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

The Hongkong and Shanghai
Banking Corporation Limited,
of No. 01, Queen's Road Central,
Hongkong,
carrying on business in Sri Lanka
at No.24, Sir Baron Jayathilake
Mawatha,
Colombo 01.
Petitioner

CASE NO: CA/WRIT/284/2017

Vs.

1. W. J. D. Seneviratne,
   Minister of Labour, Trade Union
   Relations and Sabaragamuwa
   Development,
   Labour Secretariat,
   Narahenpita,
   Colombo 05.

1A. Ravindra Samaraweera,
Minister of Labour, Trade Union Relations,
Labour Secretariat,
Narahenpita,
Colombo 05.

1B. Dinesh Gunawardhana,
Minister of Skills Development, Employment and Labour Relations,
Ministry of Skills Development, Employment and Labour Relations,
7th Floor, Labour Secretariat,
Colombo 05.

2. S. A. Nimal Sarnatissa,
Secretary,
Ministry of Labour, Trade Union Relations and Sabaragamuwa Development,
Labour Secretariat,
Narahenpita,
Colombo 05.

2A. D. M. Sarath Abayagunawardana,
Secretary,
Ministry of Skills Development, Employment and Labour Relations,
7th Floor, Labour Secretariat,
Colombo 05.

3. A. Wimalaweera,
Commissioner General of
Labour,
Department of Labour,
Colombo 05.

4. S. Kariyawasam,
Arbitrator,
No.75, Melpitiya,
Matale.

4A. P. Mahadeva,
No.K77, Torrington Flats,
Torrington Avenue,
Colombo 05.

5. U. M. C. L. Fernando,
No.91/10, St. Peter's Road,
Moratuwa.
Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Nihal Fernando, P.C., with Rohan Dunuwille, Sankha Karunaratna and Rhadeena de Alwis for the Petitioner.
Shaheeda Barrie, S.S.C., with A. Jayathilleke, S.C., for the 1st-3rd Respondents.
Navin Marapana, P.C., with Uchitha Wickremasinghe for the 5th Respondent.

Argued on: 23.07.2020

Decided on: 17.09.2020

Mahinda Samayawardhena, J.

The services of the 5th Respondent employee were terminated by the Petitioner employer on 13.06.2016. The 5th Respondent filed a case in the Labour Tribunal on 25.09.2016 seeking:

(a) reinstatement or
(b) reasonable compensation in lieu of reinstatement
(c) costs of the action and
(d) any other reliefs the Labour Tribunal deems fit.

In the meantime, the 5th Respondent also complained to the Commissioner of Labour about this dispute – *vide* P10. The Commissioner referred the dispute to the subject Minister, who, in terms of section 4(1) of the Industrial Disputes Act, referred the same for settlement by arbitration – *vide* P17 and P18. This was done by the Minister after the institution of the case in the Labour Tribunal.

The question referred for settlement by arbitration is:

> *Whether Mrs. U.M.C.L. Fernando [the 5th Respondent] who worked at Hongkong and Shanghai Banking Corporation Limited – Sri Lanka [the Petitioner] as a senior Manager had been caused injustice by not being paid the pension fund which is paid under the Defined Contribution Scheme when an employee is terminated from employment, and if so, to what reliefs she is entitled.*

The Petitioner filed this application seeking to quash by certiorari the said decision of the Minister to refer the dispute for settlement by arbitration.

The main ground upon which the Petitioner bases this application is, when the dispute is *sub judice* in the Labour Tribunal, the Minister cannot refer the same or part of it for arbitration.

The 5th Respondent counters this argument by stating that the dispute referred for arbitration is distinctly different from the dispute presented before the Labour Tribunal.

I am afraid, I cannot agree. The alleged "two disputes" are intrinsically interwoven.

The complaint of the Petitioner to the Labour Tribunal is that the termination of her services was unjustifiable. On that basis, she seeks reinstatement or compensation and any other reliefs.

The subsequent reference for arbitration admits the termination of employment but questions the non-payment of the "pension fund".

The said two disputes are irreconcilable, in that, in the dispute presented before the Labour Tribunal, the 5th Respondent disputes the termination, but in the dispute referred for arbitration, the Petitioner accepts the termination but disputes the denial of the benefits she claims she is entitled to. She cannot claim the benefits of the "pension fund" without first accepting the termination of employment.

On the other hand, the dispute referred for arbitration is meaningless if the Labour Tribunal directs reinstatement on the basis that the termination of the 5th Respondent is unjustifiable.

If the Labour Tribunal comes to the conclusion that the termination is unjustifiable, but decides, instead of

reinstatement, to grant the reliefs as prayed for in paragraphs (b) and (d) of the prayer to the application filed before the Labour Tribunal, which I quoted above, the Labour Tribunal can also address the issue referred for arbitration.

Without drawing attention to any of these matters, the Minister has simply made a general referral of the matter for arbitration. This, in my view, will lead to conflicting or overlapping decisions by both the Labour Tribunal and the Arbitrator on the same dispute.

In *Eksath Kamkaru Samithiya v. Upali Newspapers Ltd. [2001] 1 Sri LR 105* at 107-108, the Supreme Court, whilst dismissing the appeal filed against the Judgment of the Court of Appeal, held:

> *The only matter urged by counsel on behalf of the employer at the hearing in the Court of Appeal was that the Minister had no power to refer a dispute for settlement by arbitration in terms of section 4(1) of the Industrial Disputes Act while applications in respect of the same dispute were pending in the Labour Tribunal. The Court of Appeal held as follows: "The combined effect of the provisions of Interpretation Article 170, Articles 114 and 116 is that the decision in Wimalasena v. Navaratne and others (1978-79) 2 SLR 10, can no longer be considered as valid authority for the proposition that the Minister has unlimited powers under section 4(1) of the Industrial Disputes Act which would enable him to refer a dispute which is pending before a Labour Tribunal to an Arbitrator for settlement. Such an interpretation would necessarily infringe and violate the principle of the independence of the judiciary enshrined in Article 116 of the Constitution which is paramount law"...I*

> *see no reason to interfere with the finding of the Court of Appeal. I accordingly hold that the Court of Appeal has not erred in the interpretation of Article 116(1) of the Constitution and that the Minister had no power to refer the dispute regarding the termination of services for compulsory arbitration when applications in respect of the said dispute were pending in the Labour Tribunal.*

Whilst it was submitted on behalf of the 5th Respondent that the aforesaid Supreme Court decision is distinguishable from the instant case, it was submitted on behalf of the 1st Respondent Minister that the said decision is *per incuriam*. I reject both submissions. The Judgment of the Supreme Court, which is binding on this Court, is in accordance with sound legal principles and common sense.

It is my considered view the referral for arbitration by the Minister is *ultra vires*. Hence I quash the said decision by certiorari.

In view of this, there is no necessity for me to consider the other arguments advanced on behalf of the Petitioner.

I grant the reliefs as prayed for in paragraphs (b), (c) and (e) of the prayer to the amended petition dated 21.07.2020.

The application of the Petitioner is allowed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal