ANZ GRINDLAY'S BANK
v.
MINISTRY OF LABOUR AND OTHERS

COURT OF APPEAL.
SENANAYAKE, J.
C.A. APPLICATION 873/94
INDUSTRIAL COURT A/2394
MARCH 25, 1995.

Industrial Law – Industrial Disputes Act S4(1) – Arbitration – S5(1) S8(2A) – Payment of Gratuity Act, No. 12 of 1983 – Enhancement – Industrial Dispute – Resignation – Claim for enhanced gratuity – Live Dispute – Cessation of Employment.

'The 4th Respondent resigned from the Services of the Petitioner Bank with effect from 1.7.91. In terms of S5(1) (2) read with S8(2A) he was paid gratuity computed on the basis of 1/2 months salary for each year of completed service. Thereafter by his letter of 6.9.91 he requested for gratuity computed on the basis of 2 months gross salary for each year of service; referring to the case of 2 employees who had resigned after his resignation and had been paid gratuity at 2 months for each year of completed service, after adding a further 5 year period. The Commissioner refused this application. Thereafter on 21.6.93, a request was made to the Minister of Labour to refer this matter to Arbitration in terms of S. 4(1). In an application to quash the said reference, it was:

Held:

(1) There was no Trade Dispute or any dispute at the time the Employee tendered his resignation.

(2) A dispute can be referred for settlement only if the Dispute arose while the relationship of Employer-Workman subsists.

(3) The Minister cannot act under S4(1) where there was no industrial dispute existing at the time when the Workman ceased to be an employee,

Cases referred to:

1. *Standard Chartered Bank v. C. Carthigesu* CA 456 of 1992.
2. *S.C. Special leave to Appeal application* 165/94
3. *S.C. Appeal* 106/94 SCM 22.2.1995
4. *R. v. National Arbitration Tribunal* 1947 AER 703.
5. *State Bank of India v. S. Sundaralingam* 73 NLR 514.

AN APPLICATION for a Writ of Certiorari.

S. L. Gunasekera. with *Gomin Dayasiri* for Petitioner
Adrian Perera S.C. for 1st and 2nd Respondent.
A. R. Surendran with *Gihan Ranawake* for 4th Respondent.

Cur. adv. vult.

May 24, 1995.
SENANAYAKE, J.

This is an application for a mandate in the nature of a Writ of Certiorari to quash the order of the 1st Respondent dated 8th March, 1994 the document marked P7 and also a Writ of Certiorari to quash the order of the 3rd Respondent dated 4th November, 1994 marked P13 and also for a mandate in the nature of Writ of Prohibition preventing and or restraining the 3rd Respondent hearing and of proceeding with the said Arbitration No. A/2394.

The relevant facts briefly are as follows: The petitioner is a Banking Company duly incorporated and having Branch Offices in several parts of the world including a registered Branch Office in Sri Lanka. The 1st Respondent is the Minister of Labour and 2nd Respondent the Commissioner of Labour and the 3rd Respondent was a person who was appointed by the 1st Respondent in terms of Section 4(1) of the Industrial Disputes Act as an Arbitrator, the 4th Respondent was the employee of the Petitioner from 1st June 1979 to 30th June 1991. The 4th Respondent applied for one months annual leave followed by 2 months no pay leave from the end of January 1991 to be spent in the United Kingdom by letter dated 17th December, 1990. The 4th respondent overstayed the leave and never reported to work thereafter. The 4th Respondent resigned from the service of the Petitioner with effect from 1st July, 1991 and he also requested by another letter to the Personnel Manager marked P2A where he stated that he had tendered

a letter of resignation and there were two outstanding loans that he had obtained from the Bank for housing and a vehicle and he wished to settle these two loans with the proceeds from the E.P.F. and E.T.F. and accrued interest and gratuity. After the settlement of the two loans the surplus is to be credited to his current Account No. 1056596001 and once the loans were settled, to release the title deeds and cancel the Mortgage Bond of the house and the Promissory Note of the vehicle loans and to hand over the relevant papers to his brother P. U. de Costa who had the Power of Attorney. In view of the Petitioner's resignation the petitioner paid the 4th respondent gratuity computed on the basis of half month's salary for each year of completed service in terms of Section 5(1) read with Section 8 (2A) of the payment of gratuity Act.

Thereafter by letter dated 6th September, 1991 marked P3, the 4th Respondent requested from the Petitioner gratuity computed on the basis of two months gross salary for each year of service and had referred to the fact that two other employees who had resigned after his resignation had been paid gratuity at two months gross salary for each year of service after adding a further 5 year period of service thus the 4th respondent's Attorney made an application for enhanced gratuity in terms of Section 10(1) of the Payment of Gratuity Act to the 3rd Respondent on 7th May, 1992, and the said application was inquired into by an Assistant Commissioner of Labour and he made order on 2nd of December, 1992, marked P4(a) refusing his Application. The 4th Respondent did not canvass the order made by the Assistant Commissioner of Labour in any Court of Law. After 7 months of the order P4A the 4th Respondent made an application on 21st July, 1993 to the 2nd respondent requesting that the question whether or not the 4th Respondent was entitled to enhanced gratuity be referred to Arbitration under Section 4(1) of the Industrial Disputes Act.

The submission of the Learned Counsel for the petitioner was threefold. His first submission was as there was no industrial dispute the Minister had no jurisdiction under the provisions of Section 4 of the Industrial Disputes Act to refer the matter for Arbitration. His 2nd submission was the Arbitrator had no jurisdiction to entertain or proceed with the matter referred to as there was no dispute. His 3rd submission was the dispute between the appellant and the petitioner was after the resignation and therefore there was no industrial dispute.

In my view it is necessary to examine his third submission as the primary submission because the 4th Respondent voluntarily tendered his resignation on 1st July, 1991 and this was confirmed by his own document P2 dated 1st July, 1991 and P2a where he had given specific instructions as to how his outstanding loans could be settled. With the acceptance of his resignation the employer-employee relationship ceased to exist. In my view the 3rd Respondent by letter dated 6th September, 1991 for the first time had raised the issue that he should be paid gratuity at the rate of 2 months gross salary for each year. At the time of his resignation and the acceptance of his resignation there was no dispute regarding the gratuity. If the 4th Respondent had protested regarding the payment or at the time of resignation, if he had indicated that he was entitled to gratuity calculated at 2 months gross salary for each year of service then one could come to the conclusion that at the time he tendered his resignation, if he had indicated to the Petitioner that he should be paid gratuity on the basis of 2 months gross salary for each year of service. In the instant case there was no "live" dispute at the time the 1st respondent acted under Section 4 of the Industrial Disputes Act. The Petitioner relied on the judgment of the *Standard Chartered Bank v. C. Carthigesu* [1] where the Court of Appeal quashed the order of the Arbitrator. S. B. Perera the Appellant in that case appealed to the Supreme Court and the Supreme Court in *S.C. Special L.A. Application 165/94* [2] and *S.C. Appeal 106/94* [3] set aside the order of the Court of Appeal and held there was a dispute for settlement by Arbitration. But the facts in that case are distinguishable, the appellant in that case was employed by the Standard Chartered Bank in 1957 and was appointed as Manager Operations in 1985, and by letter dated 19th October 1989 the appellant applied for permission to retire from the Banks services as early as possible preferably within one month and requested the Bank to grant a pension commensurate with the 32 years of service.

In terms of the Pension fund Rules of the Bank set out in a Trust Deed to which the appellant was a party, employees who had completed not less than 10 years of service were entitled to a pension computed on the basis set out in the Rules either upon reaching his normal retirement age of 55 years or upon premature retirement on account of infirmity or disability.

The Appellant was 55 years of age at the time of the retirement, the retirement was not on account of infirmity or disability. In reply to his letter dated 19th October the Manager Administration of the Bank wrote to the Appellant pointing out that no provisions existed in the terms and conditions of service for the payment of the requested pension and that the Bank will therefore require to consider the application and thereafter refer it to the Head Office in London. On 3rd November, 1959 the Bank wrote to the appellant informing him that his request for premature retirement on pension terms had not received approval. On 10th November, 1989 the appellant wrote to the Bank tendering his resignation with effect from 13th November, 1989. These were the salient facts of the case. So at the time his resignation was tendered on 13th November, 1989 there was a dispute regarding his conditions of service, *in terms of the definition* – Industrial Dispute-in the Industrial Disputes Act. The matter for settlement that was referred to was on the basis that the Appellant was entitled to retirement benefits, but whether having regard to the length and quality of the service he had rendered especially in the light of the fact that two other employees had retired prematurely had nevertheless been granted retirement benefits. In the said case there was a dispute and the dispute arose before the Appellant tendered his resignation. Considering these facts the Supreme Court had come to a determination that there was a "live" industrial dispute. Therefore the Minister had acted under Section 4(1) of the Act, because there was a dispute that arose on 19th October, 1989 when the Bank responded negatively to the appellant's request.

In the instant case there was no dispute between the Petitioner and the 4th respondent. At the time the 4th respondent tendered his resignation on 1st July, 1991 it was to be effective from that date, and P2A confirms that he was accepting gratuity and to deduct the outstanding loans and credit the balance to his Current Account and release the relevant documents to his brother who had been appointed as his Attorney. The 4th respondent had not asked for two months gross salary for each year of service as gratuity. It was only in September, 1991 by P3 that he had indicated to the Bank that he had heard that some others who retired prematurely after his resignation had been granted two months gross salary for each year of service. At the time he made this request it must be understood quite clearly

and without any ambiguity that he was an ex-employee and there was no relationship in the nature of employer-employee.

I am not for a moment stating that an ex-employee under no circumstances cannot have an Industrial Dispute. That would be contrary to the intention of the Industrial Disputes Act. If the dispute arose before the termination or due to voluntary resignation by the workman there was a "live" dispute to be referred to and the Minister has the power under Section 4(1) of the Industrial Disputes Act to refer to Arbitration. Cessation of employment does not mean that there is no Industrial Dispute if in fact before the cessation there was a dispute between the employer and employee. In *Rx v. National Arbitration Tribunal* [(4)] Lord Goddard rejected the submission that there must be an existing contract of employment because "if effect were given to it would mean that any workman could Nullify the whole provision of the order and the object of the regulation under which it was made by terminating the contract of service before a reference was ordered or even after the matter was referred but before the Tribunal considered it.

I am of the view that in the instant case there was no trade dispute or any dispute at the time the 4th respondent tendered his resignation.

The 4th respondent in his objection averred that the petitioner had not accepted the said resignation in writing, the 4th respondent had also stated that before the resignation was handed over to the petitioner that he through his brother demanded payment of gratuity at a higher rate and his brother Upul de Costa objected to the computation of the gratuity at a lower rate and as a result of this objection his brother refused to sign the receipt 4R6 given by the petitioner. If that was the position I cannot understand why the 4th respondent waited till 6th September, 1991 to protest to the petitioner about the said gratuity. In the complaint made by P4 to the Commissioner of Labour under Section 10 (1) of the Payment of Gratuity Act, No. 12 of 1983 the 4th respondent's brother had indicated that the petitioner operated a scheme of gratuity whereby employees were paid 2 months gross salary for each year of service. Such agreement form the basis of payment of gratuity by the

Petitioner. I cannot understand why the 4th Respondent's Attorney waited till 7th of May 1992 to make this complaint to the Commissioner of Labour.

Each case must be viewed on the facts of that case. One could cite any number of authorities especially from the Courts of India of the various branches of the High Courts but one has to decide whether the terms and the language used by the Industrial Disputes Act India has any similarity to our Industrial Dispute Act. One should not import wholesale the decisions because the section of the statutes are not the same. Section 5 of the Gratuity Act lays down the minimum that has to be paid as gratuity to an employee and if the Petitioner had complied with Section 5 (1) of the Gratuity Act he would have complied with the Law, unless there was a special agreement between the parties to pay higher gratuity at the time of resignation or termination.

The Counsel for the 4th respondent submitted that there was no evidence of the acceptance of the resignation by the Petitioner. I am unable to accept his submission. His submission is contrary to all documents filed by the Petitioner and the Respondent.

I am unable to agree that the 1st Respondent could act under Section 4 (1), where there was no Industrial Dispute existing at the time where the workman ceased to be an employee. An Industrial Dispute must necessarily arise at the time of employment not after the cessation of employment either voluntarily or by termination. If one were to take the view that there could be an Industrial Dispute after cessation of employment we would be opening the gateway for all employees to refer matters for arbitration in terms of Section 4 (1) of the Act even after passage of a long period. For example if the petitioner was paying 6 months gross salary for each year of service to the retiring employees presently, could an ex-employee who had resigned 5 years ago claim the same gratuity that was not in existence or contemplated by the petitioner at that time or which was not followed at the time he ceased to be an employee. If one were to accept the view that the 1st respondent has the power under Section 4 (1) to make such a reference on the basis that there was an Industrial Dispute I am of the view that we would be doing violence to the language of the Act.

The 4th respondent in his statement of objections averred that when his brother handed the letter of resignation he demanded the payment of gratuity computed at a higher rate as specified in the scheme. That his brother was informed by Mr. Cassell that the gratuity computed at the higher rate would be paid to the 4th respondent once the approval of the Petitioner's General Manager was obtained. If there was such a representation made I cannot understand why he had failed to mention this important undertaking in his letter P3 dated 06.09.91.

In terms of 4R3 clause (e) An employee shall upon resignation/termination of employment prior to retirement in the circumstances which does not entitle him to a gratuity referred to at the aforementioned clauses (A), (B), (C) and (D) will be entitled to a gratuity computed in Terms of the Payment of the Gratuity Act No.12 of 1983. The 4th respondent therefore was fully aware of what he was entitled to as gratuity on resignation.

In the case of *The State Bank of India v. S. Sundaralingam* [(5)] one Thuraisingham a Sub Accountant employed by the petitioner retired on 10th April, 1962. On 15th August, 1963 the Union on his behalf and that of the Sub Accountants applied for the benefits of a salaries revision subsequent to the orders in I.D. 306 and I.D. 306A. In the application the Union included an application of pension and the consequent arrears of salary and pension.

Alles, J. observed at page 316 "I cannot see how this definition can ever apply to any dispute or difference between an employer and an ex-employee who has retired from service of his employer. Thuraisingam ceased to be the Petitioner's employee on 10th April, 1962. This is a case of cessation of employment and not one of termination or reinstatement. 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".

To my mind that a dispute can be referred to settlement only if the dispute arose while the relationship of employer and workman subsisted. A dispute which arises between an ex-employer and an

ex-worker after the employer-workman relationship has ceased to exist is not an industrial dispute within the meaning of the Act.

In the circumstances, I hold that the Minister's order referring the purported dispute between the petitioner and the 4th respondent is ultra vires Section 4 (1) of the Act and allow the application by allowing the paragraph's c, d and e of the prayer of the Petition.

I refrain from making an order for costs.

Application allowed.