

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

SC/Appeal No 03/10

Special Leave to Appeal

Application No. 187/2009

High Court Kandy Case No.

HC Appeal 44/2008

LT.Kandy Case No. 3/118/2003

National Institute of Co-operative Development

Polgolla

Respondent-Appellant- Petitioner-Appellant
-Vs-

VimalJayathilake Wijesekara

Nikathenna, Puwakdheniya

Kegalle

Applicant-Respondent-Respondent-Respondent

Before : Sisira J. De Abrew, J
 Upaly Abeyrathne, J &
 Anil Gooneratne, J

Counsel : - Rajeev Goonathilleke,SSC for the

Respondent-Appellant-Petitioner-Appellant

Manohara de Silva,PC with Aravinda Wijesurendra for
Applicant-Respondent-Respondent-Respondent

Argued on : 23rd November 2016

Written submission

Tendered on : 27.9.2010 by the Respondent-Appellant

15.12.2016 by the Applicant-Respondent

Decided on : 15.2.2017

Sisira J De Abrew

The Applicant –Respondent-Respondent- Respondent (hereinafter referred to as the Applicant-Respondent) filed an application in the Labour Tribunal seeking, inter alia, that he be appointed as a Grade I lecturer with effect from 21.9.2001; that he be paid back wages from 21.9.2001; that he be paid reasonable compensation. The learned President of the Labour Tribunal after inquiry decided that the services of the Applicant-Respondent have been unjustifiably terminated by the Respondent-Appellant-Petitioner-Appellant (hereinafter referred to as the Respondent-Appellant) and ordered Rs.217,200/- as compensation in lieu of reinstatement. Being aggrieved by the said order of the learned President of the Labour Tribunal, both parties preferred appeals to the High Court and the learned High Court Judge by his judgment dated 23.7.2009, set aside the order of the learned President of the Labour Tribunal and ordered that the Applicant-Respondent be reinstated with back wages. Being aggrieved by the said judgment of the High Court, the Respondent-Appellant has appealed to this court. This court, by its order

dated 15.1.2010, granted leave to appeal on questions of law stated in paragraphs 10(i) to 10(v) of the Petition of Appeal dated 26.8.2009 which are set out below.

- I. Whether the application to the Labour Tribunal, Kandy, by the Respondent was prescribed (time barred)
- II. Whether the Labour Tribunal, Kandy, had jurisdiction to hear and determine this matter.
- III. Whether Section 23 of the National Institute of Co-operative Development (Incorporation) Act No 1 of 2001 applies to the contract of employment of the Respondent dated 25.02.1982 (Folio 170 of annexure "X")
- IV. Whether the Petitioner was the employer of the Respondent.
- V. Without Prejudice to the above, whether the issuing of the notice of Vacation of Post on the Respondent, amounts to an action of termination of employment by the Petitioner in terms of Section 31B (1) of the Industrial Disputes Act No. 43 of 1950 as amended.

Learned PC for the Applicant-Respondent on 27.7.2010 in this court had taken up the following preliminary objection to the maintainability of this appeal. It is as follows:

“Learned PC Submitted that the appeal had been filed on the basis that the Respondent-Appellant was not the employer of the Applicant-Respondent. Learned PC submitted that the Respondent-Appellant would therefore not have status in terms of Section 31DD(1) of the Industrial Disputes Act as

amended by Act No.32 of 1990 in so far as a right of appeal thereby conferred to workman, trade union or an employer.”

Learned PC at the hearing before us stressing his preliminary objection submitted that since the Respondent-Appellant takes up the position that he is not the employer of the Applicant-Respondent, he could not have preferred this appeal to this court in terms of Section 31DD(1) of the Industrial Disputes Act, and that only a workman, trade union or an employer could appeal against an order of a High Court made in the exercise of its appellate jurisdiction in relation to an order of a Labour Tribunal. Before I deal with the said preliminary objection, I would like to consider whether the Labour Tribunal could have entertained the application of the Applicant-Respondent. Learned SSC submitted that the Applicant-Respondent was a public servant and was not an employee of the Respondent-Appellant. I would like to consider whether the Applicant-Respondent was a public servant at the time of his termination of services. In considering the said question the following facts are relevant.

The Secretary to the Ministry of Food and Co-operative by his letter dated 25.2.1982 appointed the Applicant-Respondent as a lecturer of the Co-operative Development School at Polgolla with effect from 15.6.1981. This is the letter of appointment of the Applicant-Respondent. According to the said letter of appointment, the said post is permanent and he is entitled to his pension (vide page 200 of the brief). The said facts alone demonstrate that the Applicant-Respondent has been appointed as a public servant. On a request made by the Deputy Minister of Urban Development, Constructions and Public Utilities, the Applicant-Respondent was released to the above

Ministry and the Secretary to the Ministry of Urban Development, Constructions and Public Utilities by his letter dated 23.11.2000 (vide page 166 of the brief) appointed the Applicant-Respondent as Public Relation Officer of the Deputy Minister of the said Ministry with effect from 9.11.2000. The Secretary to the Ministry of Urban Development, Constructions and Public Utilities by his letter dated 1.10.2001 addressed to Commissioner of Co-operative Development released the Applicant-Respondent from the said Ministry with effect from 21.9.2001. A copy of the said letter was also sent to the Applicant-Respondent. But the Applicant-Respondent failed to report to the Department of Co-operative Development. In view of his failure to report back to the Department of Co-operative Development, he was served with a vacation of post notice dated 9.11.2001 by the Commissioner of Co-operative Development. It is therefore seen that the Applicant-Respondent by the said notice was informed that he had vacated post with effect from 21.9.2001 (vide page 152 of the brief). The Applicant-Respondent appealed to the Public Service Commission against the said notice of vacation of post. The Public Service Commission after considering his appeal, by order dated 21.1.2003, converted the said vacation of post to a compulsory retirement (vide page 142 of the brief).

If the Applicant-Respondent is not a public servant why did he appeal to the Public Service Commission? The Applicant-Respondent, by his own appeal to the Public Service Commission, has accepted that he is a public servant.

Considering all the aforementioned matters, I hold that at the time the Applicant-Respondent was sent on vacation of post, he was a public servant.

Section 49 of the Industrial Disputes Act No 43 of 1950 (as amended) reads as follows. “Nothing in this Act shall apply to or in relation to the State or the Government in its capacity as employer, or to or in relation to a workman in the employment of the State or the Government.”

It is therefore seen that if a workman is a public servant, he cannot move the Labour Tribunal for redress and the Labour Tribunal has no jurisdiction to entertain an application of a public servant when his services were terminated. In the present case I hold that the Applicant-Respondent was a public servant at the time he was sent on vacation of post; that he is not entitled to file an application for relief for termination of his services; that the Labour Tribunal did not have jurisdiction to entertain his application; and that the Labour Tribunal should have dismissed his application in limine. The 2nd question of law is as follows.

“Whether the Labour Tribunal Kandy had jurisdiction to hear and determine this matter.”

In view of the conclusion reached above, I answer this question of law as follows. “The Labour Tribunal Kandy did not have jurisdiction to hear and determine this matter.”

In view of the conclusion reached above, the other questions of law do not arise for consideration. I have earlier held that the Labour Tribunal did not have jurisdiction to hear and determine the application and that the Labour Tribunal should have dismissed the application filed by the Applicant-Respondent in limine. For the above reasons, I dismiss the application of the Applicant-Respondent filed in the Labour Tribunal Kandy.

In view of the above conclusion reached by me, I hold that there is no merit in the preliminary objection and reject the same.

For the aforementioned reasons, I set aside the judgment of the High Court Judge dated 23.7.2009 and the order of the Labour Tribunal 24.1.2008. I allow the appeal. Having considered the facts of this case, I do not make an order for costs.

Appeal allowed

Judge of the Supreme Court

Upaly Abeyratne J

I agree.

Judge of the Supreme Court

Anil Gooneratne J

I agree.

Judge of the Supreme Court