Act (as amended), in so far as a right of appeal thereby conferred to an employer.

To decide whether the appellant was the respondent's employer at the relevant time the entire chain of events that had taken place with regard to the respondent's service has to

be considered. To consider this all the correspondence and other facts pertaining to the same will have to be examined.

In those circumstances I am of the view that in the interest of justice this preliminary objection also should be considered in the main appeal.

The Registrar is directed to list this appeal for hearing in due course with notice to both parties.

Judge of the Supreme Court.

Wanasundera, PC, J &

I agree.

Judge of the Supreme Court.

Aluwihare, PC, J

I agree.

Judge of the Supreme Court.