SRI LANKA STATE PLANTATIONS CORPORATION
v.
THE PRESIDENT, LABOUR TRIBUNAL, GALLE AND OTHERS

COURT OF APPEAL
S. N. SILVA, J.
C.A. APPLICATION 1194/90
6 & 28 JUNE AND 5 JULY,1991

Industrial Law – Certiorari – Right of State Counsel to appear for a Corporation – Industrial Disputes Act, Section 49.

Held :

The Sri Lanka State Plantations Corporation is established by law and is subject to extensive control by the Government. It is set up with public funds, it manages government land and its profits go to the public coffers. Although not a government department it is not a private institution. It is an agency of the government.

The Attorney-General can appear not only for the State but also for any organ or agency of the government.

The government as the employer of the Attorney-General and his officers has the right to decide the nature and extent of the work that should be performed by them. The assignment of work by the employer to an attorney-at-law being an employee can never amount to a denial of the right to equality.

The Attorney-General and his officers appear not only in cases having a positive State element but also in private law disputes, i.e., litigation involving private rights, obligations and claims.

If there is a likelihood of a conflict of interest between the Attorney-General's statutory powers and functions and his appearing in a particular case for a public Corporation or other entity, that conflict should be brought to the notice of the particular Court which could rule on the propriety of the Attorney-General appearing but this cannot be done on a hypothetical assumption.

Cases referred to:

(1) *The Land Reform Commission v. Grand Central Ltd.* (1981) 1 SLR 250.

(2) *The Ceylon Bank Employees Union v. Yatawara*, 64 N.L.R. 49.

(3) *Dahanayake v. de Silva* (1978-79-80) 1 Sri LR 41.

(4) *Rajaratne v. Air Lanka Ltd.* (1987) 2 Sri L R 128.

(5) *Amaradasa v. The Land Reform Commission*, 79 NLR 505.

(6) *Vettivelu v. Wijeratne*, 60 NLR 44.

(7) *Dharmapala v. Selliah*, C A – L A 165/81 – C A minutes of 16.09.1982.

APPLICATION for writ of certiorari to quash decision of the President of the Labour Tribunal.

K. C. Kamalasabeyson, D.S.G. with K. *Sripavan, S.S.C.* and *A. H. M. D. Navaz, S.C.* for petitioner.

R. K. W. Goonesekera with *J. C. Weliamuna* for 2nd respondent.

No appearance for other respondents.

Cur adv vult.

19th July, 1991.

S. N. SILVA, J.

The Petitioner Corporation has filed this application for a writ of certiorari to quash the order dated 08-11-1990 made by the President of the Labour Tribunal (the 1st Respondent). A copy of the order has been produced marked 'Z'. The said order was made

pursuant to a preliminary objection raised by counsel who appeared for the 2nd Respondent, being the Applicant for relief in case No. G/17459, L.T. Galle.

The 2nd Respondent filed the application against the Petitioner Corporation seeking relief in respect of the termination of his services. An answer was filed to this application by an attorney-at-law described as the Legal Officer of the Petitioner Corporation. On 31-07-1990 when the application came up for inquiry a State Counsel appeared for the Petitioner Corporation instructed by the Legal Officer who filed the answer. Counsel for the 2nd Respondent took a preliminary objection to State Counsel appearing for the petitioner Corporation. Learned President heard submissions of both counsel regarding the preliminary objection. A written submission was tendered by counsel for the 2nd Respondent. No written submissions were tendered by State Counsel although two dates were granted for this purpose. Thereupon the President made the order challenged in these proceedings upholding the preliminary objection raised by Counsel for the 2nd Respondent. Learned President sought to base his decision on two judgments of the Supreme Court. They are judgment, in the case of *The Land Reform Commission v. Grand Central Ltd.*[1] and, in the case of *The Ceylon Bank Employees Union v. S. B. Yatawara,*[2]. On the basis of the *Grand Central case* judgment learned President has come to a finding that the Attorney-General cannot appear in a private case and that he could appear only on behalf of the State. He has relied on the judgment in *Yatawara's case* to hold that in view of the provisions of section 49 of the Industrial Disputes Act proceedings cannot be instituted in the Labour Tribunal against the State. On these two grounds he arrived at the conclusion that there is no occasion for the Attorney-General to appear before a Labour Tribunal. He has also observed that if one party is permitted to retain the services of the Attorney-General to represent that party, the other party also should be afforded a similar opportunity. If it is not so done there will be a violation of Article 12(1) of the Constitution which enshrines the right to equality. Therefore he held that State Counsel cannot be permitted to appear in the proceedings.

The Petitioner has stated in this application that "pursuant to a Cabinet decision, Heads of Corporations, Government Owned

Business Undertakings and Government Owned Public Companies were required to hand over the legal work of the said institutions to the Attorney-General's Department". It is further stated that in view of this requirement the petitioner referred all its legal work including the matter in question to the Attorney-General. The Petitioner has further stated that the Corporation is a State Agency and is entitled to be represented by the Attorney-General and his officers acting in their official capacity. It is also pleaded that the order deprives the Petitioner of a right to be represented at the hearing before the Labour Tribunal.

Learned Deputy Solicitor-General (who appeared in support of the application without any objection being raised by counsel for the 2nd Respondent) submitted that the decision of the Divisional Bench of the Supreme Court in the *Grand Central case* is not authority for the proposition that the Attorney-General can appear only in a case to which the State is a party. It was submitted that the Supreme Court held that the Attorney-General cannot appear in his capacity as an Attorney-at-law so long as he holds the office of Attorney-General and that he will be heard by courts only in his capacity as Attorney-General. It was also submitted that the decision in *Yatawara's case* is only to the effect that the Bank of Ceylon is not a Government Department. That, the said decision is not authority for the proposition that the Attorney-General and his officers cannot represent a party before a Labour Tribunal. That, when the Attorney-General or any of his officers appears before a Court or Tribunal he enjoys the same status as that of an attorney-at-law and an objection could be raised to such an appearance only on the same grounds that an objection could be raised to any other attorney-at-law. Such an objection could be raised on the basis that there is a clear conflict of interest between the attorney-at-law and the party whom he seeks to represent or on the ground of a specific prohibition in law. It was submitted that the ground should be clearly established and not founded on a hypothetical basis. The order of the learned President does not contain any such basis on which an objection could be founded and it was submitted that the order is illegal and contrary to the principles of natural justice.

Learned Senior Counsel for the 2nd Respondent sought to justify the order on the grounds relied upon by the President. However,

learned Counsel conceded that the Attorney-General could represent a Public Corporation, being a State Agency where "a state element is necessarily involved" in the litigation. That, in the absence of "a positive state element" in the litigation the Attorney-General cannot appear for a Public Corporation. It was submitted that such a restriction is necessary to avoid a possible conflict of interest. As regards an application before a Labour Tribunal, it was submitted that the State will not be a party to such an application in view of section 49 of the Industrial Disputes Act and the decision in *Yatawara's case*. The dispute related to a contract of employment between the Petitioner Corporation and the 2nd Respondent. Therefore it was submitted that it is a private dispute not involving any "State element" and that the Attorney-General and his officers cannot appear for the Petitioner in such a dispute. It was also submitted that the decision of the Cabinet of Ministers pleaded by the Petitioner cannot be relied upon and the decision does not have the effect of attributing a "State element" into what is essentially a private dispute.

In reply, learned Deputy Solicitor-General submitted that the character or nature of the litigation is irrelevant to the question whether the Attorney-General and his officers should be permitted to appear. It was submitted that the material consideration is the identity of the litigant, and that there could be no objection whatever to the Attorney-General and his officers appearing in their official capacity for a Public Corporation set up, and controlled by the Government or an entity in which the Government has total financial interest. It was further submitted that, as the recognized agent of the Government in civil actions, the Attorney-General appears in cases that are essentially "private disputes" involving no "state element" whatever. Therefore, a question of "positive state element" could not be introduced to deny a right of representation to the Attorney-General and his officers appearing for a Public Corporation. Further that if such a precondition is introduced Courts and Tribunals will have to hold a preliminary inquiry to ascertain the nature and the extent of the State's interest in the litigation before permitting the Attorney-General and his officers to appear. That, such a procedure is unprecedented, unworkable and without any legal basis.

The Petitioner Corporation was established by the Ceylon State Plantation Corporation Act No. 4 of 1958. Its members are appointed

by the appropriate Minister and an officer of the General Treasury and an officer of the Department of Agriculture are official members of the Corporation (section 3(1)). The Minister is empowered to remove any member without assigning reason (section 3(5)). The power of appointing and removing the Chairman of the Corporation is vested in the Minister (Section 4(1) and (5)). At the time it was initially set up the only objects were to develop, maintain and manage plantations approved by the Minister on lands as may be alienated to the Corporation and to undertake the management of any planted crown land (section 3(5)). Even after the amendment of the objects effected by Act No. 49 of 1979 it is seen that substantially the objects remain the management and administration of land alienated too vested in the Corporation by the Government. The initial capital of the Corporation is determined by Parliament and paid out of the Consolidated Fund and may be increased upon resolution of Parliament (section 7). The profits of the Corporation will be paid into a general or special reserve and the balance as may be determined by the Corporation with the approval of the Minister is paid to the Deputy Secretary to the Treasury to be credited to the Consolidated Fund (section 8). Thus it is seen that the Corporation is established by law and subject to an extensive control by the Government. It is set up with public funds, it manages government land and its profits go to the public coffers. The Petitioner Corporation is similar in this respect to the large number of Public Corporations that were set up from the mid 1950s. The Government Sponsored Corporation Act (Cap. 181) enacted on 14-04-1955 and the State Industrial Corporations Act No. 49 of 1957 constitute the early legislation that provided for the establishment of these Corporations. Over the years, a large number of Corporations have been set up under various statutes. The Constitution of 1972 in section 90(1) required the Auditor-General to audit the accounts of Public Corporations and submit annual reports to the National State Assembly. This Constitution also provided that officers of the Corporations should take the oath of allegiance in schedule 'B' to the Constitution (section 133(1)). In the Constitution of 1978 there is a definition of the phrase "Public Corporation" in Article 170. This definition, which is based on the definition contained in section 22 of the Finance Act No. 38 of 1971, is as follows:

> " "Public Corporation" means any corporation, board or other body which was or is established by or under any written law other than

the Companies Ordinance, with funds or capital wholly or partly provided by the Government by way of grant, loan or otherwise."

It is to be noted that the two ingredients of the definition are :

(1) the manner of establishment, that is, by or under any written law other than the Companies Ordinance;

(2) the sources of the funds or capital, that it should be provided wholly or partly by the Government.

Article 154(1) requires the Auditor-General to audit the accounts of all Public Corporations. He is required to report on such audit to Parliament within ten months of the close of each financial year. Article 165(1) requires every officer of a Public Corporation to take the oath of allegiance provided for in the 4th Schedule. The 6th Amendment to the Constitution requires them in addition to take the oath set out in the 7th Schedule.

In the case of *Dahanayake v. de Silva* [3], the Supreme Court held that the Petroleum Corporation must necessarily be considered an agent of the State and that a contract entered into with the Corporation for the distribution of its products should be considered a contract entered into by the Corporation on behalf of the State for the purpose of construing the provisions of section 13(3)(c) of the Soulbury Constitution. Later, in a series of cases the Supreme Court has considered whether the action of public Corporations and other State Agencies should be considered executive or administrative action in relation to Articles 17 and 126 of the Constitution. Different tests have been adopted that emphasise the functions of the particular Corporation and/or the control of the Corporation, in relation to and by the Government. It is seen that the interpretation given to the phrase "executive or administrative action" has been considerably expanded over the years. In the case of *Rajaratne v. Air Lanka Ltd.* [4], it was held that the action of Air Lanka Ltd. in relation to a matter of appointment to a post of Flight Engineer is executive or administrative action. Atukorale, J. stated (at page 134) "the question therefore arises as to what is meant by the expression executive or administrative action. Our Constitution contains no definition of this

expression. The trend of our decisions, however, has been to construe this expression as being equivalent to actions of the government or of an organ or instrument of the Government". After an exhaustive analysis of the provisions with regard to capital of the company, the appointment of its Directors, the functions and the manner in which these functions were previously performed, Atukorale, J. stated as follows:

> "All the above circumstances enumerated by me show that Air Lanka is no ordinary company. It has been brought into existence by the government, financed almost wholly by the government and managed and controlled by the government through its own nominee Directors. It has been so created for the purpose of carrying out a function of great public importance which was once carried out by the government through the agency of a statutory Corporation. In reality Air Lanka is a company formed by the government, owned by the government and controlled by the government.
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> The juristic veil of corporate personality donned by the company for certain purposes cannot, for the purposes of the application and enforcement of fundamental rights enshrined in Part III of the Constitution, be permitted to conceal the reality behind it which is the government. The brooding presence of the government behind the operations of the company is quite manifest. The cumulative effect of all the above factors and features would, in my view, render Air Lanka an agent or organ of the government. Its action can therefore properly be designated as executive or administrative action within the meaning of Articles 17 and 126 of the Constitution. The petitioner has thus established that he is entitled to relief under Article 126(4)".

The learned President of the Labour Tribunal in his order raised the question whether the Petitioner Corporation is a "private institution" or a "government institution". He sought to answer this question solely with reference to section 49 of the Industrial Disputes Act and its interpretation as given by the Supreme Court in *Yatawara's case (supra)*. Section 49 of the Industrial Disputes Act states that the

provisions of the Act shall not apply "to or in relation to the Crown or Government in its capacity as employer or to or in relation to a workman in the employment of the Crown or the Government". In effect this provision excludes the application of the Industrial Disputes Act in relation to situations where a contract of employment exists between the Government and one of its officers and employees. There is a general rule of interpretation contained in section 3 of the Interpretation Ordinance that "no enactment shall in any manner affect the right of the Crown unless it is therein expressly stated or unless it appears by necessary implication that the Crown is bound thereby". The provisions of section 49 of the Industrial Disputes Act are no more than a restatement of this general rule of interpretation, in relation to the Act. In *Yatawara's case (supra)*, a reference to arbitration was challenged on the basis that the Bank of Ceylon is a party to an arbitration and that the reference is bad in law in view of section 49 of the Industrial Disputes Act. In relation to this objection Sansoni, J. came to a finding that the Bank of Ceylon is not a Government Department and that the reference is not defective.

The provisions of section 49 of the decision in *Yatawara's case*, relied upon by learned President are not helpful to identify the true character of the Petitioner Corporation. The learned President has failed to take into account the reality of there being a large number of statutory Corporations and entities set up by the Government, performing functions that would otherwise be performed by the Government, and controlled by the Government. He had also failed to take into account the fact that in view of the financial investments made by the Government in these Corporations and entities, under the Constitution, Parliament exercises control over them through the Auditor-General. The employees of these Corporations and entities do not have any contracts of employment with the Government and, certainly the Industrial Disputes Act applies in relation to them. However, the character of the Corporations and entities cannot be determined solely by this fact. In the decisions of the Supreme Court referred to above these Corporations have been described as agencies of the Government and in certain instances their action has been considered as executive or administrative action. Therefore although they are not Government Departments they cannot be considered as private institutions. In relation to the Petitioner

Corporation, the provisions of the Incorporating Statute referred to above clearly show that it is an institution in respect of which the Government has control and a complete financial interest. It manages government land. Therefore adopting the test of the extent of control or that of the nature of functions or the extent of financial interest, the Petitioner Corporation should be considered an agency of the Government, and not a private institution, as assumed by the learned President.

The next basis of the learned President's decision is that the Attorney-General could appear only on behalf of the State. He has sought to draw this inference from the decision in the *Grant Central case* (*supra*). In the *Grand Central case*, an objection was taken to the Attorney-General appearing for the Land Reform Commission in his private capacity as an Attorney-at-Law and not in his capacity as Attorney-General. The objection was upheld by this Court and affirmed by the Supreme Court. There was no determination by this Court or by the Supreme Court as to the type of cases in which the Attorney-General or any of his officers could appear in his official capacity. With reference to this matter the Chief Justice observed (at page 255) that the Attorney-General's "right to practise his profession as the Chief Law Officer of the State in all Courts in the Island has not been denied. Indeed, it has been conceded in no uncertain terms". Therefore the decision in the *Grand Central case* is certainly not authority for the proposition that the Attorney-General can appear only for the State. The observation made by the Chief Justice (at page 261) that the "image of impartiality will be tarnished if the Attorney-General takes part in private litigation arising out of private disputes" has to be understood in relation to the finding in the case that the Attorney-General can appear only in his official capacity. The fact that the Chief Justice did not contemplate an impropriety in the Attorney-General appearing in his official capacity for any organ or agency of the Government is clearly borne out by the observation (at page 254), "If it (The Land Reform Commission) was an organ or agency of Government the Attorney-General could have, and would have marked his appearance in his official capacity". Thus it is seen that both grounds relied upon by learned President to uphold the objection are without basis.

I have to now consider the ground urged by learned Counsel for the 2nd Respondent that the Attorney-General and his officers could

appear for a public Corporation only in litigation having a "positive state element" and the observation made by the learned President with regard to a possible infringement of Article 12(1) of the Constitution.

The Attorney-General is the chief law officer of the State. He holds a paid office under the Republic. He is appointed by the President and is a public officer in terms of the Constitution. He could not be categorised a judicial officer and in relation to his functions he comes within the Executive of the country. Similarly the legal officers of the Attorney-General's Department are Attorneys-at-Law who hold paid offices under the Republic. The power of appointment, dismissal and disciplinary control in relation to them finally rest with the Cabinet of Ministers. Therefore, primarily, the government decides as to the particular work that will be handled by the Attorney-General and his officers. From about 1974 to 1978 upon a decision of the Cabinet of Ministers the Attorney-General and his officers handled all the legal work of the Public Corporations and other entities referred to above, without any objection being raised in any Court as to their right to represent these entities. In the case of *Amaradasa v. The Land Reform Commission*[5], the Additional Solicitor-General with several other officers of the Attorney-General's Department appeared for the Land Reform Commission and the Hon'ble Minister who were respondents to the application. This case was heard before a Divisional Bench of the Supreme Court without any objection or observation being made, with regard to the right of the Additional Solicitor-General to represent the Land Reform Commission.

Subsequently, the Cabinet of Ministers decided that the Attorney-General and his officers should not appear for Public Corporations. This decision is referred to in the judgment in the *Grand Central case*. It appears that now the Cabinet of Ministers has reversed that decision and directed that the legal work of the Public Corporations and other entities referred in the petition should be handled once again by the Attorney-General and his officers. Certainly, no one could deny the Government's right as the employer to decide the nature and the extent of the work that should be performed by its employees. The right of any person to engage the services of an Attorney-at-Law is well recognised. This engagement may be to

appear in a particular case or to handle the legal work as an employee. The assignment of work by the employer to an Attorney-at-Law being an employee could never amount to a denial of the right to equality. In any event, it is seen that the 2nd Respondent has retained an Attorney-at-Law of his choice to appear for him. He has not complained of an infringement of the right to equality, by the Government. In those circumstances the observation of the President in this respect is misconceived.

The submission of learned Counsel for the 2nd Respondent that the Attorney-General and his officers could appear for a Public Corporation or other entity only in litigation having a "positive state element" assumes that the Attorney-General and his officers do not appear in litigation involving only private rights, obligations and claims when they represent, in their official capacity, the Government, Ministers and public officers. In relation to civil actions section 25(a) of the Civil Procedure Code provides that the Attorney-General is the recognised agent of the Government. Section 463 of the Civil Procedure Code empowers the Attorney-General to get himself substituted as a party defendant in any action filed against a Minister, Parliamentary Secretary or a public officer. In the case of *Vettivelu v. Wijeratne*[6], and of *Dharmapala v. Selliah*[7], (decided after the *Grand Central case*) it was held that an officer of the Attorney-General's Department can appear for a public officer in a civil action without recourse to the procedure in section 463. The majority of these civil actions filed against the Government, Ministers and public officers are based on causes of actions involving private rights, obligations and claims and could be aptly described as private law disputes. These causes of actions do not relate to matters involving public law. Hence there is no basis whatever to insist that the Attorney-General and his officers could appear for public Corporations and other entities only in litigation involving a "positive state element". Learned Counsel did not elaborate as to what is meant by this requirement of a "positive state element". The submission was that it excludes disputes such as the one in issue which relates to a contract of employment between the Petitioner Corporation and the 2nd Respondent. This contract of employment is no different from the contract of employment between the Government and one of its officers. There is no public law element in either situation. In the

circumstances I am of the view that the distinction drawn between the two, upon what is termed a "positive state element" is without any basis whatever. I am also inclined to agree with the submission of learned Deputy Solicitor-General that if such a precondition is introduced, in every case where the Attorney-General or his officers appear for a Public Corporation in their official capacity, a separate inquiry will have to be held to ascertain whether there is a "positive state element" in the matter. Such a precondition and procedure is totally inconsistent with the provisions of section 41 of the Judicature Act which gives a right to a party to be represented by an Attorney-at-Law of his choice.

Learned Counsel submitted that a "positive state element" should be present for the Attorney-General and his officers to appear in order to avoid a conflict of interest. It is indeed correct that the Attorney-General has several statutory powers and functions specially in the public law area of Constitutional and Criminal Law. The powers and functions in Criminal Law matters are such that in these matters the Attorney-General and his officers could appear only for the prosecution. If there is a likelihood of a conflict of interest between the Attorney-General's statutory powers and functions and his appearing in a particular case for a public Corporation or other entity, that conflict should be brought to the notice of the particular Court. The Court will then go into the question whether there is a likelihood of a conflict of interest and if so satisfied make order, in the exercise of the inherent power, that the Attorney-General cannot appear for such Public Corporation or entity in the particular case. Such a decision should be made in relation to the facts and circumstances of the particular case. I am inclined to agree with the submission of learned Deputy Solicitor-General that such a decision cannot be based on a hypothetical assumption. In this instance there is no material whatever from which an inference could be drawn that the statutory powers and duties of the Attorney-General would result in a conflict of interest if a State Counsel appears for the Petitioner Corporation in the Labour Tribunal. The order of the learned President of the Labour Tribunal that State Counsel cannot represent the Petitioner Corporation is without any legal basis and is contrary to the provisions of section 41 of the Judicature Act. It is also contrary to the principles of natural justice being an ingrained requirement in our

judicial proceedings since it effectively denies a right of hearing to the Petitioner Corporation. Hence, I am of the view that the order has an error of law which goes to jurisdiction. I accordingly issue a Writ of Certiorari as prayed for in prayer 'B' to the prayer of the petition. In the particular circumstances of this case I would make no order for costs.

Certiorari issued.