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

Delegation of the European Union
to the Democratic Socialist
Republic of Sri Lanka and for the
Republic of Maldives,
No. 26,
Sri Marcus Fernando Mawatha,
Colombo 7.
And Another
Petitioners

CASE NO: CA/WRIT/229/2015

Vs.

1. President of the Labour Tribunal,
   Labour Tribunal No.1,
   Colombo1.
2. Pavithra Devasurendra,
   No. 100/15B,
   Raja Mawatha,
   Ratmalana.
3. Hon. Attorney General,
   Attorney General's Department,
   Hulftsdrop,
   Colombo 12.
   Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Geoffrey Alagaratnam, P.C., with Suren Fernando for the Petitioner.
Sobhitha Rajakaruna, D.S.G., for the 1st and 3rd Respondents.
Athula Perera for the 2nd Respondent.

Decided on: 05.11.2019

Mahinda Samayawardhena, J.

The petitioner filed this application seeking (a) to quash by way of writ of certiorari the interim order and the final order made by the 1st respondent marked P8 and P9 whereby the petitioner employer was directed to pay compensation to the 2nd respondent employee on the basis that the termination of the services of the latter was unjustifiable; and (b) to prohibit the 1st and the 2nd respondents by way of writ of prohibition from further steps being taken on the said orders.

The petitioner refused to participate in the Labour Tribunal proceedings initiated by the 2nd respondent citing diplomatic immunity.

The learned Deputy Solicitor General appearing for the 1st and 3rd respondents concedes that the petitioner enjoys diplomatic

immunity in terms of the provisions of the Diplomatic Privileges Act, No.9 of 1996, in particular, section 4 thereof.[1]

The 1st respondent has also either accepted or not contested it in the impugned orders.

However, the 1st respondent has made those impugned orders predominantly on the basis that the petitioner has waived off the immunity.

The 1st respondent has stated that the petitioner had earlier settled two similar cases, apparently before another division of that Tribunal. It appears that the 1st respondent has considered it as a general waiver of the diplomatic immunity by the petitioner.

Settlement of two cases on good faith without taking up high-flown technical objections cannot be considered as submission to the jurisdiction in all future cases. In the present case there is no submission to jurisdiction. Each case shall be dealt with separately.

As the learned President's Counsel for the petitioner submits, there is no "universal waiver of diplomatic immunity".

The learned counsel for the 2nd respondent has drawn the attention of this Court to section 2(3) of the Diplomatic Privileges Act, which runs as follows:

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[1] Vide page 41A of the Gazette Extraordinary marked P1 and the letter of the Ministry of Foreign Affairs marked P2.

> *For the purposes of Article 32 (of the Vienna Convention on Diplomatic Relations), a waiver by the head of mission of any State or any person for the time being performing his functions, shall be deemed to be a waiver by that State.*

The party alleging waiver of diplomatic immunity shall prove that the other party with full knowledge of his right abandoned it either expressly or by conduct which is inconsistent with the immunity he is entitled to claim. The abandonment of diplomatic immunity cannot be presumed and the onus of proving waiver shall be on the party alleging it.

In *The British High Commission v. Ricardo Wilhelm Michael Jansen*[2] the Supreme Court held that:

> *There is another principle of law that negatives the assumption of the High Court Judge that a reference to Sri Lankan Labour Law in the terms and conditions of the contract had the effect of waiver. Such a provision that the Sri Lankan Labour Law would apply to the terms and conditions was nothing more than an assertion that Sri Lankan Labour Law was the governing law of the terms and conditions. Such an assertion would not constitute an express waiver of state immunity. In fact the case of Ahmed v. Government of the Kingdom of Saudi Arabia (1996) 2 All ER 248, a Solicitor's letter advising the Government that employees might have certain employment rights in UK Law could not be interpreted as a "written*

[2] SC Appeal 99/2012, SCM of 10.07.2014.

> *agreement to waive immunity under section 2 of the UK's State Immunity Act 1978."*
>
> *In fact the mere recitation that Sri Lankan Labour Law will apply to the terms and conditions of the contract of employment is not to be understood as a submission to jurisdiction as in an arbitration agreement—see Mills v. USA 120 ILR p.162. In the circumstances I hold that the covenant in the letter of appointment that Sri Lankan Labour Law will apply to the terms and conditions is not to be regarded as a submission to jurisdiction and there is thus no waiver of immunity on that score.*

The 1st respondent has considered the Letter of Appointment of the 2nd respondent marked P3 and the "*Framework rules laying down the conditions of employment of local staff of the Commission of the European Communities serving in non-member countries*" marked P6(1) and (2) to come to the conclusion that the industrial disputes of the local staff are triable by the domestic Courts.

The learned counsel for the 2nd respondent has narrowed down this argument to Article 11 of the Letter of Appointment and Article 23 of the aforesaid Framework Rules.[3]

Article 11 of the Letter of Appointment reads as follows:

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[3] Vide paragraph 2.7 of the written submissions.

Article 11

The parties hereby expressly declare that any dispute arising between them as regards the interpretation or performance of this contract will be referred to an arbitration body. Such referral may not take place until the internal appeal procedure laid down in Chapter X of the Rules laying down the Specific Conditions of Employment applicable to local staff serving in Sri Lanka has come to an end; it shall be without prejudice to referral of the dispute to the court having jurisdiction under local law in accordance with the first paragraph of Article 23 of the Framework Rules.

The arbitration body shall consist of two arbitrators, each party selecting one arbitrator. Should they fail to agree, the arbitrators shall select a third arbitrator, who will give a joint award with them.

The arbitrators' award shall not be subject to appeal and shall have the status of an amicable settlement. The powers of the arbitrators shall last for three months, beginning on the date of the agreement to seek arbitration. The arbitrators shall be exempted from all legal formalities and from the registration of their award, copies of which they shall send to the parties by registered mail. They shall determine the costs and fees payable for the arbitration procedure.

Article 23 of the Framework Rules reads as follows:

> *Article 23*
>
> *Where an Agreement has been concluded between the government of the host country and the Commission on the establishment and the privileges and immunities of the Delegation of the Commission of the European Communities in the country in question, any dispute between the institution and a member of local staff shall be referred to the court having jurisdiction under local law.*
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> *Referral to this court may be preceded by arbitration.*

In that backdrop, it is the submission of the learned President's Counsel for the petitioner that, in any event, the 2nd respondent could not have gone before a local Court without first referring the dispute for arbitration.

There is no doubt that Article 11 of the Letter of Appointment contains an Arbitration Clause.

However the learned counsel for the 2nd respondent relies on the last part of the 1st paragraph of Article 11 of the Letter of Appointment which states that "*it shall be without prejudice to referral of the dispute to the court having jurisdiction under local law in accordance with the first paragraph of Article 23 of the Framework Rules*" to argue that there is no duty by the 2nd respondent to initiate arbitral proceedings before invoking the jurisdiction of the local Court. I regret my inability to agree with that argument.

As the learned President's Counsel for the petitioner submits, in terms of Article 11 of the Letter of Appointment, the employee has two hurdles to surmount before taking the matter to the local Court.

Firstly, he shall, after the internal disciplinary procedure is concluded, follow "*the internal appeal procedure laid down in Chapter X of the Rules laying down the Specific Conditions of Employment applicable to local staff serving in Sri Lanka*".

Secondly, he shall refer the dispute for arbitration.

Then what is the meaning of: "*it shall be without prejudice to referral of the dispute to the court having jurisdiction under local law in accordance with the first paragraph of Article 23 of the Framework Rules*" found in Article 11 of the Letter of Appointment?

When there is such an Arbitration Clause, in terms of section 5 of the Arbitration Act, No.11 of 1995, "*the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter.*" That means, irrespective of having an Arbitration Clause, the Court shall have jurisdiction, provided the other party does not object to it. It is only if the other party objects, the jurisdiction of the Court is ousted.

Hence "referral of the dispute to the court" shall be understood subject to arbitration. That is why there is a detailed description about the conduct of arbitral proceedings in Article 11 of the Letter of Appointment.

The trend of authority is to give full effect to Arbitration Clauses found in Agreements.[4]

The only point raised by the learned Deputy Solicitor General for the 1st and 3rd respondents is that, although the petitioner is entitled to diplomatic immunity, this application for writ is unsustainable as no writ can be issued against the impugned orders because the 1st respondent made those orders as a President of a Labour Tribunal, who is a judicial officer.

I must say that the learned counsel for the 2nd respondent does not take up such a position.

I think, Article 140 of the Constitution provides the answer to the concern of the learned Deputy Solicitor General. That Article reads as follows:

> *Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person.*

I am of the view that the petitioner can challenge the vires of the impugned orders by way of a writ.

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[4] Vide the Judgment of the Supreme Court in Elgitread Lanka (Pvt) Ltd v. Bino Tyres (Pvt) Ltd (SC Appeal No: 106/08, SCM of 27.10.2010).

For the aforesaid reasons, I hold that the impugned orders of the Labour Tribunal are *ultra vires* as the petitioner is entitled to diplomatic immunity under Diplomatic Privileges Act, No.9 of 1996.

Accordingly, the impugned orders are set aside, and the application of the petitioner is allowed, but without costs.

Judge of the Court of Appeal