THE

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[2013] 1 SRI L.R. - PART 15

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ARTICLE 126 (1) OF THE CONSTITUTION – Fundamental rights jurisdiction and its exercise – Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement, by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV – Application of the 'tests' 393

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Church of the Foursquare Gospel in Sri Lanka and another vs. Kelaniya Pradeshiya Saba and others

Overruling the preliminary objection, this Court held that Robinson Club Bentota Ltd., which had been cited as the 2nd Respondent to the application, was an agency of the State by reason of the chain of agency and control that existed between them. The following dictum of M. D.H. Fernando J at 373 of the judgment gave expression to the reasoning of Court:-

> "The 2nd Respondent was owned, as to 80% by the State-through the ICSL and its successor SLIC: and it was likewise controlled by the State, which was assured of a majority on the Board – through nominee directors of ICSL and SLIC, appointed with the approval of the Minister. The chain of ownership and control may extend indefinitely: e. g. the State may set up a limited liability company which it (in substance) owns and controls: and that company in turn may set up another company or other entity. . . and so on. But however long the chain may be, if ultimately it is the State which has effective ownership and control, all those entities – every link in that chain – are State agencies."

This decision was distinguished in *Organization of Protection of Human Rights & Rights of Insurance Employees and Others Vs. Public Enterprises Reform Commission and Others*[(2)], on the basis that pursuant to the subsequent Share Sales and Purchase Agreement dated 11th April 2003 by which a large majority of the shareholding of Sri Lanka Insurance Corporation Ltd. (SLIC) were acquired by Minford Holdings (Pvt.) Ltd., and Geenfield Pacific E.M. Holdings Ltd., thereby depriving the State of the power to nominate even one member of the Board of Directors of the said company. In coming to the conclusion that SLIC has accordingly

ceased to be an instrumentality or agency of the Government, Shirani Bandaranayake J., (as she then was) at page 328 of her judgment noted that consequent to the aforesaid Share Sales and Purchase Agreement, "the character of the then Sri Lanka Insurance had been changed from its previous status". and went on to make the following observation:-

> "The percentage of the share capital of the relevant institution held by the Government, the amount of financial assistance given to such an institution by the State and the existence of deep and pervasive control exercised by the Government over an institution, in my view are the most reliable tests that could be applied in deciding whether a particular institution would come within the scope and ambit of executive or administrative action contemplated in terms of Article 126 of the Constitution. On a consideration of all the circumstances of this application it is apparent that there is no State control over the 2nd respondent and it is not an instrumentality or an agency of the Government."

These dramatic illustrations of the application of the test of deep and pervasive control, clearly demonstrate that an entity could be deemed to be an instrumentality or agency of the State even in the absence of statutory incorporation, and that even without clear provision in an incorporating statute conferring pervasive controlling power to the State, the existence of a relationship or circumstances that give the State deep and pervasive control over an otherwise private body or entity may be established.

Learned President's Counsel for the Petitioners have contended that the State did enjoy dominant control over the affairs of the IFS, and for this purpose, relied on documents

such as the letter of appointment dated 16th November, 1992 (P3A) addressed to the 1st Petitioner in SC FR Application No. 73/2007 showing that appointments to the academic staff were expressly made subject to "the provisions of the Manual of Procedure of the Institute of Fundamental Studies read with the Government of Democratic Socialist Republic of Sri Lanka Establishment Code and Financial Regulations". Applications of members of the academic staff of IFS for overseas leave had to be approved by the President of Sri Lanka. Learned President's Counsel also referred to certain documents which show that the question of granting permanent status to non-academic staff of the IFS engaged the attention of the Institute after the issuance by the Ministry of Public Administration of PA circular No: 27/2001 dated 29th October 2001, and the question was considered at two meetings of the Board of Governors of IFS which were held at the President's House in Colombo on 29th May 2002 (P17) and 1st April 2002 (P18).

It appears that at the second of these meetings held on 1st April 2002, it was decided that all non-academic staff who did not hold permanent posts should be considered for permanency "in accordance with the cadre positions approved by the Management Services Department and provisions of PA circular No: 27/001 dated 29.10.2001". Although at that time no decision appears to have been taken with respect to the academic staff of IFS, the aforesaid decision of the Cabinet of Ministers reveals that the Institute of Fundamental Studies was considered to fall within the category of "Public Institutions, State Corporations and Statutory Boards" to which the said circular applied. It also appears that after PA

circular No. 13/2005 was issued, the 1st Petitioner in SC FR Application No. 73/07 wrote the letter dated 3rd August 2005 (P8A) to the Director of IFS seeking permanent status, and that a few months later, five members of the academic staff of IFS including some of the Petitioners, addressed a joint letter dated 8th February 2006 (Annexure to P 13) to the Secretary to the President in which they urged in the final paragraph as follows:

> "As our Institute is directly under HE the President, we kindly request you to take necessary action to make our employment permanent at your earliest convenience."

Another important document to which the attention of Court was invited by learned President's Counsel for the Petitioners, was the Cabinet Memorandum dated 2nd November 2005 entitled 'Revision of Salary Structure and Terms of Employment – The Institute of Fundamental Studies" (R 3) which was produced with the affidavit dated 13th June 2007 tendered to Court by Kalyanathissa Walisundara, who was at that time the Secretary to IFS. It is important to note that the said Cabinet Memorandum was personally signed by the then President of Sri Lanka in her capacity as President, and the proposals contained therein were recommended by a Cabinet appointed Committee headed by Professor Senaka Bandaranayake, and thereafter approved by the Board of Governors of IFS. It also appears from the Introduction to the Report of the said Committee which was appended to the said Cabinet Memorandum, that the specialized and apex character of IFS, and its importance to national development, was highlighted.

It is in this context, significant that the said Cabinet Memorandum was submitted to the Cabinet of Ministers by the Presidential Secretariat and not through the relevant Minister responsible for the IFS in terms of the allocation of functions under the Constitution. With the said affidavit of the Secretary of IFS, a copy of the Cabinet Conclusion marked R4 was also tendered in Court. This document shows that the said Memorandum was considered by the Cabinet of Ministers under Supplementary Agenda item 94.08, and Cabinet approval was granted to implement the proposals contained therein with effect from January 2005, and to obtain necessary financial allocations for this purpose from the General Treasury.

In the context that the Petitioners in SC FR Application No. 73/07 have sought *inter alia* an order from this Court quashing the decision contained in the memorandum dated 19th January 2007 (P11) not to extend their contracts of service beyond 18th February 2007, it is relevant to note that the said decision was taken by the Board of Governors of IFS at a meeting held on 18th January 2007. Similarly, it is manifest that the decisions by which the Petitioner in SC FR Application No. 413/09 was initially appointed as Acting Director of IFS on 15th February 1996 (L) and as Director of IFS on 6th May 1998 (LI) had been made by the Board of Governors of IFS. However, it is significant that the subsequent letter date 14th March 2005 (L3) informing the Petitioner in SC FR Application No. 413/09 that his services are extended for a further period of 3 years was written by the Secretary to the President on the instructions of the President of Sri Lanka, and is quoted below:-

OFFICE OF THE PRESIDENT

14th March 2005
Prof. Kirthi Tennakone,
No. 24, Sri Tapodarama Mawatha,
Hantana,
Kandy.
My Dear Professor
Appointment as the Director of the IFS

I am pleased to inform you that His Excellency the President has instructed me to inform you that your services as the Director of IFS has been extended for another period of 03 years with effect from 5th May, 2005.

The conditions stipulated in the letter No. EAP/1/2/IFS/6 and dated 03rd May, 2002 will remain unchanged.

Yours sincerely,

M D W Ariyawansa *Sgd/.WJS Karunaratne,*
Addl. Secretary to the President *Secretary to the President*

CC. 1. Secretary,IFS
2. Auditor General, Auditor General's Department

There is nothing to show that the decision to grant the said extension had the approval of the Board of Governors of IFS.

The Petitioner in SC FR Application No. 371/09 has also produced a letter dated 3rd June 2008 (marked I) addressed to the Director of IFS under the hand of the Secretary to the President, which reveals that in response to an appeal dated 13th May 2008 made to the President by five scientists

of the IFS, approval was granted to extend the period of service of the said Petitioner and four others for 3 months with effect from 18th June 2008. A minute made by the Director of IFS on the foot of the said letter, contains instructions to circulate copies of the said letter to the officers who have been granted the extension. Similarly, the subsequent letter dated 12th September 2008 (11) containing a direction not to grant extension of contract to the said Petitioner and 5 scientists named in the said letter beyond 18th September 2008, which has been addressed to the Acting Director of IDS by the Secretary to the President, simply states that "it has been decided" not to grant any further extension to those scientists beyond that date, but "one month's notice should be given." These communications from the Secretary to the President do not indicate whether the Board of Governor of IFS had approved the said decisions. It is also significant that the decision communicated to the Acting director of IFS by the said letter marked '11' was given effect by his letter dated 15th February 2008 (12) addressed to the Petitioner in SC FR Application No. 371/09 and the other officers concerned. The Acting Director has simply appended to his letter the communication from the Secretary to the President, and requested the recipients thereof to "kingly note the contents therein" and adding that they are given "a month's notice".

The evidence outlined above reveals very clearly that the Institute of Fundamental Studies (IFS) has functioned under the supervision and direction of the successive Presidents of Sri Lanka, and that many important decisions had been taken by them without the approval of the Board of Governors, which in any event consists of a majority of representatives of the President and the Government. This manifestation

of deep and pervasive State control established beyond any doubt that IFS has been, and remains, an instrumentality or agency of the State, and the submission made by learned President's Counsel for the Petitioners that the actions of IFS concerning the conditions of service and tenure of the senior academic staff of the Institute constitute 'executive or administrative' action within the meaning of Article 126 of the Constitution, is well founded.

Conclusions

For the aforesaid reasons, I hold that the Institute of Fundamental Studies (IFS) is an instrumentality or agency of the State, and that its impugned actions constitute 'executive or administrative' action. The "threshold question" raised by court in SC FR Application No. 73/2007 is answered in favour of the Petitioners in that case, and the preliminary objection raised by the Respondents in SC FR Application No. 371/2009 and SC FR Application No. 413/2009 is over-ruled.

Accordingly, SC FR Application No. 73/2007 will be resumed before this Bench, for hearing on its merits. The other two applications, namely SC FR Application No. 371/2009 and SC FR Application No. 413/2009, are re-fixed for support on a date convenient to Counsel before any Bench of this Court.

P. A. RATNAYAKE, PC. J. - I agree.

S. I. IMAM, J. - I agree.

CHURCH OF THE FOURSQUARE GOSPEL IN SRI LANKA AND ANOTHER VS. KELANIYA PRADESHIYA SABHA AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 781/2008
JULY 28, 2009
SEPTEMBER 7, 2009

Writ of Certiorari - Building Plan approved for residential premises - Urban Development Authority Act - Section 8 J [1] - Complaint by residents of the area that the activities and rituals in the premises constituted a public nuisance - Construction suspended by order of the approving authority - Validity? - Objections related to the building that is going to be constructed?

Held:

(1) Once approval is granted under Section 8(i) of the UDA Act it is the duty of the petitioners to construct the buildings according to the approval granted.

(2) The respondents have not complained that the petitioners have violated any term or condition in the building permit.

(3) The objection is for the use of musical instruments in high volume and unusually loud religious activities causing breach of peace and sound pollution. There objections are not related to the building that is going to be constructed but it is in relation to an existing state of affairs in relation to an existing building.

Per Sriskandarajah J.

> "The complaints of the use of musical instruments in high volume and unusually loud religious activities causing breach of peace and sound pollution are not related to the building that was approved to be constructed - if the state of affairs is to be controlled these respondents or any other person affected could take action according to law to curtail that situation."

APPLICATION for a Writ of Certiorari.

Viran Corea with *Gehan Gunetileka, and S.A. Beling* for petitioner.

Anil Silva with *Nandana Perera* for 1st, 4th respondents.

Cur.adv.vult

November 03, 2009

SRISKANDARAJAH, J.

The 1st Petitioner is a body incorporated under the Church of the Foursquare Gospel in Sri Lanka (Incorporation) Act No 37 of 1986 and the 2nd Petitioner is the Reverend Pastor in charge of the church of the 1st Petitioner in Kelaniya. It is common ground that premises No. 344, 1st Lane, Waragoda, Kelaniya is owned by the 1st Petitioner since 6th December 1992. The Petitioners submitted that on or about 5th April 2007 they submitted an application (No. K.B. A. 116/2007) with a Plan No 757 to the Kelaniya Pradeshiya Sabha for the purpose of obtaining permission to carry out certain improvements to the existing Church building at No. 344, 1st Lane, Waragoda, Kelaniya. Such improvements were in the form of renovation and refurbishment of the existing building and the construction of an additional floor. The 1st to 4th Respondents admitted that an application and a plan bearing the above numbers were submitted on 5th April 2007 but they contended that the application made by the Petitioners was to construct a new building. The said building plan was approved for residential premises subject to the condition that the rights of others would not be affected.

The said Respondents contended that on complaints received from the residents of the area that the activities and rituals in the said premises constituted a public nuisance the 1st Respondent informed that a representative of the 1st Petitioner should attend a meeting at the 1st Respondent's

office. The Respondent further contended that the then Chairman of the 1st Respondent informed the Petitioner to suspend the construction until this dispute was resolved.

The Petitioners submitted that the purported complainants were not present at the aforesaid meeting held on 12th March 2008. The (then) Chairman of the 1st Respondent decided to hold a further meeting on 19th March 2008; even on that day the purported complainants were not present therefore the (then) Chairman assured the 2nd Petitioner that a speedy resolution to the matter would be reached. The petitioners further submitted that the 2nd Respondent the Chairman of the Kelaniya Pradeshiya Sabha informed him on 7th June 2008 by a letter to attend a meeting on 11th June 2008 at 10 a.m. presided over by the 2nd Respondent in order to discuss the said matter. At the said meeting presided over by the 2nd Respondent the complainants, the Pradeshiya Sabha Members including 3rd and 4th Respondents, a Buddhist Clergyman and the 5th Respondent were present among others.

The Respondents submitted that at the meeting the 3rd Respondent as well as the Buddhist Clergyman informed the 2nd Respondent that the using of musical instruments in high volume and unusually loud religious activities caused breach of peace and sound pollution. The 2nd Respondent further submitted that after hearing both parties the 2nd Respondent had stated that his decision would be communicated in writing. The 2nd Respondent contended that after a careful consideration of the matter in issue he decided to cancel the approval granted for the construction of the building.

The Petitioners in this application are seeking a writ of certiorari to quash the said decision of the 2nd Respondent contained in the letter dated 2nd July 2008 marked P10.

The Petitioners' position is that the Petitioners by application No KBA 116/2007 with the plan No. 757 (P2) applied to the Kelaniya Preseshiya Saba for obtaining permission to carry out certain improvements to the existing church building at No. 344, First Lane Waragoda; which consists of renovation and refurbishment of the existing building and the construction of an additional floor on the top of the existing structure. The said building proposal prepared by Dimuthu Architectural Group is marked as P3 and it is titled as Proposed Building to build a "Church of the Foursqure Gospel No. 344, First Lane Waragoda. Kelaniya for Rev. D.G.W.Jayalath, Pastorl K. H. Susantha". The said application was approved by the 2nd Respondent by his letter of 18.06.2007 marked P7. The seal of the Kelaniya Predeshiya Saba approving the plan is also affixed in P2 and P3. The 2nd Respondent has given the above approval for and on behalf of the Urban Development Authority under Section 8J(1) of the Urban Development Authority Act No 41 of 1978 as amended by Act No. 4 of 1982. The Respondents position is that the said building plan was approved for residential premises subject to the condition that the rights of the others would not be affected.

The approval was granted to build a residential premises separate from the existing building in No. 344, First Lane Waragoda, Kelaniya or it is to build a floor on the top of the existing building for residential purposes is the matter for the Respondents as they have approved the plan hence that they will know better. Whatever it may be the Petitioners are bound to do the construction in-conformity with the building permit. When the construction work commenced objections

were raised by persons other than the Respondents and after a meeting with the 2nd Petitioner and the persons raised the objections the 2nd Respondent had informed the Petitioners to stop the construction of the said building.

Once an approval is granted under Section 8K(1) of the UDA Act it is the duty of the Petitioners to construct the building according to the approval granted. Where any development activity is commenced, continued, resumed or completed contrary to any term condition set out in the permit issued in respect of such development activity the Urban Development Authority in this instant case the 1st Respondent under the delegated authority by written notice may require the person who is executing such development activity on or before such day as shall be specified in such notice, not being less than seven days from the date thereof to cease such development activity forthwith as provided under Section 28A(1)(a) of the said Act as amended.

The 2nd Respondent by his letter of 2nd July 2008 marked P10 has informed the 2nd Petitioner to stop the construction. The reason given by the 2nd Respondent is that the residents of that area and the Buddhist Clergymen have objected to the said construction and considering the peace and security of the area he has come to this decision. In the affidavit of the 2nd Respondent filed in this application the 2nd Respondent further explained that when he had a meeting on the objections of the residents and the Buddhist Clergyman it was revealed that the use of musical instruments in high volume and unusually loud religious activity are causing breach of peace and sound pollution in the area causing public nuisance.

In the instant case the Petitioners have only commenced the construction of the building. The respondents have not complained that the Petitioners' have violated any term or

condition set out in the building permit issued in respect of the said development activity. The only condition that was laid down was to use the building without affecting the rights of the others. The use of the building will not arise as the approved building is for a residential purpose and it is not constructed and completed. The objection by the residents and Buddhist Clergyman is for the use of musical instruments in high volume and unusually loud religious activities causing breach of peace and sound pollution. These objections are not related to the building that is going to be constructed for residential purposes but it is in relation to an existing state of affairs in relation to an existing building. If the said state of affairs is to be controlled the Respondents or any other persons affected could take action according to law to curtail the situation.

The complaints of the use of musical instruments in high volume and unusually loud religious activities causing breach of peace and sound pollution are not related to the building that was approved to be constructed. Therefore the order to stop the constriction of the said building contained in the letter marked P10 is *ultra vires* to the powers conferred on the 1st and 2nd Respondents under Section 28A(1)(a) of the Urban Development Authority (Amendment) Act No. 4 of 1982 as amended by Act No. 44 of 1984.

In the given circumstances this court issues a writ of certiorari to quash the order contained in the letter of the 2nd Respondent dated 2nd July 2008 marked P10.

The application for a writ of certiorari is allowed without costs.

Application allowed

ASIAN HOTELS & PROPERTIES PLC VS. BENJAMIN AND 5 OTHERS

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, C.J.,
EKANAYAKE, J AND
IMAM, J.
S.C. APPEAL NO. 143/2010
S.C. (SPL) L.A. NO. 132/2010
C.A. APPL. NO. 4/2009 (WRIT)
MARCH 29TH, 2011

Industrial Disputes Act - Section 3(1)d, Section 4(1), Section 36(4), Section 17(1) - Duties and powers of arbitrator in settlement of disputes by Arbitration - Discretion of the Arbitrator to award just and equitable relief - Audi alteram partem - both sides shall be heard. Provisions of the Evidence Ordinance - Necessity to comply? Evidence ordinance Section 2, Section 114(f)

The 1st Respondent - Respondent (1st Respondent) was employed by Messers - Crescat Developments Ltd. as the Manager, Apartments Leasing and Rentals which was a subsidiary of the Petitioner - Appellant (Appellant). After holding an inquiry, the Appellant had terminated the 1st Respondent's services. The 3rd Respondent. The Minister of Labour Relations referred the dispute between the 1st Respondent and the appellant for arbitration before the Arbitrator (the 4th Respondent). The purported dispute according to the Appellant was,

1. whether the termination of the services of the 1st Respondent by the Appellant is justified and if not, to what relief he is entitled; and/or

2. whether the granting of annual bonus for the financial year 2003/2004 to the 1st Respondent by the Appellant is justified, and if not to what relief he is entitled.

At the arbitral proceedings, when the inquiring officer before whom the domestic inquiry of the 1st Respondent was held, was summoned to produce the entire record of the domestic inquiry, the 1st Respondent for the first time had objected to the production of the proceedings of the domestic inquiry, on the ground that it is a violation of the *audi alteram partem* rule.

The 4th Respondent made order upholding the objection raised by the 1st Respondent and held that the domestic inquiry proceedings cannot be marked until the witnesses who gave evidence at the domestic inquiry are called upon to testify and disallowed the application to mark the domestic inquiry proceedings through the inquiring officer before whom the domestic inquiry of the 1st Respondent was held.

The Appellant filed an application in the Court of Appeal seeking a Writ of certiorari on the basis that the said order of the 4th Respondent is unlawful and/or invalid.

The Court of Appeal dismissed the said application on the basis that the marking of the domestic inquiry proceedings would cause prejudice to the 1st Respondent, as one of the witnesses at the domestic inquiry had not been produced as a witness before the arbitration.

Held:

(1) When an industrial dispute is referred to an Arbitrator to adjudicate upon it, such an order has to be based on just and equitable relief. For the purpose of granting such relief there is no necessity for the Labour Tribunals to follow the rigid rules of Law.

per Dr. Shirani A. Bandaranayake, C.J. -

> "As the Labour Tribunal should dispense just and equitable relief, to arrive at their decisions, they would not require strict degree of proof that is required in a Court of Law since there is no necessity to comply with the provisions of the Evidence Ordinance. Further Sections 36(4) of the Act specifically states that strict compliance with the provisions of the Evidence Ordinance is not required."

(2) The steps that were taken by the Arbitrator in his refusal to accept the proceedings of the domestic inquiry is a clear violation of the rules of natural justice.

APPEAL from the Judgment of the Court of Appeal.

Cases referred to:

1. *Kalamazoo Industries Ltd. and others Vs. Minister of Labour and Vacational Trianing and Others* - (1998) 1 Sri L.R. 235

2. *The Bharat Bank Ltd., Delhi Vs. The Employees' of the Bharat Bank Ltd.,* Delhi - AIR , 1950 SC 188
3. *United Engineering Worker's Union Vs. K. W. Devanayagem* - (1967) 69 N.L.R. 289
4. *Daniel Vs. Rickett, Cockrell and Co.* - (1938) 2 K. B. 322
5. *The Ceylon Workers Congress Vs. The Superintendent, Kallebokka Estate*
6. *The Batticaloa Multi - Purpose Co-operative Societies Union Ltd. Vs. Velupillai - (1971) 76 NLR 60*

Gomin Dayasiri with *Manoli Jinadasa* and *K. Sivaskantharajah* for the Petitioner - Appellant

S.Barrie, SC, for the 2nd, 3rd and 6th Respondents - Respondents.

Cur.adv.vult.

September 03, 2010

DR. SHIRANI A. BANDARANAYAKE, CJ.

This is an appeal from the Judgment of the Court of Appeal dated 02.07.2010. By that Judgment the Court of Appeal had dismissed the application of the petitioner-appellant (hereinafter referred to as the appellant), which had sought a writ of certiorari to quash the Order of the Arbitrator dated 14.11.2008. The appellant came before this Court seeking for Special Leave to Appeal from the said Order of the Court of Appeal for which such leave was granted by this Court.

The facts of this appeal, as submitted by the appellant, albeit brief, are as follows:

The 1st respondent - respondent (hereinafter referred to as the 1st respondent) was employed by Messers. Crescat

Developments Limited in the capacity of Manager Apartments Leasing and Rentals, which was a subsidiary of the appellant. After holding an inquiry, the appellant had terminated his services. By an Order dated 11.04.2005, the 3rd respondent-respondent (hereinafter referred to as the 3rd respondent) referred a purported industrial dispute, between the 1st respondent and the appellant for arbitration before the 4th respondent-respondent (hereinafter referred to as the 4th respondent). The purported dispute was, according to the appellant, that,

1. whether the termination of the services of the 1st respondent by the appellant is justified and if not, to what relief he is entitled and/or;

2. whether the granting of annual bonus for the financial year 2003/2004 to the 1st respondent by the appellant is justified and if not what relief he is entitled.

The 1st respondent had not attended a single sitting of the arbitration. Learned Counsel for the 1st respondent had claimed that the 1st respondent is out of the country for medical treatment. According to the learned Counsel for the appellant, upto the date the writ application was made before the Court of appeal which was three years since the commencement of the arbitration, the 1st respondent had not made a single appearance in person before the arbitration as he continued to stay abroad.

The arbitration proceedings had continued and after the conclusion of the evidence in chief of the 3rd witness produced on behalf of the appellant, the appellant had given notice to the Arbitrator that they intend to summon Mr. F.N. de Silva, retired President of the Labour Tribunal and independent

Inquiring Officer before whom the domestic inquiry of the 1st respondent was held, to produce the entire record of domestic inquiry proceedings. Learned Counsel for the 1st respondent had not raised any objection to the said summoning of Mr. F.N. de Silva as a witness, to produce the domestic inquiry proceedings.

On 16.09.2008, when the witness Mr. F.N. de Silva was summoned to produce the said domestic inquiry proceedings and the Report, learned Counsel for the 1st respondent for the very first time had objected to the production of the said proceedings, stating that it is in violation of the *audi alteram partem* rule. Learned Counsel for the 1st respondent had thereafter moved for time to file written submissions on the said objection raised by him.

Written submissions were filed on behalf of the appellant by his Counsel.

Thereafter the 4th respondent, being the Arbitrator, had made Order dated 14.11.2008 upholding the objection raised by the 1st respondent and had held that the domestic inquiry proceedings cannot be marked until the witnesses who gave evidence at the domestic inquiry are called upon to testify and disallowed the application to mark the domestic inquiry proceedings through Mr. F.N.De Silva.

The appellant had thereafter filed an application in the Court of Appeal seeking a writ of certiorari on the basis that the said Order of the 4th respondent dated 14.11.2008 is unlawful and/or invalid.

The Court of Appeal had dismissed the said application on the basis, *inter alia*, that the marking of the domestic inquiry proceedings would cause prejudice to the 1st respondent,

as one of the witnesses at the domestic inquiry, one T.T. Al Nakib had not been produced as a witness before the arbitration.

When this appeal was taken for hearing learned Counsel for the appellant submitted that the argument could be based on the following question.

> *"Whether domestic inquiry proceedings should be allowed to be marked in arbitration and/or Labour Tribunal proceedings irrespective of the fact that the witnesses of the Domestic Inquiry were summoned to give evidence or not."*

Learned Counsel for the appellant strenuously contended that, the arbitrations and Labour Tribunal proceedings are guided by the principles laid down on the basis that they grant just and equitable relief and therefore there should not be mandatory requirement for all the witnesses who gave evidence before the domestic inquiry to give evidence before the arbitration proceedings.

Learned Counsel for the appellant relied on Section 17(1) of the Industrial Disputes Act in support of his contention that the Arbitrator is bound to hear all evidence presented by parties. Consequently it was contended that in terms of Article 17(1), that the Arbitrator must entertain and admit the domestic inquiry proceedings and therefore consider which parts and portions he should rely upon. The contention therefore was that the decision of the Arbitrator to disallow the marking of the domestic inquiry proceedings is erroneous in law. It was also contended that the Arbitrator had failed to consider the provisions contained in Section 36(4) of the Industrial Disputes Act. Learned Counsel for the appellant

contended that in terms of Section 2(1) of the Evidence Ordinance, arbitration proceedings are outside the Evidence Ordinance. The contention was that according to the aforesaid statutory provisions the Arbitrator and the parties get a wider scope in entering, presenting and determining evidence than in a court of law.

Section 17(1) of the Industrial Disputes Act deals with the role of the Arbitrator in settlement of disputes by arbitration, which reads as follows;

> *"When an industrial dispute has been referred under Section 3(1)(d) or Section 4(1) to an arbitrator for settlement by arbitration, he shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable. A labour tribunal shall give priority to the proceedings for the settlement of any industrial dispute that is referred to it for settlement by arbitration."*

The provisions of Section 17(1) of the Industrial Disputes Act and its applicability was considered by the Court of Appeal in *Kalamazoo Industries Ltd and Others vs. Minister of Labour and Vocational Training and Others*[1]. In that matter all parties to the dispute had consented at the outset of the arbitration inquiry that the dispute is common to all four companies and the inquiry into the claim for all demands be consolidated and amalgamated. Both the applicant trade union and the respondent companies were given time to tender their written submissions with the documents produced on their behalf. The applicant handed in the written submissions with the documents, but the four respondent

companies failed to submit their written submissions and documents until the time that the award was drawn up and signed by the Arbitrator. The marked documents relied on by the four respondent companies were not tendered. On the basis of the above position, the Court had held that,

> *"Although Section 17(1) of the Industrial Disputes Act stipulates that the arbitrator shall make all inquiries into the dispute, hear evidence and thereafter make his award, no duty is cast on him to invade private offices of litigants and take forcible possession of documents. It is not now open to the petitioners to annex the documents R1 to R35 and on their strength assail and impugn the award."*

It is not disputed that the question at issue had taken place at a time when the matter was before the Arbitrator. It is also to be noted that the issues raised were on the basis of an industrial dispute that was to be adjudicated by an arbitrator.

It is well settled law that the Labour Tribunals are expected to grant just and equitable reliefs. It is also necessary to be borne in mind that for the purpose of granting such relief there is no necessity for the Labour Tribunals to follow the rigid rules of law.

The position was considered in *The Bharat Bank Ltd., Delhi v The Employees' of the Bharat Bank Ltd., Delhi*[2] that had expressed the role of the Labour Tribunals in very clear terms, which reads as follows:

> *"In settling the disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can*

confer rights and privileges on either party, which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It is not merely to interpret or give effect to the contractual rights or obligations of the parties.

. . . . The Tribunal is not bound by the rigid rules of law."

The true position with regard to the exercise of the functions of the Labour Tribunal was clearly illustrated in the majority judgment of *United Engineering Worker's Union Vs. K. W. Devanayagan* (3), where it was stated that,

"The powers and duties of an arbitrator under the Industrial Disputes Act of an Industrial Court and of a Labour Tribunal on a reference of an industrial dispute are the same. In relation to an arbitration, the arbitrator must hear the evidence tendered by the parties. So must a Labour Tribunal on a reference. An Industrial Court has to hear such evidence as it considers necessary. In each case the award has to be one which appears to the Arbitrator, the Labour Tribunal or the Industrial Court just and equitable. No other criterion is laid down. They are given an unfettered discretion to do what they think is right and fair."

The Labour Tribunals were established over five (5) decades ago for the prevention, investigation and settlement of industrial disputes and when an industrial dispute is referred to an arbitrator to adjudicate upon it, such an Order has to be based on just and equitable relief.

As clearly referred to in *Daniel v. Rickett, Cockrell and Co.*[4] if the Tribunal or the Arbitrator is given the power to decide a matter justly and equitably, it is undoubtedly given a discretion.

Similarly, the provisions of the Evidence Ordinance, would not be applicable in an inquiry conducted by the Labour Tribunal or by the Arbitrator. The Evidence Ordinance has clearly stipulated the degrees of proof and the ascertainment of standards that are necessary for the administration of justice. As the Labour Tribunals should dispense just and equitable relief, to arrive at their decisions, they would not require strict degrees of proof that is required in a court of law since there is no necessity to comply with the provisions of the Evidence Ordinance. Furthermore, Section 36(4) of the Act specifically states that strict compliance with the provisions of the Evidence Ordinance is not required.

However this does not mean that the Labour Tribunals are barred from accepting any evidence. They could, if the necessity arises, rely on material available before the Tribunal. What is necessary is to grant just and equitable relief and for this purpose it is essential that the principles of natural justice should be followed. This position was clearly, expressed by Tambiah, J. in *The Ceylon Workers Congress Vs The Superintendent, Kallebokka Estate*[5].

> *"Although, by subjective standards of an employer, a dismissal may be bona fide and just and equitable, nevertheless when looked at objectively, it may be unjust and inequitable. . . .*
>
> *Whenever a Tribunal is given the power to decide a matter justly and equitably, it is given a discretion (Daniel Vs.*

Rickett (supra). Therefore the Industrial Disputes Act, as amended, gives a discretion to the Labour Tribunal, to make an Order which may appear just and equitable and such a jurisdiction cannot be whittled away by artificial restrictions."

It is therefore quite clear that although there is no necessity for the Labour Tribunals to strictly comply with the provisions of the Evidence Ordinance, they are bound by the rules of natural justice. Out of the two salient principles that govern the principles of natural justice, viz; no man should be a judge in his own cause *(nemo judex in re sua)* and both sides shall be heard *(audi alterm partem)*, the latter would be more salutory in regard to this appeal since the said Rules would be applicable to arbitration proceedings as well. This means that the Arbitrator has to hear both parties. He cannot hear one party and his witnesses only in the absence of the other party. However, an Arbitrator could proceed to hear a case, *ex parte,* if a party who had been noticed, is not present.

Learned Counsel for the appellant contended that the 4th respondent had refused to mark the proceedings of the domestic inquiry on the basis that the witnesses had not been summoned to give evidence and therefore there had been a breach of the rules of natural justice. As stated earlier, the appellant had terminated the services of the 1st respondent, which was an admitted fact. The appellant had taken the position that the services of the 1st respondent were terminated after holding a due inquiry and on the basis of the findings of the said inquiry. Learned Counsel for the appellant contended that as the termination of services of the 1st respondent was an admitted fact, the appellant was called upon by the 4th respondent to commence the case. Accordingly,

it was necessary to place before the 4th respondent all the evidence relied upon by the appellant to justify the termination of the services of the 1st respondent prior to closing their case. Since the appellant relied on the inquiry that was held prior to the termination of services of the 1st respondent, the proceedings of the domestic inquiry were extremely necessary to be marked.

The said domestic inquiry proceedings, according to the appellant, contained only the evidence of four (4) witnesses, out of which two of them had already given evidence before the Arbitrator.

Learned Counsel for the appellant submitted that there is no bar for the 1st respondent to call any witness and examine that witness, if there is such a necessity.

In *The Batticaloa Multi - Purpose Co-operative Societies Union Ltd Vs. V. Velupillai*[6] the Court had specifically held that for the purpose of granting just and equitable relief, a President of the Labour Tribunal, after satisfying himself that the evidence had been properly recorded, could act on the basis of the evidence led at the domestic inquiry. Considering the said aspect, Alles, J. in that decision held that,

> "In considering, however, what "just and equitable" Orders should be made I see no objection to Presidents of Labour Tribunals examining or even acting on the evidence led at the domestic inquiry, after satisfying themselves, that the evidence has been properly recorded, ensuring that the workman had a fair opportunity of meeting the allegations made against him and seeking support for his findings from the evidence so led."

An Arbitrator, who has been empowered to make such award should do so, as may appear to him just and equitable. Section 17 of the Industrial Disputes Act, referred to earlier, clearly had granted an unfettered discretion for the Arbitrator to mete out just and equitable relief.

The question in the present appeal arose when the Arbitrator had rejected the marking of domestic inquiry proceedings in the arbitration proceedings. When the said rejection was placed before the Court of Appeal, that Court had decided in favour of the Arbitrator on the basis that a presumption could be drawn in terms of section 114(f) of the Evidence Ordinance that evidence which could be and is not produced would if produced be unfavorable to the person who withholds it. The Court of Appeal in this regard had referred to the evidence of the witness, namely, T. T. Al Nakib.

The domestic inquiry proceedings contained the evidence of four (4) witnesses. Out of those four (4) witnesses, 2 of them, viz., Gerard Abeysinghe and Stephen Anthonisz had already given evidence before the Arbitrator. The 3rd witness was the 1st respondent himself and the said T. Al Nakib, according to the appellant, was the witness summoned by the 1st respondent himself to give evidence before the domestic inquiry.

Learned Counsel for the appellant brought to the notice of the Court that there is no bar for the 1st respondent to call the said witness if he so desired to examine him, as the 1st respondent had not even commenced his own case.

Considering such circumstances, it is evident that the refusal of the Arbitrator to mark the domestic inquiry

proceedings on the basis that the witnesses have not been summoned to give evidence is not correct. Thus it is apparent that the steps that were taken by the Arbitrator in his refusal to accept the proceedings of the domestic inquiry is a clear violation of the rules of natural justice.

For the reasons aforesaid the question on which this appeal was argued is answered in the affirmative.

This appeal is accordingly allowed. The Judgment of the Court of Appeal dated 02-07-2010 and the Order of the Arbitrator dated 14-11-2008 are set aside.

I make no order as to costs.

EKANAYAKE, J. - I agree.

IMAM, J - I agree.

Appeal allowed.

Judgment of the Court of Appeal and the Order of the Arbitrator dated 14.12.2008 set aside.