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

In the matter of an application for Mandates in the nature of Writs of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. CASE NO. WRT/0654/23

1. National Council for Disaster Management,
   Vidya Mawatha,
   Colombo 07.

2. Major General Herath Mudiyanselage Udaya Herath (Retd),
   Director General,
   Disaster Management Centre,
   Vidya Mawatha,
   Colombo 07.

PETITIONERS

Vs.

1. Hon. Minister of Labour,
   Labour Secretariat,
   Colombo 05.

2. Commissioner General of Labour,
   Department of Labour,
   Colombo 05.

3. Mr. Kanchana Silva,
   (Arbitrator),
   Janahiru, No. 129/B,

Anagarika Dharmapala Mawatha,
Kandy.

4. Mr. W.J.M.D. Nawaratne,
No. A/1/39,
Perahera Mawatha,
Kollupitiya,
Colombo 03.

RESPONDENTS

BEFORE : K.M.G.H. KULATUNGA, J.

COUNSEL : Sumendra Fernando, instructed by Anil Danasuriya, for the Petitioners.

Isuru Lakpura, instructed by K. K. Nilushika Lashani Welagedara, for the 4th Respondent.

Pulina Jayasooriya, SC, for the State.

ARGUED ON : 25.08.2025

WRITTEN SUBMISSIONS ON: 08.09.2025

DECIDED ON : 18.09.2025

JUDGEMENT

K.M.G.H. KULATUNGA, J.

1. The 4th respondent was employed by the 1st petitioner, the National Council for Disaster Management, on a contractual basis, as the Assistant Director (Emergency Operations) of the Disaster Management Centre, on 24.04.2008, and then was made permanent in that capacity on 01.07.2011.

2. The 4th respondent was nominated, with another, to participate at a seminar held in Honolulu, Hawaii, from the 9th of February to the 15th of March, 2017. Upon the 4th respondent proceeding to the USA to participate in the said seminar, he was provided with accommodation. Upon arrival, in view of a certain incident, on a complaint of a female employee, the 4th respondent had been arrested by the Honolulu Police, and criminal action had been filed in a Court for harassment. Thereafter, the 4th respondent had been enlarged on bail.

3. The prosecuting attorney of the District Court of the First Circuit of the Honolulu Division, State of Hawaii, had notified the Disaster Management Centre of the complaint, according to which the charge is as follows:

> *"On or about February 08th, 2017 in the city and county of Honolulu, State of Hawaii, WEERASINGHE NAWARATNE, also known as Mudiyanselage Dammika Nawaratne Weerasinghe Jayathilaka, with intent to harass, annoy, or alarm any other person, did strike, shove, kick, or otherwise touch other person in an offensive manner and/or subject the other person to offensive physical contact, thereby committing the offence of harassment, in violation of Section 711-1106 (1) (a) of the Hawaii Revised Statutes.*
>
> *Dated at Honolulu, Hawaii: February 10th 2017"*

4. Upon this incident and the events that followed, the 4th respondent has returned to Sri Lanka, and upon instructions received from the Ministry of Disaster Management, the 2nd petitioner Director General, has caused the interdiction of the 4th respondent. Thereafter, a domestic inquiry had been conducted in terms of the Establishments Code, and the 4th respondent's services had been terminated. The said termination was preceded by a due finding of the inquiring officer that the allegation was established. The said inquiring officer has also obtained the details of the incident in Hawaii through the Sri Lankan Embassy in the USA. Upon obtaining this information, the same had been brought to the notice of the 4th respondent who had not responded. The said inquiry

has proceeded on thirteen charges/allegations. During the course of the arguments, the main contention was whether the matter of termination could be referred to arbitration under Section 4(1) of the Industrial Disputes Act, No. 43 of 1950 (hereinafter referred to as the "IDA"), as amended.

5. After the argument was concluded, both parties tendered their post-argument written submissions. According to the written submissions filed on behalf of the 4th respondent the issue for determination in this appeal has been formulated as follows: "*The substantive issue of law and question for determination is whether a person whose employment has been terminated is entitled to have the same referred to arbitration.*" In the course of the arguments, the following two related issues arose for consideration:

   i) firstly, if a "live dispute" in the sense of a subsisting contract of employment was required for a matter to be referred to arbitration under Section 4(1) of the IDA; and

   ii) secondly, if termination is a "minor" industrial dispute coming within the meaning of Section 4(1).

6. Accordingly, the substantive issue of law is whether there had been a valid reference of an industrial dispute within the meaning of Section 4(1) of the IDA. This issue had also been raised before the arbitrator as a preliminary objection, and the arbitrator had overruled the said objection. In the impugned award these objections have been recorded as follows:

> "01. මෙම නඩුව තුළ සජීවී කාර්මික ආරවුලක් (Live Dispute) නොමැති බවත්,
> 02. මෙම් නඩුව අසා තීරණය කිරීමට කාර්මික අධිකරණයට අධිකරණ බලයක් නොමැති බවත්,
> 03. එනයින් පළමු පාර් ශවයේ ඉල්ලීම විමසීමට ගැනීමකින් තොරව මුල් අවස්ථාවේදීම නිශ්ප්‍රභා කරන ලෙසද, පළමු පාර්ශවයේ ඉල්ලුම්පත්‍රය නිශ්ප්‍රභා කරන ලෙසද, නඩු ගාස්තු හා අධිකරණයට මැනවැයි හැඟෙන වෙනත් හා වැඩිමනත් සහනයන් ලබා දෙන ලෙසත් ය."

The said objection as raised on 29.08.2022 before the arbitrator (*vide* page 94 of the documents) is that *"it is the Labour Tribunal that has jurisdiction in respect of termination of employment, and as such, the arbitrator has no jurisdiction to take cognisance and entertain this application.*" Accordingly, this issue of jurisdiction has been raised before the arbitrator.

7. It was the argument of the petitioner that the 3rd respondent arbitrator does not have jurisdiction in terms of the IDA to hear and determine the matter, as the employment of the 4th respondent had been terminated by them, and there is no *'live dispute'*. As opposed to this, the position of the 4th respondent is that the definition of '*industrial dispute'* considered along with the definition of '*workmen*' will necessarily include a person whose services have been terminated and who is not in employment at the time of reference. Accordingly, it was argued that a matter of termination is an industrial dispute that may be referred to an arbitrator by a Minister, under Section 4(1) of the IDA. Section 4 reads as follows:

> *"(1) The Minister may, if he is of the opinion that an industrial dispute is a minor dispute, refer it, by an order in writing, for settlement by arbitration to an arbitrator appointed by the Minister or to a labour tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference.*
>
> *(2) The Minister may, by an order in writing, refer any industrial dispute to an industrial court for settlement."*

According to Section 4(1), it is a "minor dispute" in the opinion of the Minister that may be referred for settlement through arbitration, by an arbitrator or to a labour tribunal even if parties to the dispute do not consent to such reference. Whatever that may mean, it is a "minor dispute" in his opinion that the Minister is empowered to so refer.

8. This matter had been referred to arbitration by the Minister of Labour acting under Section 4(1). According to Section 4(1), the Minister is empowered to refer a matter for arbitration notwithstanding the parties

not consenting if, in the opinion of the Minister, that industrial dispute is a "minor dispute". The term "minor dispute" was introduced to the statute by the amending Act No. 62 of 1957. To comprehend the relevance and the significance and the effect of introducing this new concept of minor disputes, it is necessary to briefly consider the legislative development that brought in this concept in 1957. The IDA, as originally enacted by Act No. 43 of 1950, did not contain or include labour tribunals as a forum to resolve industrial disputes. The pre-1957 IDA provided for conciliation, arbitration, collective bargaining, and industrial courts. The scheme of the statute was that these remedies were accessible and available on the co-operation and consent of the employer. When such consent and co-operation were not available and forthcoming, the only available option was a referral by the Minister for compulsory arbitration. Thus, if the Minister did not so refer, the workmen were left with no remedy under the IDA. If at all, the option of a person unjustly terminated from his employment was to resort to the common law remedies or civil action in the District Court, or maybe for breach of contract and specific performance of the contract of service.

9. In that backdrop, in 1957, a substantial amendment was brought to the IDA by Act No. 62 of 1957. This amendment, whilst introducing Part IVA, incorporated and established labour tribunals, of which the jurisdiction was specified in Section 31B. An employee was entitled to make an application to a labour tribunal with or without the consent of the employer. Correspondingly, the labour tribunal was empowered to make a just and equitable order awarding reinstatement or compensation to those who were unfairly dismissed or terminated. Whilst so introducing the labour tribunal, Section 4 was also amended. The original Section 4 was repealed, and a new Section 4 was so introduced. The original Section 4 as it prevailed prior to the amendment was as follows:

> *"**4.** The Minister may, by an order in writing, refer an **industrial dispute** to an industrial court for settlement if such dispute is in an essential industry or if he is satisfied that such dispute is likely*

> *to prejudice the maintenance or distribution of supplies or services necessary for the life of the community or if he thinks that it is expedient to do so."* [emphasis added.]

The new Section 4, as amended, is as follows:

> *"**4.** (1) The Minister may, if he is of the opinion that **an industrial dispute is a minor dispute**, refer it, by an order in writing, for settlement by arbitration to an arbitrator appointed by the Minister or to a labour tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference.*
>
> *(2) The Minister may, by an order in writing, refer any industrial dispute to an Industrial Court for settlement."* [emphasis added.]

The legislature, by the above amendment, had introduced and recognised two categories of industrial disputes: (1) industrial disputes in its totality, encompassing all disputes, as defined in Section 47 of the IDA. However, in respect of Section 4(1), a subcategory of the industrial disputes has been specifically provided for, namely, those disputes which may be considered as "minor disputes". This is not defined.

10. Jurisdiction and competence of an arbitrator to take cognisance arise from the reference under Section 4(1), and the jurisdiction is thus circumscribed thereby and limited to industrial disputes that are "minor disputes" in the opinion of the Minister. This limitation is in perfect harmony with the scheme of the IDA, which confers jurisdiction to the labour tribunal to determine matters of termination. As it is only a "minor dispute" that may be referred to arbitration under Section 4(1) and it is only such a "minor dispute" that an arbitrator can take cognisance of and adjudicate. The effect, import, and object of the totality of the Amendment, to my mind, the Minister had been conferred with a discretion to refer a dispute which in his opinion is "minor" which is also correspondingly limits the jurisdiction of the arbitrator.

11. In contrast, by Section 4(2), the Minister is also empowered to refer **any industrial dispute** to an industrial court for settlement. The legislature, for good reason, has specified two different categories. It is not an accident but an intentional inclusion, with a specific object and purpose.

As I see, on a consideration of a totality of these provisions, there is a clear scheme laid down by the IDA as amended. Firstly, by Section 31B (1), the labour tribunal is conferred with the jurisdiction to entertain and take cognisance of matters pertaining to termination of employment. Section 31B (7) provides that a person is required to invoke such jurisdiction within six months of the alleged termination. Having been so established and vested with the said jurisdiction, the statute also provides for the Minister to make a reference under Section 4(1), subject to the limitation of minor disputes, by which the legislature has clearly intended that certain disputes neither be referred to nor adjudicated by an arbitrator.

12. "Industrial dispute" is defined in Section 47; however, "minor dispute" is not defined. Primarily it depends on the opinion of the Minister. When a discretion is to be exercised based on an opinion on a matter of fact, a Court would be slow to substitute its own opinion on the same. However, such discretion must be exercised reasonably and not arbitrarily. On the face of it, if such decision or forming of such opinion shown to be totally irrational, erroneous, or arbitrary, then a Court acting in review can and will interfere. Lord Mustill, following ***Edwards vs. Bairstow*** [1956] AC 14, is cited in Wade & Forsyth on Administrative Law (9th Edition, at page 215) as follows:

> *"On a challenge to the commission's jurisdiction to undertake the investigation the House of Lords held that the 'clear cut approach [as described in the preceding pages] cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the* ***court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational****."* [emphasis added.]

This has been reflected in the decision of ***Karunathilaka and Another vs. Dayananda Dissanayake, Commissioner of Elections*** [1999] 1 SLR 157, where Fernando, J., held that,

> *"Whether such a decision is right or wrong is a question which involves the merits. Our duty is to decide, not whether that would be a correct exercise of the Commissioner's discretion, but only whether that would be an unlawful, arbitrary, capricious, or unreasonable exercise of discretion. We are of the view that it would not."*

13. In this instance, the Minister has referred, and the arbitrator has taken cognisance of a matter of termination of employment. The objection as to jurisdiction had been so raised that in the absence of a "live dispute" the arbitrator had no jurisdiction to consider an issue of termination. This is an objection that goes into the jurisdiction of the arbitrator. When an issue/objection is raised as to the jurisdiction of a tribunal or administrative body, it is competent to make a determination. For instance, the doctrine of "**kompetenz-kompetenz**", particularly used in International Arbitration, states that a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. The doctrine of kompetenz-kompetenz is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules, where the Article 16 (1) of the Model Law and Article 23 (1) of the Arbitration Rules both provide that "*[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*"

14. Then in ***Ittepana vs. Hemawathie*** (1981) 1 SLR 476, it was held that,

> *"'Jurisdiction' may be defined to be the power of a court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. When the jurisdiction of a Court is challenged the Court is competent to determine the question of*

> *jurisdiction. An inquiry whether the Court has jurisdiction in a particular case is not an exercise of jurisdiction over the case itself. It is really an investigation as to whether the conditions of cognizance are satisfied. Therefore, a Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it."*

When the jurisdictional issue was raised before the arbitrator upon the referral, the arbitrator considered the jurisdictional objection and rejected the same. Then, it is open for a Court to review and determine the legality of the jurisdictional issue so raised before the arbitrator.

15. Can termination of employment be reasonably considered as being a "minor dispute"? When considering the nature and the varying forms of disputes, termination or the determination of a person's employment certainly would be at the top end of the spectrum of such disputes when considered in an ascending order of seriousness. This is simply so because termination would be the ultimate and the most serious decision and dispute that can arise in labour relations between employer and employee. To my mind, by any stretch of imagination, be it objectively or subjectively considered, termination cannot be or be considered a "minor dispute".

16. The Minister is empowered, in writing, to refer an industrial dispute, which in his opinion is a "minor dispute", for arbitration under Section 4(1) of the Act, whether the parties consent to such reference or otherwise. Such reference presupposes the existence of a dispute of that nature. Accordingly, if no such industrial dispute existed, or if the said dispute is not "minor" in nature, the Minister has no power of reference, and correspondingly, the arbitrator has no power to adjudicate upon such dispute. This is so for the simple reason that a reference based on a misconceived or erroneous opinion of the Minister cannot create a non-existing dispute nor convert a dispute which is otherwise serious to one of a minor nature. The arbitrator derives jurisdiction by such reference.

17. The arbitrator, upon rejecting the objection, took cognisance and adjudicated upon a dispute which is certainly not a minor dispute. This is a clear instance where the arbitrator has acted without jurisdiction. The arbitrator does not have jurisdiction over the cause or the matter, namely, that which is not a "minor dispute". Lord Denning MR in ***Pearlman vs. Keepers and Governors of Harrow School*** [1978] APP.L.R. 07/14, holding that the decision of a county court could be quashed for error of law, the normal right of appeal having been cut off by statute, held that:

> *"[N]o court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it."*

Confirming the above, Lord Browne-Wilkinson in ***R vs. Hull University Visitor ex p. Page*** [1993] AC 682 held that:

> *"The fundamental principle is that the courts will intervene to ensure that the powers of public decision making bodies are exercised lawfully. In all cases, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires his powers and therefore unlawfully."*

18. Then, in the case of ***Beatrice Perera v. The Commissioner General of Inland Revenue of National Housing*** (1974) 77 NLR 361 at 366, Tennekoon C.J. held as follows:

> *"Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways.* ***A Court may lack jurisdiction over the cause or matter or over the parties****; it may* ***also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by***

> ***the Court***. *Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or a defectus triationis.* ***Both classes of jurisdictional defect result in judgments or orders which are void.*** *But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction."* [emphasis added.]

19. The above was followed and cited with approval by a five-bench decision of the Supreme Court of ***JMC Jayasekara Management Centre (Pvt) Limited vs. Commissioner General of Inland Revenue*** (SC/Appeal/05/2021, decided on 05.03.2025), where Samayawardhena, J., held as follows:

> *"If a decision is ultra vires, it is a nullity for all intents and purposes; it is void, not voidable. In* ***Anthony Naide v. The Ceylon Tea Plantation Co. Ltd. of London (1966)*** *68 NLR 558 at 560, Sansoni C.J. stated 'It is clear law that a judgment given without jurisdiction is a nullity, for judicial power is capable of being exercised by a court only when it is a court of competent jurisdiction, and that means competent under some law.'*
>
> *There is a distinction between an act without jurisdiction and an error within jurisdiction. The non-existence of jurisdiction (patent lack of jurisdiction) and the irregular exercise of jurisdiction (latent lack of jurisdiction) are distinct concepts. The issue at hand constitutes a patent lack of jurisdiction, which is fatal and can be raised at any stage of the proceedings, including for the first time on appeal. No amount of acquiescence, waiver or inaction will cure*

such defect, as parties cannot expressly or impliedly confer jurisdiction on a Court where none exists."

20. Applying the aforesaid tests, I am of the view that the arbitrator has acted without jurisdiction, that there is a patent lack of jurisdiction, and that the award so made is a nullity. Objections of this nature can be taken up at any time, and when so declared, the process and the decision will be a nullity. To that extent, I hold that the impugned award is a nullity, and the petitioner is entitled to a writ of *certiorari* as prayed.

21. Then the issue of a "live dispute" was adverted to and considered by the arbitrator, as well as both parties, who made extensive submissions on this matter. The petitioner relied on the decision of Eva Wanasundera, PC, J., in the case of ***Mercantile Investments Ltd vs. Mahinda Madihahewa*** (SC/Appeal/22/2012, SCM 15.02.2016), with reference to Section 19(2) of the IDA, and it was opined thus:

> *"It is obvious that when an award is made, the terms of the award becomes implied terms attached to the contract of employment**. So, there should be an existing contract of employment for the award to take effect at the time of making the award at the end of the arbitration.** This section presupposes the existence of a valid contract between the employee and the employer."*

Therefore, in order to so imply such award as a term of the contract of employment, the existence and the continuation of the contract of employment is a necessary prerequisite during and at the point of the arbitration and the making of the award. It is this requirement that is referred to as the requirement of a "live dispute". When the contract of employment is determined, be it by termination or otherwise, there is no "live dispute". It is for this reason that Justice Wanasundera, in the above judgement, held that:

> *"The dispute is not "live" anymore because then the employee is not an employee anymore and the relationship between them comes to an end. There is no possibility of "an award to be taken*

as implied terms of the contract of employment", according to Sec. 19 of the Act.

The employee will not be without a remedy. He can make an application to the Labour Tribunal for wrongful termination or constructive termination by the employer if it is the dispute which made him go for employment into another place."

22. I observe that similar views to that of Justice Wanasundera in ***Mercantile Investments Ltd*** (supra) were followed in the decisions of ***Ceylon Bank Employees Union vs. Yatawara*** (1962) 64 NLR 49, ***The State Bank of India vs. Sundaralingam and Others*** (1971) 73 NLR 514, ***Upali Newspapers Limited vs. Eksath Kamkaru Samithiya*** (1999) 3 SLR 205, and ***Indrajith Rodrigo vs. Central Engineering Consultancy Bureau*** [2009] 1 Sri L.R. 248. Particularly, in ***The State Bank of India vs. Sundaralingam and Others*** (supra), Alles, J., held that the definition of "*industrial dispute*" cannot apply to a dispute between an employer and an ex-employee who has retired, categorising it as a "*cessation of employment and not one of termination or reinstatement",* concluding as follows:

"When a person ceases to be in employment, there cannot be a live dispute between the parties which can ever culminate in an award affecting the terms of employment."

23. I am also aware and mindful of the contrary views to the judgement of Justice Wanasundera, expressed in the decisions of ***S.B. Perera vs. Standard Chartered Bank and Others*** (1992) 1 SLR 73, ***Ranin Kumar, Proprietor, Messrs Chemie vs. State Pharmaceuticals Corporation*** (2004) 1 SLR 277, ***De Costa vs. ANZ Grindlays Bank*** (1996) 1 SLR 307, and the majority opinion of the Supreme Court in ***Colombo Apothecaries Co. Ltd. vs. Wijesooriya and Others*** (1968) 70 NLR 481.

24. ***Colombo Apothecaries Co. Ltd. v. Wijesooriya and Others*** (1968) 70 NLR 481 was a judgement of a Divisional Bench of seven judges of the

Supreme Court, with a majority and a minority opinion, on whether a dispute arising from the termination of a workman's services (specifically, between an employer and the dismissed workman) constituted an "industrial dispute" for the Minister to refer. The majority opinion of the Court (by their Lordships T.S. Fernando, G.P.A. Silva, Siva Supramaniam, Samerawickrame, JJ.) was that the dispute **was an "industrial dispute"** within the meaning of Section 48, and the Minister had the power to refer it for settlement, holding that a "dispute or difference" connected with the termination of services "*arises at least contemporaneously with the dismissal"*. The fact that the employer-workman relationship ceased after the dispute arose (or at the moment of dismissal) did not extinguish the dispute or affect the Minister's power to refer it.

25. However, the minority opinion (by their Lordships H.N.G. Fernando, C.J., Abeyesundere, J., and Tennekoon, J.) aligns with Justice Wanasundera's view in ***Mercantile Investments Ltd***. The minority, particularly Tennekoon, J. (as his Lordship then was), argued that the dispute **was not an "industrial dispute"** as defined, and therefore the Minister's reference was *ultra vires* and invalid. The reasoning (predominantly of Tennekoon, J.) was based on the fact that the definitions of "employer" and "workman" primarily refer to a subsisting contract of service. The third limb of the "workman" definition (*"for the purposes of any proceedings... includes any person whose services have been terminated"*) applies only **during** proceedings, not before the reference to determine if a dispute is an industrial dispute. **It presupposes the existence of an industrial dispute and cannot be used to establish its initial existence**. Tennekoon, J., concluded that at the time the dispute arose, "*neither the company nor the 2nd respondent qualified as 'employer' or 'workman' respectively within the meaning of those words in the phrase 'dispute or difference between an employer and a workman'."*

26. As I have already held that termination is not and cannot be considered a "minor dispute" and the arbitrator does not have jurisdiction, it is no longer necessary to consider the issue of "live dispute"; however, I must confess that in the context of the totality of the amendments brought in by Act No. 62 of 1957, the opinion of Justice Wanasundera in ***Mercantile Investments Ltd*** (supra), to my mind is in consonance with the symmetry and the scheme of the IDA.

27. Notwithstanding the above finding that the award is a nullity, I will, for the purpose of completeness, consider the merits of the findings of fact of the award. The arbitrator has come to the finding that the disciplinary sanction imposed on the respondent is not just and equitable and held that injustice has been caused to the 4th respondent and awarded reinstatement and payment of back wages for the period under interdiction. The said amount so calculated is to be Rs. 3,732,768.00/- and accordingly, the said award has been made. I observe that the arbitrator has not afforded the opportunity to the petitioner to lead evidence and has, in the most *ad hoc* and arbitrary manner, on his own volition, in the course of the evidence of the 1st witness, directed the filing of affidavits and suddenly ordered that this will be determined on written submissions. The petitioner alleges that the arbitrator was due to migrate, and this was the reason for the said unusual conduct.

28. On a perusal of the proceedings before the arbitrator, it is apparent, and I clearly observe, that the conduct of the hearing is rather unusual and irregular. At various points, the arbitrator seems to make orders as to the filing of affidavits and concluding the matter on written submissions. On some occasions, these orders are made in the absence of the parties. The sum total is that the arbitrator has not allowed the petitioner (the 2nd party before the arbitrator) to lead and conclude the evidence, even of the 1st witness who had been called. The arbitrator has thus failed to make all such inquiries that were necessary and hear such evidence that the parties intended to tender. Whilst there is an apparent

denial of a fair hearing, this is also, to a great degree, violative of Section 17(1) of the IDA, which requires the arbitrator to make all inquiries as he may consider necessary and hear such evidence as may be tendered by parties, and thereafter to make such award. The hearing, in the context of the rule of fair procedure, does not have to be a hearing of oral testimony. Providing an opportunity to file written submissions or place material by way of affidavit may be sufficient. In Hilaire Barnett's Constitutional & Administrative Law (9th Ed., at page 615) it is opined as follows:

> *"Where there exists no right to an oral hearing, the question becomes one of the extent to which – and means by which – the view of the individual can be put to the decision making authority. It may well be the case that the opportunity to make written submissions will satisfy the requirements for justice and fairness. For example, in* ***Lloyd v. McMahon*** *(1987), local government councillors were in breach of their statutory duty to set the level of local rates. When the district auditor came to determine the issue, the applicants claimed the right to an oral hearing, and that the absence of such a hearing amounted to a breach of the rules of natural justice and was, accordingly, ultra vires. The court disagreed, holding that, since the auditor* ***had given notice of the case against them and had considered written representations from them, he had acted fairly*** *and, accordingly, lawfully."* [emphasis added.]

29. In the present matter, the 1st petitioner (the 2nd party before the arbitrator) had been able to lead a major part of the evidence in chief of the 1st witness, an administration officer, and submit marked documents R-1 to R-11, which include the internal inquiry report, the charge sheet and other documents which contain a summary of the submission led. To some extent, the necessary evidence and material appeared to have been elicited or brought into the record. However, the arbitrator in making his award has failed to advert to and consider this material. The arbitrator has also completely failed to appreciate and consider the basis on which the alleged termination is said to have been made. Thus, it appears that the conduct of the hearing has been

irregular, inconsistent and piecemeal. Notwithstanding the filing of written submissions being permitted, the overall effect of this haphazard procedure followed is that a fair hearing has not been afforded to the 1st petitioner (the 2nd party before the arbitrator). This is also an additional ground which vitiates the impugned arbitral award.

30. Upon considering the evidence and documents R-1 to R-11 and the written submission, the arbitrator has determined that there is a failure to prove the alleged incident of harassment, as alleged to have been committed in Honolulu. The arbitrator refers to the presumption of innocence and observes that the internal inquirer has failed to appreciate the alleged criminal offence and finds that the matter has not been duly proved at the domestic inquiry. On this observation, the arbitrator has come to the finding as stated above. The arbitrator has concluded that there is no evidence to prove the 4th respondent committed the alleged criminal act of harassment. The basis of termination is not committing the said criminal act, but the 4th respondent putting himself into a situation in which such an allegation was made and the criminal process was set in motion. This aspect is not in dispute and is common ground. The said basis of termination is reflected by the allegations preferred at the domestic inquiry.

31. The charge sheet consists of thirteen allegations, of which the alleged criminal act of harassment was the second allegation. The allegations do not allege the committing of the criminal act of harassment as charged in the Honolulu courts. The said allegations are as follows:
    a. Count 1 pertains to proceeding to attend the training program without disclosing his state of ill-health;
    b. Count 2 is the denial of that opportunity to another officer;
    c. Count 3 is on getting involved in a verbal altercation with an employee in Honolulu;
    d. Count 4 is the harassment or assault or attempting to so assault a female employee;

e. Count 5 is getting into a situation and circumstance which afforded the opportunity to the Honolulu Police to arrest and produce the respondent before a court of law;
f. Count 6 is creating the conditions that enabled the organisers to remove him from the said programme;
g. Count 7 is a general count of bringing Sri Lanka into disrepute by the commission of acts alleged in counts 3, 4, 5 and 6;
h. Count 8 is causing the wastage of funds allocated and spent for the respondent officer to travel to the United States;
i. Count 9 is causing financial loss by his conduct;
j. Count 10 is the denial of the opportunity for another officer to participate in the said programme;
k. Count 11 is the failure to inform the Sri Lankan authorities of the incident until it was brought to the notice by the Sri Lankan Embassy of the USA; and
l. Counts 12 and 13 are general charges based on counts 1-9 and counts 1-12 of general breach of trust and causing disrepute.

32. At the domestic inquiry, the 4th respondent was preferred with 13 counts, and the arbitrator has only considered one issue: the failure to prove the committing of the alleged criminal act of harassment in respect of which the 4th respondent has been charged in Honolulu. There is no disciplinary charge of committing such an act of harassment preferred against the respondent at the disciplinary hearing. Various matters resulting from and arising due to the 4th respondent allegedly getting involved in a criminal incident and being arrested is what is alleged in all these disciplinary charges. The arbitrator has erroneously proceeded on the premise that the entire disciplinary proceedings, the finding, and the termination are dependent upon the proof beyond reasonable doubt of a criminal allegation. The arbitrator has failed to consider and comprehend that the termination was not based on the proof of the criminal charge of harassment but, *inter alia*, on getting himself into certain situations due to being involved in some criminal allegation.

33. The arbitrator was required to consider if the termination was just and fair. The basis of termination is the proof of the 13 allegations cumulatively and not the proof of the committing of a crime in Honolulu. The 4th respondent has admitted being involved in some incident involving a female employee, being arrested, being charged in a criminal court, being released on bail, that he was not permitted to participate in the intended training programme and that he returned without such participation. The disciplinary allegations are premised on the 4th respondent placing himself in a situation and circumstances that resulted in him being criminally charged and being denied participation in the programme. These basic facts are thus common ground and admitted, except that the 4th respondent denies assaulting or harassing a lady but admits some unpleasant exchange of words. This incident had led to the immediate attention of the hotel management, with the condominium staff and the organisers being alerted, as well as the Police. Rightly or wrongly, a complaint has been made to the Police and the criminal process has also been set in motion. As to whether he committed an act of harassment or not in the criminal sense, it is not the issue that is relevant to the disciplinary allegations preferred against the 4th respondent, but the fact of getting himself into such a situation in the first place. The arbitrator has completely failed to ascertain the core nature of the allegations levelled against the 4th respondent and the basis of termination. On a perusal of the evidence, I observe that the 4th respondent's evidence, by itself, establishes the basic factual matters on which the termination was based.

34. As to such acts of misconduct causing and bringing Sri Lanka into disrepute, as alleged by the said charges, will be matters of inference. When an officer visits a foreign country on training programmes as an officer from an institution of Sri Lanka, a very high standard of conduct is required to be maintained. What is relevant is that admittedly, there have been several other participants from Sri Lanka who all have been provided with the same facilities and placed in similar circumstances as

that of the 4th respondent. There is no allegation or incident against any other but the 4th respondent. This leads to the necessary inference that the 4th respondent has failed to conduct himself with the necessary decorum and restraint and has placed himself in the position that provided the opportunity and the circumstances which compelled the Honolulu authorities to institute criminal action. All other alleged acts and events, and his termination, flow from this basic incident.

35. The arbitrator has thus not considered the evidence in its totality and the alleged conduct which warranted the disciplinary action. In this context, I find that the award of the arbitrator is vitiated by his reliance on irrelevant considerations and failure to properly evaluate the relevant material before him. As noted in **Wade & Forsyth's Administrative Law** (11th Ed., at p. 323):

> *"[T]here are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void. It is impossible to separate these cleanly from other cases of unreasonableness and abuse of power, since the court may use a variety of interchangeable explanations, as was pointed out by Lord Greene. Regarded collectively, these cases show the great importance of strictly correct motives and purposes. They show also how fallacious it is to suppose that powers conferred in unrestricted language confer unrestricted power."*

This principle was also applied by A.H.M.D. Nawaz, J., in ***Tennakoon Mudiyanselage Janaka Bandara Tennakoon vs. Hon. Attorney General and Others*** CA/WRT/335/2016 (15.11.2020), where His Lordship held that:

> *"In administrative justice, failure to take into account relevant considerations and taking into account irrelevant considerations would taint and nullify the decision as illegality which is an aspect of Wednesbury unreasonableness. Our attention has not been drawn to any analysis or consideration of these matters before a decision was made to indict the Petitioner."*

36. In the above circumstances, it is clear that the arbitrator has completely failed to appreciate and evaluate the totality of the evidence and failed to consider the basis of the termination. In these circumstances the finding of the arbitrator is, to my mind, irrational, unreasonable, and arbitrary.

37. Accordingly, the writ of *certiorari* as prayed for by prayer *(c)* is issued, and the arbitral award No. A/01/2022, dated 11.05.2023, published in the Gazette (Extraordinary) No. 2335/10, dated 06.06.2023 (marked P-60), is hereby quashed.

38. Consequent to the aforesaid, the petitioner is entitled to obtain and receive the sum of Rs. 3,732,768.00 and the accrued interest as referred to in prayer *(e),* and the 2nd respondent is directed to take necessary steps to release the said deposit and the accrued interest accordingly.

Application is allowed.

JUDGE OF THE COURT OF APPEAL