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

In the matter of an application for the issue of a writ of Mandamus and Certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Writ Appln.
No. 746/2007

Ceylon Grain Elevators Limited,
No. 15, Rock House Lane,
Colombo 15.

Petitioner.

Vs..

01. Inter Companies Employee's Union,
No. 158/18, E.D. Dabare Mawatha,
Colombo 15.

(For and on behalf of 159 Employees)

And 07 others.

Respondents.

Before : **S. Sriskandarajah, J (P/CA) &**
H.N.J. Perera, J.

Counsel : Nihal Fernando, P.C. with Rohan Dunuwila for the Petitioner.

Dr. Almeida Gunaratne for 1st Respondent.

Anton Fernando for the 8th Respondent.

Vicum de Abrew, S.s.C, for A.G.

Argued on: 8.12.2011

Decided on: 30.5.2012

H.N.J. Perera, J.

The Petitioner has filed this application seeking inter - alia for an issue of an order in the nature of a Writ of Certiorari quashing the notifications marked X3, X4 and the decision dated 15.06.2007 marked X11 in the petition. The petitioner has further prayed that the reference to the Industrial Court marked X4 be referred back to the 5th Respondent for amendment. The petitioner states that the 1st Respondent Union on or about August 2006 preferred an application setting out purported disputes that had arisen

between the 1st Respondent Union and the Petitioner and the 8th Respondent. Thereupon the 5th Respondent Minister of Labour referred the said purported dispute to the Industrial Court for settlement by virtue of the powers vested in the 5th Respondent Minister under the Industrial Disputes Act.

The Petitioner further states that the 6th Respondent Commissioner of Labour by notice dated 26/5/2006 informed the petitioner of the purported dispute referred to the Industrial Court which reads as follows: "Whether the non officer of employment with effect from 20/3/2006 to the 57 employees whose names are referred, to in the attached schedule and who were employed at Ceylon Grain Elevators Ltd. on contract basis by Avant Guard Security Services (Private) Ltd. is justified and if not justified, to what relief each of them are entitled." The Petitioner in paragraph 4 of the petition therefore submits that following questions of law has arisen for consideration by this Court.

(A) Is there a "Industrial dispute" between the petitioner and 1st Respondent Union, as the Petitioner did not contract the 8th

Respondent to supply labor to the Petitioner Company and/or none of the workmen referred to in the schedule of the reference were engaged in any work at the Petitioner Company?

(B) Does the Industrial Disputes Act provide for any dispute to be referred to the Industrial Court for non offer of employment?

(C) Can an employee have two employers simultaneously.

In paragraph 5(i) to (ii) of the written submissions, the petitioner sets out the reasons for the said reference to be ex-facie bad in law. The 1st Respondent Union denies the position that the Union had made an application regarding this dispute to the Commissioner of Labour. It is the Union's position that the Industrial Dispute arose between the Union (including the employees who have been described in the schedule) and the Petitioner. In paragraph 5 of the objections the 1st Respondent states that several persons have been involved in paying the salaries to the employees referred to in the schedule and those persons had implied that they are from the 8th Respondent Company. The 1st Respondent states that there was no contract of employment

between the 8th Respondent and the employees named in the schedule and further states that the employees of the Petitioner started a strike action on 20.03.2006 and thereafter the employment of some workers (the workman in the schedule of C.A.. Writ 769/06) were terminated by the Petitioner and even though the strike referred to was concluded the workers in the schedule were not allowed to report to work. The 1st Respondent further states that after the 5th Respondent became aware of this incident the Petitioner and the Union were summoned for several discussions and the final discussion took place on 12.4.2006 and at the discussion the Petitioner agreed to allow the workers to report for work with effect from 27.04.2006 and as the Petitioner did not allow the workers to report for work as agreed the 5th Respondent referred the matter for settlement by way of arbitration. It is the position of the 1st Respondent that there is a clear Industrial dispute between the parties. And if the Industrial Court is satisfied that there is an Industrial dispute, Industrial Court is not barred from holding an inquiry and further submits that the Industrial Court. cannot uphold the objections of the Petitioner without holding a proper inquiry. The 1st Respondent further states that the workers named in the schedule had directly contracted the Petitioner and

received the employment from the Petitioner and that the 57 workmen referred to in the schedule had worked for the petitioner and that they had not worked for the 8th Respondent at any time. In paragraphs 8 of their written submissions the Petitioner submits that the Industrial Court was obliged in the first instance to satisfy itself to the correctness of the reference and determine that the Industrial Court had jurisdiction to hear and determine the said matter purported to be a dispute and further submits that the purported reference of the Minister refers to a dispute between parties when in fact the Petitioner is not the employer or contract the 8th Respondent to outsource labour. It is the position of the Petitioner that the 8th Respondent did not assign the workmen in the schedule to the reference to work in or at the premises of the Petitioner Company and as such there cannot be any dispute with workmen of the 1st Respondent Union who are admittedly employed by the 8th Respondent and had no nexus with the Petitioner whatsoever.

The main argument put forward on behalf of the Petitioner was to the effect that whether there is an Industrial Dispute between the petitioner and the 1st Respondent Union as

petitioner did not contract the 8th Respondent to supply labour to the petitioner Company and that there lies no dispute to be referred to the Industrial court, for non offer of employment. As the Industrial dispute Act provides specifically only to non-employment there cannot be two employers and as the purported reference also refers to a dispute between parties, where in fact Petitioner is not the employer and as such there cannot be any dispute with the workmen of the 1st Respondent Union who are admittedly employed by the 8th Respondent Avanet Group Security Services Private Limited. It is submitted on behalf of the Petitioner that the reference is bad in law and that the Industrial Court failed in the first instance to consider whether the dispute referred to the Industrial Court is bad in law and the reference of the Industrial Court cite two employers and for the reasons stated in the paragraph 37 of the written submissions the Court should grant the relief as prayed for in the petition. Section 48 of the Industrial Disputes Act defines an Industrial dispute as "any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or for non-employment, or the terms of employment, or with the conditions of labor, or the termination of the services or

the reinstatement in services, of any person and for the purposes of this definition "workmen" includes a trade Union consisting of workmen." Counsel for the Petitioner contended that the dispute between the Respondent and the Petitioner was not an Industrial Dispute within the meaning of the Act. In Colombo Apothecaries Company Limited Vs Wijesuriya 70 N.L.R. 488. G.P.S. Silva, J stated that "when I consider the definition of the words "Industrial dispute" in the present Act, I cannot help thinking that it is wide enough to include every serious problem that can arise between an employer and employee in relation to the employment.....

So far as the powers of the Minister under Section 4 of the Act are concerned, experience has shown too often that the termination of services of one employee has resulted in considerable or complete dislocation of an Industry with which he was associated. In these circumstances the question suggests itself whether a sagacious and prudent Minister, having all the data before him, would not be in the best position to consider whether the termination of services of a particular worker is or is not of such a nature as to be likely to lead to unrest is one or more Industries and, When he so feels, whether

he would not be justified in setting on motion the machinery contemplated in Section 4 of the Act.....

When the matter in dispute reaches the Minister, in my view, there is only one purpose for which he will consider it, namely, for the purpose of proceeding under Section 4 of the Act in relation to the existing dispute. For this purpose he has to satisfy himself first that there is an Industrial dispute and, if so for the purposes of exercising his powers under sub section (1), to form an opinion as to whether or not it is a minor dispute. In regard to the first matter I think he will be fully justified in deciding that there is an Industrial Dispute in this case by reference to the definitions of the words Industrial dispute..... "read with the definition of the word "workman" which includes, for the purpose of any proceeding under the Act in relation to an Industrial Dispute, a person whose services have been terminated. It seems to me an unwarranted restriction of the meaning of this definition to hold that the Minister should first consider whether an Industrial dispute in terms of the definition exist independently of the purpose for which he is indulging in such consideration. In my view he has necessarily to consider the meaning of the words, having the purpose of that

consideration in the forefront, namely to take proceedings under Section 4. Else there is no occasion for him to consider whether there is an industrial dispute or not.

In the instant case the Petitioner denies that he had ever employed the employees referred to in the schedule whilst the 8th Respondent had admitted employing some of the employees referred to in the schedule and further there is also evidence to suggest that the employees had been out sourced. All these matters has to be looked into by the Industrial court and have come to a clear finding as to who the employer of the workmen referred to in the schedule to the petition. All these facts show that there is an Industrial dispute within the meaning of Section 48 of the Act and therefore this Court is of the opinion that in the instant case there is an Industrial dispute within the meaning of Section 48 of the Act and that the order of the Section 4(1) was properly made by the Minister.

In Tirunawakarasu Vs. Siriwardena and others, (1981) 1 Sri L.R., 185,193 Wanasundera, J observed as follows:

"The Industrial Disputes Act provides for state intervention in the resolution of disputes between Management and workmen. The procedures that are divised therein for the settlement of Industrial disputes reach beyond the interests of the contesting parties and are matters of real concern to the community at large."

In S.B. Perera Vs Standard Charted Bank and others 1995 (1 Sri L.R. 73 Amarasinghe, J referred to the analysis of the definition of the Industrial dispute in the Industrial Disputes Act by Tennakoon, J in Colombo Apothecaries Company Limited Vs. Wijesuriya and states that Tennakoon, J in that case held that the definition Industrial Dispute fell into 3 parts.

The first referred to the factum of the dispute or difference. The 2nd part to the parties to the dispute, and the 3rd part to the subject matter of the dispute. With regard to the 3rd part, Tennakoon, J having said that a dispute or difference must be connected with the employment of non-employment or the terms of employment or with the conditions of labour or the termination of services or the re-instatement in service of any person drew attention

to fact that "while in the 2nd part the parties are described by reference to such words as "employers" and "workmen" the legislature in describing the subject matter of the dispute, did it by reference not to any workman, but by reference to any person."

In Colombo Apothecaries Company Limited Vs. Wijesuriya Tennankoon, J held that "it has been said frequently and quite recently reiterated by their Lordships of the privy Council that the purpose and object of the Act is the maintenance and the promotion of the Industrial Peace, and it may be added that the preservation of the Industrial Peace is directed not to the redress of private and personal grievances but to the securing of the uninterrupted supply of goods and services to the public by employers engaged in such Enterprises. The Act takes as the prime danger to the Industrial Peace, that kind of situation which is capable of endangering Industrial Peace and gives it the name 'Industrial Dispute'. In the definition of the Industrial Dispute the emphasis is thus not on the denial of or infringement of a right of workman by his employer but on the existence of a dispute or difference between given parties

connected with the rights not merely of a party to the dispute but also of third parties.

His Lordship further added that "what is important to note, of course, is that the legislature, in using the expression 'any person' instead of the term ' workman' in that portion of the definition of 'Industrial Dispute' which relates to the subject matter of the dispute, used an expression wide enough to include a person who is not a de facto or de jure workman in his primary sense and into this class would fall both a person who has never had employment before and also a person who having been in service has been discharged." Therefore the mere denial of the petitioner stating that petitioner had not employed any of the employees referred to in the schedule will not prevent the Minister from referring the Industrial Dispute to the 6th Respondent. Therefore this Court is of the view that the mere denial of the Petitioner will not prevent the Minister from referring the said Industrial Disputes to the 6th Respondent in respect of an Industrial dispute referred under Section 48 for settlement by Arbitration. Section 17 of the Industrial dispute Act requires an Arbitrator to make such

award as may appear to him just and equitable. And Section 17(i) empowers the Arbitrator to make all inquiries into the dispute as he may consider necessary. It is an administrative Act of the Minister.

The Minister has to form an opinion as to the existence of the Industrial Dispute. The Minister have all the data before him is in a position to form an opinion as to the existence of an Industrial dispute within the meaning of Industrial disputes Act. In the instant case the Minister had formed an opinion as to the existence of an Industrial Dispute between the parties concerned and has referred the same to the Industrial Court. Therefore the Industrial court has jurisdiction to inquire into the matter and clear any doubt as to who the employer of the employee's referred to in the schedule to the petition. For that purpose the Industrial Court is in a position to make all inquiries into the dispute as it may consider necessary. The Industrial Court is of the view that since the objections raised by the Respondent go to the route of the reference a comprehensive hearing should be given before it decides the matter. I agree with the submissions made by the 5th and 7th Respondents where they state that the matters referred to in the reference were not capable of been

adjudicated summarily, as the matters under reference were essentially been a questions of fact. Therefore I see no reason to interfere with the order made by the 6th Respondent marked X11 as there is no merit in the application of the petitioner. Therefore I dismiss the application of the petitioner and award costs of Rs 15000/= payable by the petitioner to the 1st Respondent.

JUDGE ~~OF~~ THE COURT OF APPEAL

S. Sriskandarajah, J. (P/C.A)

I agree.

PRESIDENT OF THE COURT OF APPEAL