KUMARASINGHE AND ANOTHER
v.
STATE DEVELOPMENT & CONSTRUCTION CORPORATION

SUPREME COURT.
G. P. S. DE SILVA, C.J.
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 55/93
H.C. (NWP) NO. 275/92
L.T. 23/KU/3141
L.T. 23/KU/3155
OCTOBER 04 1994

Industrial Dispute – Right of Labour Tribunal sitting in Colombo to transfer case to Labour Tribunal sitting in Kurunegala – Appellate jurisdiction of Provincial High Court – Are separate appeals necessary from a joint order on applications of two workmen? – Effect of change of regulation making authority – Can regulations made by the former regulation making authority be used pending new regulations by the new authority? – Can tribunal adopt its own procedure in the absence of procedure? – Sections 31A(1), 31C(1), 31D(3), 31D(6), 31D(7), 31A(2) 39(1) (ff) of the Industrial Disputes Act, as amended by Act, No. 32 of 1990 – Article 154P(3)(c) and 170 of the Constitution of 1978 – High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, ss. 2 and 4 – Regulation 32A and S. 31D(3) of the Industrial Disputes Act as amended by Act, No. 32 of 1990.

Two workmen working under the respondent at Aralaganwila, Polonnaruwa were dismissed. They filed applications seeking relief in the Labour Tribunal, Colombo. On the application of the respondent, the President transferred the applications to the Labour Tribunal to Kurunegala. The applications were heard together under regulation 32A and decided by a single order of the Labour Tribunal. The applications were dismissed. A single appeal was then preferred to the High Court.

Held:

(1) The appointment of Labour Tribunal Presidents though made by the Judicial Service Commission under Article 170 of the Constitution of 1978 was to an office and not to a designated post and each person so appointed has identical powers and islandwide jurisdiction. The transfer of a Labour Tribunal case is an administrative act and not a judicial act and hence the Labour Tribunal itself has the implied power to transfer a case where it is appropriate to do so. Hence the transfer of the applications from the Labour Tribunal, Colombo to the Labour Tribunal, Kurunegala was valid.

(2) Even if the transfer of the applications was invalid, it is an order which the Provincial High Court of the Western Province alone could have quashed in the exercise of its revisionary jurisdiction vested in it by section 2 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. In the absence of such an order of the Provincial High Court of the Western Province the High Court Judge of the North Western Province acted in excess of his jurisdiction in pronouncing the transfer invalid.

(3) The appellate jurisdiction of a Provincial High Court over the orders of Labour Tribunals has been conferred upon it by s.2 of Act No. 19 of 1990 (enacted pursuant to the provisions of Article 154 P3(c) of the Constitution). The right of appeal to such court is conferred by s.4 of the said Act and section 31D(3), as amended by Act No. 32 of 1990, of the Industrial Disputes Act. The High Court Judge of the North Western Province was in error when he took the view that the aggrieved party has no right of appeal to another High Court but the High Court of the Province within which the tribunal to which the application was originally made is situated.

(4) In view of the fact that the two applications were heard together and decided by one order against both applicants the absence of separate appeals would not constitute a failure to follow "a vital step" required by section 31D(3) of the Industrial Disputes Act. The objection is technical and does not warrant rejection of the appeal. There is no defect in the appeal which can be regarded as fatal.

(5) Even in the application of imperative requirements of the law, Courts endeavour as far as possible to avoid a denial of justice. As the joint appeal is valid the submission based on s. 31D(6) of the Industrial Disputes Act (relating to stamping of appeals) fails.

(6) In spite of the repeal of section 39(1) (ff) and the enactment of s. 31A(2) of the Industrial Disputes Act (both being sections enabling regulations to be made) the existing regulations made under section 39(1) (ff) by the Labour Minister remain in force until they are replaced by new regulations by the Justice Minister. Even if it were otherwise and regulation 32A made under section 39(1)(ff) had become inoperative there is no illegality in the Tribunal adopting any procedure for hearing applications provided such procedure is just and fair. In terms of such procedure the tribunal may hear two or more applications together.

(7) The case will be remitted to the High Court for the appeal to be heard on the merits, but it must in view of s. 31(7) of the Industrial Disputes Act, be disposed of within six months.

Cases referred to:

1. *Jafferjee v. Subramaniam* 71 NLR 518.
2. *The State Timber Corporation v. Fernando* S.C. Special Leave to Appeal Application No. 225/92 SCM 22.03.1993.

3. *Manager, URY Group, Passara v. The Democratic Workers' Congress* 71 NLR 47.
4. *Board of Trustees of Tamil University Movement v. De Silva* (1982) 1 Sri LR 316.
5. *Hewagam Korale East Multi-purpose Co-operative Society Ltd., Hanwella v. Hemawathie Perera* (1986) 1 CALR 535.
6. *James Perera v. Godwin Perera* 48 NLR 190.
7. *Jamila Umma v. Mohamed* 50 NLR 15.
8. *Disanayake v. Siyane Adikari Co-operative Stores Union* 60 NLR 140.
9. *Karunaratne v. Commissioner of Co-operative Development* 79(2) NLR 193.
10. *Vinasithamby v. Joseph* 65 NLR 359.

APPEAL from order of the High Court of the North Western Province.

S. Sinnathamby for the appellants.
P. A. Ratnayake, S.S.C. for the respondent.

Cur adv vult.

October 22, 1994.
KULATUNGA, J.

This is an appeal by two workmen whose joint appeal to the Provincial High Court of the North Western Province against an order of the Labour Tribunal, Kurunegala was rejected *in limine* on the following grounds:

1. That since the applications were originally filed before the Labour Tribunal, Colombo, in the Western Province, the High Court which has the jurisdiction to entertain the said appeal (in terms of S.31D(3) of the Industrial Disputes Act, as amended by Act No.32 of 1990) is the High Court of the Western Province; and The High Court of the North Western Province has no jurisdiction to entertain it.

2. The impugned order of the Labour Tribunal, Kurunegala was made consequent upon a transfer of the workmen's applications to Kurunegala "on the order of the Labour Tribunal, Colombo" which had no jurisdiction to effect such transfer in the absence of any provision in the Industrial Disputes Act, which permits such transfer. The implication of this ground is that it was the Labour Tribunal Colombo alone which could have heard and decided the said applications subject, however, to a right of appeal to the Provincial High Court of the Western Province.

3. Notwithstanding the fact that the applications of the two workmen had been heard together under regulation 32A of the regulations made under the Act, and decided by a single order of the Labour Tribunal, S.31D(3) of the Act requires each of them to file a separate appeal; that by filing a joint appeal, the workmen had failed to follow the correct procedure which is a vital step in filing an appeal; and hence the appeal has to be rejected.

This Court granted special leave to appeal on the following questions:

(i) Is the interpretation of S.31D(3) of the Industrial Disputes Act by the learned High Court Judge correct?

(ii) (a) Was the transfer of the applications of the petitioners to the Labour Tribunal, Kurunegala invalid?

(b) Assuming that the transfer was invalid, does it deprive the Provincial High Court of the North Western Province the jurisdiction to hear and determine the appeal of the petitioners against the order of the Labour Tribunal, Kurunegala?

(iii) (a) Does the failure of the petitioners to file separate appeals require the rejection of their joint appeal?

(b) Was such failure a defect which was curable by the petitioners with the permission of the High Court?

THE RELEVANT FACTS

The 1st appellant is a security guard and the 2nd appellant is the storekeeper employed by the respondent (State Development & Construction Corporation, Colombo) and are attached to Aralaganwila, Maduru Oya Project, Polonnaruwa. It would appear that the respondent terminated their services with effect from 22.08.90 on charges of irregular or fraudulent issue of diesel to a bulldozer in excess of its capacity. Each of them made an application to the labour tribunal for relief. These applications are substantially in form 'D' set out in the First Schedule to the regulations under the Act and

are addressed to "the Labour Tribunal". Whilst the said Form does not require such application to specify a particular labour tribunal, regulation 14 read with regulation 15 requires it to be sent in duplicate to the Secretary, Labour Tribunals appointed under regulation 11, in terms of which, there is only one Secretary. He functions at the Head Office in Colombo and transmits any application received by him to the appropriate tribunal. There is an assistant secretary attached to each such tribunal who attends to the administrative work relating to the applications received there.

At the hearing before us, learned Counsel for the appellant informed us that despite the requirement that applications should be transmitted to the Secretary, in Colombo there are occasions when the applicants themselves submit them to a tribunal which is convenient to them where they are entertained and inquired into, by the President of that tribunal.

In the instant case, both applications had been transmitted to the Labour Tribunal, Colombo and were given Colombo numbers. After the filing of answer, Counsel for the respondent (the employer) applied to have the applications transferred to the Labour Tribunal, Kurunegala as the workmen's last place of work was Polonnaruwa whereupon, on 21.02.91 the applications were, of consent, transferred to the Labour Tribunal, Kurunegala where they were given Kurunegala numbers. In view of the fact that the alleged acts of misconduct were committed in the course of the same transaction, the Labour Tribunal President heard the said applications together. Thereafter he made his order dated 27.11.92 dismissing their applications on the basis that the termination of their services was justified. It is against this order that the appellants made a joint appeal which was rejected *in limine* by the High Court, on legal grounds.

IS THE TRANSFER OF APPLICATIONS TO KURUNEGALA INVALID?

Learned Counsel for the appellants submitted that under S.31A(1) of the Act, Labour Tribunals are not established areawise; that S.31C(1) empowers any Labour Tribunal whose jurisdiction is invoked to inquire into an application made under S.31B(1); that these

sections, read with the relevant regulations show that the jurisdiction of a labour tribunal is islandwide; that the distribution of the cases to labour tribunals is really the function of the Secretary, which is an administrative act; that the transfer of a case is, therefore, not a judicial act; and hence a labour tribunal itself has the implied power to transfer a case where it is appropriate to do so. Counsel cited in support the decision in *Jafferjee v. Subramaniam* [1] where Sirimane J. held that the Public Service Commission (which was the appointing authority during that period) was not required to make an appointment to **a designated post** (unlike the case of appointments by the Judicial Service Commission to District Courts etc. established for different districts); that such appointment is to **an office**; and that each person so appointed has identical powers and islandwide jurisdiction. He said (p.520) –

> "For administrative convenience, the tribunals may be numbered. A fair distribution of work, or convenience in dealing with disputes in particular localities, may be considerations that are taken into account when tribunals are so numbered".

In those days, the Commissioner of Labour transferred officers to tribunals which are numbered, for the sake of convenience.

Under Article 170 of the 1978 Constitution, the Labour Tribunal President is defined as a "judicial officer"; and hence, the Judicial Service Commission now appoints persons to such office; the Commission also transfers such officers to Tribunals which are numbered, for the sake of convenience. Notwithstanding this change of the appointing authority, the decision in the **Jafferjees** case as regards the character and the jurisdiction of a labour tribunal would still apply. I am therefore, in agreement with the submission of the learned Counsel for the appellants and hold that the transfer of the applications from the Labour Tribunal, Colombo to the Labour Tribunal, Kurunegala was valid.

DOES IMPUGNED INVALIDITY OF TRANSFER AFFECT HIGH COURT'S APPELLATE JURISDICTION?

Assuming that the transfer by the labour tribunal was invalid, it is an order which the Provincial High Court of the Western Province

alone could have quashed (in the exercise of its revisionary jurisdiction given to it by S.2 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990). The Provincial High Court of the North Western Province has no jurisdiction over such order. The said S.2 provides:

"A High Court established by Article 154 P of the Constitution for a Province shall, subject to any law, exercise appellate and revisionary jurisdiction in respect of **orders made by a Labour Tribunal within that Province** ..."

In the absence of such review, the order of the Labour Tribunal, Colombo stands and consequently, no legal objection may be taken against the dispute being inquired into by the Labour Tribunal, Kurunegala. The pronouncement of the learned High Court Judge on the validity of the order of the Labour Tribunal, Colombo is, therefore, in excess of his jurisdiction, and the Labour Tribunal, Kurunegala was competent to inquire into the dispute subject, however, to an appeal to the Provincial High Court of the North Western Province.

IS THE HIGH COURT'S INTERPRETATION OF S.31D(3) OF INDUSTRIAL DISPUTES ACT CORRECT?

The appellate jurisdiction of a Provincial High Court over the orders of Labour tribunals has been conferred upon it by S.2 of Act No.19 of 1990 (enacted pursuant to the provisions of Article 154P(3)(c) of the Constitution). The right of appeal to such Court is conferred by S.4 of the said Act and S.31D(3) of the Industrial Disputes Act, as amended.

The relevant part of S.4 of Act No.19 of 1990 reads:

"A party aggrieved by any ... order, entered ... by ... a Labour Tribunal ... may, subject to the provisions of any written law applicable to the procedure and the manner for appealing and the time for preferring such appeals, appeal therefrom to the High Court established by Article 154P of the Constitution for the **Province within which such ... tribunal is situated ...** "

Section 31 D (3) of the Industrial Disputes Act, as amended reads:

> "Where the workman who, or the trade union which, makes an application to a labour tribunal, or the employer to whom that application relates is dissatisfied with the order of the labour tribunal on that application, such workman, trade union or employer may, by written petition in which the other party is mentioned as a respondent, appeal from that order on a question of law to **the High Court** established under Article 154P of the Constitution, **for the Province within which such labour tribunal is situated"**

The view taken by the learned High Court Judge is that the aggrieved party has no right to appeal to another High Court but the High Court of the Province within which the tribunal to which the application was originally made is situated. In *The State Timber Corporation v. Fernando* [2] this Court held that the wording of S.31 (d) (3) does not warrant this view. In the instant case, I observe that the learned High Court Judge in taking the same view has emphasised certain words in S. 31D(3). For the reasons given in the earlier part of this judgment and in particular, the wording of S. 4 of Act, No.19 of 1990, I have no doubt that the construction of S.31D (3) by the High Court Judge is wrong and hence reaffirm the decision of this Court in *Fernando's* case (*Supra*).

IS THE APPEAL DEFECTIVE FOR WANT OF SEPARATE APPEALS?
IF DEFECTIVE, IS IT CURABLE?

The next ground for rejecting the appeal is the failure on the part of the appellants to prefer separate applications. I am of the opinion that in view of the fact that the two applications were heard together and decided by one order against both the applicants, the absence of separate appeals would not constitute a failure to follow a "vital step" required by S.31D(3) of the Industrial Disputes Act; nor does it appear to me that, in the circumstances of this case, the said section is unequivocal on this question. I think that the objection taken by the

High Court Judge is of a technical nature and did not warrant the rejection of the appeal.

It is also observed that the order of the Labour Tribunal mentions both the appellants in its caption as applicants Nos. 1 and 2 (which is a virtual consolidation of the applications). A single appeal was lodged before the High Court bearing the same caption, which appeal was accepted in the High Court and allotted a single number. The appeal was then fixed for argument and was heard and decided on 01.02.93. In the absence of a record of the arguments of Counsel or any written submissions, it appears that the appeal was rejected on grounds raised by the learned High Court Judge himself. Such procedure caused serious prejudice to the appellants amounting to an injustice. A court of law has inherent power to remedy such injustice, if necessary by making an appropriate order for curing the defect, if any, in the appeal.

It is to be noted that particularly in proceedings under the Industrial Disputes Act which provides for just and equitable relief, parties have been permitted to cure defects where it is possible to do so without doing violence to the statute or causing prejudice to the opposite party. Thus in *Manager URY Group, Passara v. The Democratic Workers' Congress*[3] the former Supreme Court permitted the caption in the pleadings and in particular the order of the President of the Labour Tribunal to be amended by stating the employer's name to satisfy the requirement of the law as it stood then that relief under the Act could go only against a natural or a legal person. In *Board of Trustees of Tamil University Movement v. De Silva*[4] (Divisional Bench) this Court approved an order of a Labour Tribunal permitting the amendment of the caption to substitute as the respondents, "The Board of Trustees of the Tamil University Movement" in place of "The Tamil University Movement". Wimalaratne J. said (pp. 364-365) –

> "A labour tribunal will not, in my view, be able to discharge its duty of making a just and equitable order if it is to be hamstrung by technicalities in the correction of mistakes in captions, when the party against whom redress is claimed can easily be identified".

As indicated earlier, it is my view, that there was no defect in the appeal which can be regarded as fatal. At the same time, it seems to me that if any body had an interest in seeking a separation of appeals in the High Court, it was none other than the appellants themselves, on the ground of possible prejudice which would result from joint proceedings affecting them.

Learned Senior State Counsel informed us that he would not seek to justify the view taken by the High Court on the power of the Labour Tribunal, Colombo to transfer the cases to the Labour Tribunal, Kurunegala in view of the fact that it was done on the application of the employer himself. On being invited to comment on the legal submissions in the matter, he said that he was not in a position to seriously challenge those submissions. Consequently, he also did not support the High Court Judge's view that the Provincial High Court of the North Western Province had no jurisdiction to entertain the appeal.

However, Senior State Counsel sought to defend the strict construction of S. 31D(3) of the Industrial Disputes Act and the view taken by the High Court Judge that the appellants should have preferred separate appeals, in default of which their appeal had to be rejected. He submitted:

(1) that the wording of S. 31D (3) only permits a separate appeal by a workman who is aggrieved with the order of a Labour Tribunal;

(2) that regulation 32A provides that two or more applications made to a Labour Tribunal "may be heard together", which is not synonymous with a power to "consolidate" applications; and hence even though the Tribunal has made a single order pursuant to proceedings under regulation 32A, the workman should prefer separate appeals;

(3) that the provisions of S.31D(6) which provide that every petition of appeal to a High Court shall bear stamps to the value of five rupees, tend to support the strict construction of S. 31D(3). He argued that if joint appeals were permitted provision would have been made, at least in respect of stamping.

In support of the strict construction, counsel cited *Hewagam Korale East Multi-Purpose Co-operative Society Ltd., Hanwella v. Hemawathie Perera* [5] where the appeal of the employer was dismissed for failure to join a necessary party, namely, the Trade Union which had successfully applied to the Labour Tribunal for relief on behalf of the workman. In that case, the appellant had mentioned the workman as respondent and failed to mention the Union, which was really the "other party" who had to be made a respondent, in terms of the imperative provisions of S.31 D (2) of the Industrial Disputes Act. An application to add the Union was refused on the ground of long delay. This decision is justified firstly because there was non-compliance with a mandatory provision of the statute. Secondly, it is trite law that the failure to join a necessary party is fatal unless cured with the leave of Court. No such considerations arise in the case before us. As such, the decision cited by counsel has no application.

The principle that the failure to join a necessary party is fatal has been upheld in several cases where applications for discretionary writs had to be dismissed on that ground. Vide *James Perera v. Godwin Perera* [6]; *Jamila Umma v. Mohamed* [7]; *Disanayake v. Siyane Adikari Co-operative Stores Union* [8]; *Karunaratne v. Commissioner of Co-operative Development* [9]. However, the Court may permit an application to add necessary parties, provided that on the date on which the application is made to add them, the substantive application before the Court is not ready for inquiry. *Vinasithamby v. Joseph* [10]. These decisions as well as the case of *Hemawathie Perera* (*Supra*) cited by the S.S.C. show that even in the application of imperative requirements of the law, Courts endeavour as far as possible to avoid a denial of justice.

What I have said in the earlier part of this judgment suffices to meet the three submissions made by the S.S.C. against the joint appeal. I wish to add that in view of my decision that the joint appeal is valid, the submission based on S.31D (6) of the Industrial Disputes Act (relating to stamping of appeals) must fail.

Before concluding this judgment, I must refer to an observation by the High Court Judge that in view of the repeal of S. 39 (1) (ff) and the enactment of S. 31 A(2) of the Industrial Disputes Act (sections which empower the making of regulations), the existing regulations made under S. 39 (1) (ff) have become inoperative; and that no regulations appear to have been made under the new S. 31A(2). The implication of this observation is that the decision of the Labour Tribunal to hear the appellants' applications together cannot be supported because the enabling regulation 32A had been rendered inoperative; if so, the submission in favour of a joint appeal which is sought to be justified on the basis of a single order made after a joint hearing should fail.

I cannot agree with the observation of the High Court Judge. It is correct that where a statute is wholly repealed, subordinate legislation made thereunder would cease to have legal force, except in regard to rights and liabilities which have arisen under such regulations and as regards proceedings which were pending on the date of such repeal. However, where only a particular provision of a statute enabling the making of regulations repealed and replaced with a new provision, the Court has to decide whether in the context of the entire statute, the regulations made under the repealed section become inoperative, pending the making of new regulations. The difference between the repealed S. 39 (1) (ff) and the new S. 31A(2) is that whilst under the former, the regulations were made by the Minister in charge of the subject of Labour, under the latter, they are made by the Minister in charge of subject of Justice, in consultation with the Minister in charge of the subject of Labour. I am inclined to the view that the existing regulations remain in force until they are replaced with new regulations. Any other view would tend to stultify the smooth operation of the Act even to the extent of leading to absurdity or injustice.

Even if as opined by the High Court Judge, regulation 32A had become inoperative, I see no illegality in the tribunal adopting any procedure for hearing applications made to it, provided that such procedure is just and fair; and in terms of such procedure, the tribunal may hear two or more applications together.

CONCLUSION

For the foregoing reasons, I allow the appeal, set aside the judgment of the High Court, dated 01.02.93 and direct the High Court to hear and determine the appellant's appeal on the merits. In view of the provisions of S. 31 (7) of the Industrial Disputes Act as amended, I also direct the High Court to finally dispose of the appeal within six months from the receipt of the record. The Registrar is directed to forthwith return the record of the High Court, together with a copy of this judgment. No costs.

G. P. S. DE SILVA, C.J. – I agree.
RAMANATHAN , J. – I agree.

Appeal allowed. Case sent back to High Court for hearing of appeal on merits and disposal within six months.