1975 *Present :* **Tennekoon, C.J., Samerawickrame, J., Udalagama, J., Tittawella, J., and Sharvananda, J.**

THE NATIONAL UNION OF WORKERS, Appellant, *and* THE SCOTTISH CEYLON TEA COMPANY LIMITED and another, Respondents

S. C. Appeal Nos. 12-17/1973
S. C. 244/70-249/70—L. T. Nos. H/10/4695-4901/70

Industrial Disputes Act, Section 31B (1) (b)—Concept of gratuity and its legal incidents in proceedings before Labour Tribunals—Emergency (Payment of Gratuities and other Monetary Benefits to Indian Repatriates) Regulation No. 3 of 1975—History of Labour Disputes Legislation.

The Appellant Union made an application to the Labour Tribunal under Section 31 B (1) (b) of the Industrial Disputes Act on behalf of six workmen for payment of gratuity. The workmen had terminated their services with their employer from 16th March, 1970 in order to leave Ceylon for India under the Indo-Ceylon Agreement of 1964. There was no provision for payment of gratuity to them in their terms of employment. There was however the Collective Agreement No. 3 of 1967 which had been extended under Section 10 of the Industrial Disputes Act to the entire tea industry. All six workmen were employed in the tea industry and the said Collective Agreement was in force at the time of the termination of their services.

Held (per Tennekoon, C.J., with Udalagama, J., and Tittawella, J., agreeing).

(1) The words "any gratuity ..... due" in Section 31B (1) (b) of the Industrial Disputes Act mean "any gratuity legally due."

(2) Where gratuity is found legally due by reason of any statutory provision or by reason of a term which has become part of the contract by reason of a statutory provision (such as for instance by reason of a Collective Agreement or an award under the Industrial Disputes Act) the Labour Tribunal will have no power in determining the amount of the gratuity to depart from the statutory rules or from the rules for computing the gratuity which have by law been deemed to be part of the terms of the contract of service.

(3) The power to grant relief under Section 31 B(1) (b) will extend to cases where there is nothing legally due as gratuity but it would be unfair or unjustifiable conduct for the employer to refuse to pay a gratuity.

(4) Gratuities contemplated in Section 31B (1) (b) are only retiring gratuities.

(5) As regards workmen who resign before retirement age there can be no question of their being granted *orders for payment of gratuity* under Section 31B (1) (b) for that is not the kind of ex gratia payment that is contemplated by the expression "gratuity" in that Section. This statement however is subject to the exception that the resignation may, having regard to the circumstances in which it is made, be regarded as a voluntary retirement carrying with it eligibility for a retiral gratuity.

(6) Those whose services are terminated by the employer before the retirement age too would not qualify for an order of payment of gratuity *as such* under Section 31B (1) (b).

Per Samerawickreme, J :

> " Whatever may be the position regarding the claim of the workmen and the obligation of the employer under the provisions of the Industrial Disputes Act, viewed as a human problem it is desirable that some provision should be made to ensure that the workmen do not return to their homeland with empty hands. It is gratifying therefore to find that emergency regulations ..... have been used to grant relief by providing for payment of gratuities to labourers returning to India under the Agreement ..... The workmen or the Appellant-Union on their behalf may obtain gratuities under the emergency regulations in the mode and by the procedure set out therein ..... "

Per Sharvananda, J :

> " ..... I do not agree with the view that in Section 31B (1) (*b*) the legislature had in contemplation only 'retiring gratuity'. In my considered view, a workman becomes entitled to payment of gratuity on his resignation or premature retirement provided he had rendered faithful service for a considerable period."

APPEAL from a judgment of the Supreme Court.

N. Satyendra with *S. Suntheralingam,* for the Appellant.

H. W. Jayawardene, with *R. L. Jayasooriya* and *J. C. Ratwatte,* for the Respondents.

Cur. adv. vult.

December 19, 1975. TENNEKOON, C. J.

This is an appeal which was heard by this court under the provisions of sub-section (1) of Section 53 of the Administration of Justice Law No. 44 of 1973.

The National Union of Workers, made application to the Labour Tribunal under Section 31 B (1) (*b*) of the Industrial Disputes Act on behalf of six workmen, namely, M. Selliah, S. Annammah, P. Munuswamy, K. Parwathy, M. Kathiravelu and K. Valliammal, for relief or redress in respect of the question whether any gratuity or travelling expenses are due to them from their employer, namely, the Scottish Ceylon Tea Co. Ltd. The six workmen had terminated their services with their employer from the 16th of March, 1970, in order to leave Ceylon for India. These workmen were of Indian origin and were not recognised as citizens of Ceylon or of India. They had decided to resign from their employment as they had opted for Indian Citizenship and return to India under the Indo Ceylon Agreement

of 1964. The respective periods of service and the amount of the contributions made to the Employees' Provident Fund, as found by the President of the Labour Tribunal, may be gathered from the following tabulated statement.

Case No.	*Name of Worker*	*Age*	*Years of Service*	*E·P.F. Employer's Contribution*	*E·P.F. Total Contribution*
				Rs. c.	*Rs. c.*
4900	M. Selliah	M. 39	27	526 54	877 56
4901	S. Annammah	F. 33	16	521 54	869 27
4695	P. Munuswamy	M. 42	31	461 17	768 62
4696	K. Parwathy	F. 36	15	403 35	672 25
4697	M. Kathiravelu	M. 36	28	436 27	727 12
4698	K. Valliammal	F. 30	13	385 60	642 56

It is also a fact that there was, in existence at the time of termination of the services of the workmen a collective agreement (No. 3 of 1967) entered into between the Ceylon Estate Employers' Federation and the Ceylon Workers' Congress. This collective agreement was published in Government Gazette No. 14745/6 of 27th April 1967. The six workmen we are here concerned with are not and were not members of the Ceylon Workers' Congress ; however the Collective Agreement 3 of 1967 had been extended by the Minister of Labour, acting under Section 10 of the Industrial Disputes Act, to the entire Tea Industry by order published in Government Gazette No. 14759 of 1st August 1967. It was common ground that at the time of the termination of their services by the workmen concerned, the collective agreement was in force.

It was also an undisputed fact that all six workmen were workmen in the tea industry and that their employer was by reason of the Minister's order of extension bound to observe the terms and conditions set out in the Collective Agreement or terms and conditions not less favourable as contemplated in section 10 (2) of the Industrial Disputes Act.

The Collective Agreement contained a provision in regard to gratuities which reads as follows :—

Retiring Gratuities

" The existing system of payments to workers who retire on completing the age of 60 years for males and 55 years for females and continue to reside on the estate, the maximum of which are Rs. 900 for 35 years of service for males and Rs. 750 for 30 years of service for females. will continue. In the case of workers who retire off the estate on completing the aforementioned ages for males and females

respectively, and in the case of workers returning to India in whose case the age of retirement is 55 years for a male worker and 50 years for a female worker, the maximum payable is Rs. 1,080 for a male worker and Rs. 900 for a female worker for the aforementioned periods of service. Proportionately smaller amounts will be paid for lesser periods of service. In computing the aforesaid amounts the Employer's contributions to the Provident Fund will be taken into account. However, it is specifically agreed that the Workers' contribution to the Provident Fund shall not be taken into account in this computation."

This was the only reference in the Collective Agreement to the subject of gratuities. When the 6 applications came up for hearing—they were all consolidated and heard together—the representatives of the applicant union and the employer union stated that there were no disputes on the facts and that there was no need for leading any evidence. Submissions were made by both sides and the Labour Tribunal made order on 16.11.70 disallowing the claim for any travelling allowances because the applicant "had made out no case" in that regard, but ordering payment of gratuity in the following sums :—

	Rs.	*c.*
M. Selliah	1,077	57
S. Annammah	509	60
P. Munuswamy	1,080	00
K. Parwathy	477	75
M. Kathiravelu	1,080	00
K. Valliammal	414	06

In coming to this conclusion the President of the Labour Tribunal took the view, that although the Collective Agreement provided for payment of gratuity only upon cessation of employment on reaching the appropriate age of retirement, the Labour Tribunal was free to order payment of gratuities to workmen resigning to go to India at earlier ages ; in order to do so he evolved a formula different from that set out in the Collective Agreement while at the same time retaining the maximum set out in the agreement. The President of the Labour Tribunal said :

"While the obligation on the Tribunals to follow the terms of Section 8 of the Industrial Disputes Act is in no doubt, yet I am of the view that the Tribunal must not lend themselves to succumbing to iniquitous provisions of Collective Agreements.

It was also brought to the notice of the Tribunal that other employers, who are themselves parties to this same Collective Agreement, have settled questions of gratuity somewhat outside the Collective Agreement and Counsel for the employer did not deny this position (settlement on Meddacombra Group was cited as a case in point).

"The Collective Agreement states "In computing the aforesaid amounts (meaning the gratuity) the Employer's contribution to Provident Fund will be taken into account". The Tribunal is bound to take this into account, and where normally I would have calculated gratuity on the basis of one month's wages for each year of service, in these instant cases I would calculate gratuity at 1/2 month's wages for each year of service in view of the fact that the employer has paid Provident Fund as well," and.

"This method of computation, while maintaining the main provisions of the Collective Agreement, will help to remove the iniquitous situation brought about by the inherent defects in the Collective Agreement, and restore to the workers a gratuity based on the period of service."

The respondents appealed to the Supreme Court. The appeal was heard by a Single Judge and the court held that the order of the Labour Tribunal cannot stand for the reason that the Tribunal had failed in compliance with section 31 (C) (1) to make all inquiries and to receive all such evidence as was necessary to make a proper order in regard to gratuities. The Supreme Court then went on to examine what gratuities should be ordered and held that although the Collective Agreement was not binding on the workers concerned in this appeal or on their Trade Union, the Ceylon Workers' Congress, yet, since the extension of the Collective Agreement to the tea industry made it incumbent on employers in that industry to observe its terms and conditions or terms and conditions not less favourable than those contained therein, the provisions of the Collective Agreement could be used as a fair yard stick in fixing gratuities for workers, generally in the tea industry. The Supreme Court further held,

(1) that the Collective Agreement did not preclude workmen who do not reach the retiring age from receiving payment of a gratuity on a proportionate basis after deducting the employer's contributions to the Provident Fund.

(2) that it is not open to labour tribunals to criticise the the terms and conditions contained in a Collective Agreement which has been extended by the Minister 'to bind all employers in a particular trade' under Section 10 (2) of the Industrial Disputes Act, and

(3) that before an order is made for the payment of gratuity in a case unless it is covered in the recognised terms and conditions contained in a Collective Agreement due regard must be paid, after necessary inquiry, to the following matters :—

(*a*) length of service of the workman,

(*b*) the quality of that service,

(c) the financial capacity of the employer,

(*d*) the impact of that order on the national economy and the trade, if that same order can be treated as a precedent.

The Supreme Court in the result set aside the order of the labour tribunal and ordered gratuity to be paid in the following sums, the figures being worked out to the nearest rupee :—

M. Selliah	...	... Rs. 311
P. Munuswamy	...	... Rs. 500
M. Kathiravelu	...	... Rs. 432
S. Annammah		Nil
K. Parwathy	...	... Rs. 47
K. Valliammal	...	... Rs. 5

These figures were reached upon an application to each case the following formula :— Gratuity $= \frac{X}{Y} \times Z$ less employer's E. P. F. contribution, where 'X' represents the number of years of service of the particular workman, 'Y' the maximum number of years that can be taken into account under the Collective Agreement, and 'Z' the maximum gratuity provided for under the Collective Agreement. Thus in the case of Selliah gratuity was worked out as follows :—

$$\left(\frac{27}{35} \times 1080\right) - 526.54 = 311.00$$

and in the case of Parwathy—

$$\left(\frac{15}{30} \times 900.00\right) - 403.35 = 47.00$$

The appellant obtained leave to appeal to the Court of Appeal prior to 1st January, 1974, (the date of the coming into operation of the Administration of Justice Law No. 44 of 1973). That appeal was transferred to this Court and was heard by the present Bench of five Judges.

Important questions as to the nature of the powers of a Labour Tribunal in dealing with an application under section 31B arise in this case. Both the Labour Tribunal and the Supreme Court approached the case on the basis of the decision of the Privy Council in the case of *United Engineering Workers' Union vs. Devanayagam* (69 N.L.R. 289). In this case the words "gratuity due" were interpreted to mean gratuity that ought, in the opinion of the Labour Tribunal hearing a particular application, to be paid by the particular employer to the particular workman, the Tribunal being guided only by its own view of what was just and equitable.

In *Devanayagam's* case the Board that heard the appeal to the Judicial Committee was divided 3 to 2. The majority view was that a Labour Tribunal was exercising the arbitral power of the State and not the judicial power.

Applications to Labour Tribunals are made under section 31B (1) of the Industrial Disputes Act. That section enacts as follows:

> "A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a labour tribunal for relief or redress in respect of any of the following matters :—
>
> (a) the termination of his services by his employer ;
>
> (b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits ;
>
> (c) such other matters relating to the terms of employment, or the conditions of labour, of a workman as may be prescribed."

The constitution of Labour Tribunals is provided for in section 31A (1) of the Act which provides that "there shall be established for the purposes of this Act such number of labour tribunals as the Minister shall determine. Each labour tribunal shall consist of one person." The Act contained no provisions as to the person or authority by whom such single member of each tribunal shall be appointed.

In the early stages, it was assumed that Presidents of Labour Tribunals (as the single member of the Tribunal came to be known) were 'public officers' within the meaning of the Constitution and Independence Orders in Council 1946 and 1947 (hereinafter referred to as the Soulbury Constitution); and they were accordingly appointed by the Public Service Commission. In the case of *Walker Sons & Co. Ltd. v. Fry* (68 N.L.R. 73) the Supreme Court held that the President of a Labour Tribunal is a Judicial Officer within the meaning of the Soulbury Constitution then in operation and that a person not appointed by the Judicial Service Commission had no power to exercise powers of the Labour Tribunal under Part IVA of the Industrial Disputes Act. In coming to this conclusion the Supreme Court took account of the fact *inter alia* that the Labour Tribunal's jurisdiction extended to the making of orders for the payment of gratuities which are 'due', i.e., legally due. Subsequently in the case of *United Engineering Workers Union vs. Devanayagam*, (69 N.L.R. 289), the Privy Council held that the President of a Labour Tribunal was not exercising the judicial power of the State, and was therefore not a Judicial Officer as held in *Fry's Case*. The Privy Council went on to hold in this case that a person appointed as a President of a Labour Tribunal by the Public Service Commission was validly appointed. In the course of its judgment the Privy Council orveruled three judgments of the Supreme Court, viz., *Richard Pieris & Co. Ltd. vs. Wijesiriwardena* (62 N.L.R. 233) *The Electric Equipment and Construction Co. vs. Cooray* (63 N.L.R. 164) and the decision in *Fry's case,* in each of which it had been held that the word 'due' which qualified the word 'gratuity' in section 31B (1) (b) of the Industrial Disputes Act meant 'legally due'.

The Privy Council said :

> "If s. 31B (1) (b) stood alone then the words 'are due' might be interpreted as meaning 'are legally due' but this sub-section must be read with ss. 31B (4) and 31C (1) and reading it with these sub-sections it is clear that the tribunal's decision is not to be whether a gratuity or other benefit is legally due but whether it is just and equitable that it should be paid. It is not whether it is legally due but whether it ought to be paid that the tribunal is required to decide."

These decisions of the Supreme Court and of the Privy Council in *Fry* and *Devanayagam* proceeded on the basis that the Soulbury Constitution contemplated only two classes of persons who

could hold paid offices under the Crown, viz., public officers, judicial officers. This dichotomy was supposed to be a necesary result of the principle of the separation of powers which was held by the Privy Council in the case of *Liyanage and Others vs. The Queen* (68 N.L.R. 265) to be an intergral part of the Soulbury Constitution. Consequently it was assumed that it was beyond the power of the legislature to mix administrative and judicial powers in the hands of one officer. In December, 1969, a case came up before the Privy Council in which the Judicial Committee had to consider whether the power given to the Commissioner of Inland Revenue under section 80 of the Income Tax Ordinance to order a person "unless that person proves to the satisfaction of the Commissioner that there was no fraud or wilful neglect, to pay as a penalty for making an incorrect return a sum not exceeding Rs. 2,000 and a sum equal to twice the tax on the amount of the excess", was unconstitutional. In this case, *Ranaweera vs. Wickremasinghe* (72 N.L.R. 553) the Privy Council held that the power given under section 80 to the Commissioner of Inland Revenue did not involve the exercise of the judicial power. In the course of their judgment they recognised the possibility of the enactment under the Soulbury Constitution of a valid piece of legislation creating administrative offices the holders of which may decide legal questions affecting rights of subjects.

Lord Donovan speaking for the Judicial Committee said :

> " Accordingly officers appointed by the Executive may find themselves hearing evidence, weighing it, testing it, and coming to a conclusion upon it : and all the time having to do their best to be fair and impartial. In a word they have to act judicially. Yet in ordinary everyday language they would not be called " Judges " or " members of the Judiciary" or " holders of judicial office ". What is it then which distinguishes them from those who do hold and exercise such an office, seeing that the nature of the task which these Executive Officers have to perform and the qualities they must bring to bear upon it correspond on such occasions so closely, if not exactly, with the exercise of his office by a judge ? The answer which has generally been given is that where the resolution of disputes by some Executive Officer can be properly regarded as being part of the execution of some wider administrative function entrusted to him, then he should be regarded as still acting in an administrative capacity, and not as performing some different and judicial function. "

Close upon the heels of this case came another, viz., *Ranaweera vs. Ramachandran* (72 N.L.R. 562) in which the Judicial Committee had to consider the validity of appointments to the Income Tax Board of Review which were made by the Minister, and not by the Judicial Service Commission or the Public Service Commission. It was contended in this case that the members of the Income Tax Board of Review could not exercise the power of hearing and determining in accordance with law a taxpayer's appeal against an assessment because they had not been appointed by the Judicial Service Commission. Alternatively it was submitted that they were at least " public officers " who should have been appointed by the Public Service Commission. Their Lordships of the Privy Council found a solution to this dilemma in the theory that all persons holding paid offices under the Crown need not necessarily be public or judicial officers. They further held that there could be other employees of the Crown who not being *servants* of the Crown, would not fall within the definition of the term ' public officer ' contained in the Soulbury Constitution. In coming to this conclusion Their Lordships were greatly influenced by the fact that though their functions involved deciding disputed questions of fact and interpreting and applying the law relating to Income Tax, the members of the Board of Review were more like independent arbitrators which the legislature has thought it right to appoint as an administrative check in favour of the tax payer and as an additional assurance that his liability to tax will be correctly ascertained ; and since that function cannot be performed unless they remain independent and impartial, they cannot be regarded as *servants* of the Crown.

In these later cases we see a considerable retreat from the strict theory of separation of powers. The courts gradually recognised that under the Soulbury Constitution there could be legislation providing for the appointment of officers performing both judicial and non judicial functions ; that where the solution of disputes by some executive officer in accordance with law can properly be regarded as being part of the execution of some wider administrative function, then he should not be regarded as exercising the judicial power of the State.

The decision in *Devanayagam's* case was reached upon the supposition that the legislature could not have intended Labour Tribunals to be recepients of any judicial power, i.e., power of deciding upon the existing rights. This was one of the reasons

for rejecting the ordinary meaning of the word 'due' in section 31B (1) (*b*) and for regarding the powers of Presidents of Labour Tribunals as being exclusively non judicial.

In view of the decisions in the two *Ranaweera* cases which recognised that under the Soulbury Constitution the power of deciding legal questions could validly be exercised in certain circumstances by officers not appointed by the Judicial Service Commission, it seems to me that the dicta in *Devanayagam's* case call for scrutiny in the light of the Privy Council's subsequent approach to public and other non-judicial officers exercising judicial power or the power of making decisions impartially and independently. This is a task that can be undertaken today without any fears of repercussions on the validity of appointments of Presidents of Labour Tribunals in recent years ; for since the adoption of the Republican Constitution Presidents of Labour Tribunals have been unmistakably placed under that chapter of the Constitution which deals with "Administrationof Justice" and for purposes of appointments, dismissals and disciplinary control they have been placed in the same category as District Judges and Magistrates of the ordinary subordinate courts of the country.

In this situation we can make a more realistic approach to the true legislative intention in enacting Part IVA of the Industrial Disputes Act without any distortions in the language of Parliament to suit a theory of separation of powers. The Act already contained provisions for the settlement of Industrial disputes when Part IVA was enacted. Settlement of disputes was ultimately achieved by an award of an arbitrator or an Industrial Court. When Part IVA was introduced there was a slight departure from that objective. An examination of section 31B reveals that it provided not for State intervention in an industrial dispute but for a particular workman to agitate his own cause before a tribunal either by making application himself or through a Trade Union, for an order on the employer. This application was for 'relief' or 'redress' in certain given situations set out in paragraph (*a*), (*b*) and (*c*) of section 31B (1). As Lord Dilhorne himself said in *Devanayagams case* (69 N. L. R. 289 at 299)—

> "S. 31B(1) is the gateway through which a workman must pass to get his application before a tribunal ....."

Under paragraph (*a*) of 31B (1) the workman must be able to satisfy the tribunal that his services were terminated by the employer. A workman who has himself resigned cannot come

in under paragraph (*a*). What is the relief or redress that an applicant under sub-paragraph (*a*) can claim? This must necessarily be related to the powers of the Labour Tribunal. In respect of termination of services by the employer, a Labour Tribunal can order reinstatement or compensation; and the tribunal may also make an ancillary order for the payment of any unpaid wages. It seems to me perfectly obvious that an order for reinstatement or compensation can only be ordered if the employer has been guilty of improper conduct in terminating the servives of the workman. One cannot conceive of the legislature having intended that the employer should be ordered to reinstate or pay compensation where his conduct has no element of impropriety. I use the words 'improper' and 'impropriety' in the sense of unlawful or contrary to fair standards that ought to guide an employer. Thus a Labour Tribunal acting under paragraph (*a*) of section 31B (1) may hold a termination to be unlawful or unjustifiable or lawful but yet unjustifiable and so order reinstatement or compensation. The word used in the statute is 'compensation' and not 'damages'; this is because the term used had to serve both the case of unlawful termination and unjustifiable termination.

I may now turn to paragraph (*b*) of section 31B (1). To take first the expression 'any gratuity due', it will be evident from what has been said before that this question can now be approached free from the shackles of the theory of strict separation of powers for there is no need to assume that the legislature would not have entrusted labour tribunals with the task of deciding legal questions incidental to or as a necessary prerequisite to granting the kinds of reliefs or redress for which Labour Tribunals were primarily set up.

It seems to me that it is unnecessary to withhold from the word 'due' its ordinary meaning when used in a statute under the supposition that the Constitution prohibited the intermingling of judicial and non-judicial powers in the same officer or on the basis that the President of a Labour Tribunal dealing with an application under ection 31B (1) (*b*) is exercising arbitral power.

It may be advantageous, at this stage, to sketch out briefly the history of Labour Disputes Legislation in this country with particular reference to gratuities. The first legislative measure was the Industrial Disputes (Conciliation) Ordinance, No. 3 of 1931. This law was enacted for the investigation and settlement of Industrial disputes by means of conciliation. The only outcome of proceedings under that law was a settlement binding on

the parties but which could nevertheless be repudiated within a prescribed period. During the period of World War 2 there was promulgated under the Defence Regulation, the Essential Services (Avoidance of Strikes and Lock-outs). Order 1942. This applied only to the Essential Services in which strikes and lock-outs were prohibited ; there was provision for compulsory arbitration in regard to disputes in such services by Special Tribunals. Awards made by these Tribunals were binding not only on the parties concerned but also on all employers in the same or similar industries. With the cessation of hostilities in 1945 most of the regulations relating to essential services were rescinded and the only surviving statutory provision for the resolution of Industrial disputes was the Industrial Disputes (Conciliation) Ordinance of 1931. In the face of rapid social and economic changes the provisions of this law were found to be inadequate, and it was in these circumstances that the Industrial Disputes Act No. 44 of 1950 came to be enacted. This law provided for Collective Agreements, for the settlement of industrial disputes by conciliation and also for compulsory settlement of such disputes by abitrators and Industrial Courts. In 1956 by an amendment to the 1950 Act, provision was made for the settlement of industrial disputes by referring such disputes, if the parties concerned agreed for settlement by arbitration to an arbitrator jointly nominated by the parties or on failure of such nomination, to the District Judge of the District. In 1957 there came certain radical amendments to the Industrial Disputes Act of 1950. These amendments are contained in the Industrial Disputes (Amendment) Act No. 62 of 1957. This law sought to improve some of the existing provisions for the resolution of industrial disputes and also introduced some new features, the most important being the establishment of Labour Tribunals, designed to give relief or redress upon an application made by an individual workman.

This however, is not the first time that the legislature provided for Labour Tribunals. In the Motor Transport Act No. 48 of 1957 which was enacted some months before the Industrial Disputes (Amendment) Act No. 62 of 1957 and which provided for the nationalization of the omnibus transport services in the Island, provision was made for the protection of the interests of the employees of former operators of regular omnibus services. These are contained in Section 40 of the Motor Transport Act of 1957. This Section provided for the payment by former operators to their employees of certain terminal benefits.

Section 40 (1) :

"The following provisions shall apply to a person (hereafter in this section referred to as the "qualified employee") who was in the employ of the holder of a stage carriage permit for a regular omnibus service on such work as was connected with that omnibus service, and who, after April 12, 1956, has ceased or ceases to be in the employ of such holder, whether of his own accord or otherwise :—

(*a*) .....

(*b*) where the qualified employee had been employed by such holder for a continuous period of not less than twelve months immediately before the date on which the qualified employee has ceased or ceases to be in the employ of such holder, such holder shall,—

(i) if the qualified employee was remunerated at a monthly rate, pay to the Ceylon Transport Board *as a gratuity to him* a sum calculated at the rate of one half of a month's salary in respect of each complete year of employment under such holder, and

(ii) if the qualified employee was remunerated at a daily rate, *pay to* the Ceylon Transport Board *as a gratuity to him* a sum calculated at the rate of fifteen days' wages in respect of each complete year of employment under such holder,

and the salary or wages referred to in the preceding sub-paragraph (i) or (ii) shall be the salary or wages payable by such holder to the qualified employee immediately before the qualified employee ceased to be in the employ of such holder."

This was followed by further provisions in relation to gratuities which I do not think it necessary to reproduce in full. Then comes Section 41 which reads as follows :—

Section 41 (1) :

"The Minister may, in consultation with the Minister to whom the subject of Labour is for the time being assigned, constitute a Labour Tribunal or Labour Tribunals for the purpose of Section 42. Each such Tribunal shall consist of a fit and proper person".

Section 42 then went on to provide for the reference of any dispute as to the gratuity payable under section 40 to a Labour Tribunal constituted under section 41.

It will be seen that the provisions of the Motor Transport Act provided for the constitution of certain Labour Tribunals with limited jurisdiction. One of the purposes for which these Labour Tribunals were constituted was to determine whether a gratuity was due from the employer under the statutory provisions contained in that Act. These Labour Tribunals had to consider not what gratuity ought to be but what gratuity was legally due. In the case of the *Commissioner of Inland Revenue vs. South Western Omnibus Co.* (68 N. L. R. 339) the question arose whether the sums of money which stage carriage permit holders were required to pay in respect of some of their categorised employees in terms of Section 40 of the Motor Transport Act No. 48 of 1957, were "outgoings and expenses incurred in the production income" within the meaning of Section 11 (1) of the Income Tax Ordinance. Justice T. S. Fernando made the following observation in that case :—

> "Compensation was payable under the 1957 Act in respect of property requisitioned or acquired for the Ceylon Transport Board, but section 40 of that Act as amended by Act No. 22 of 1961 made provision making it obligatory on holders of stage carriage permits to pay in respect of some of their categorised employees, who will hereinafter be referred to as qualified employees, certain payments of money. The respondent became liable under this section to pay in respect of qualified employees sums aggregating to Rs. 812,500 ..... As he (Counsel) put it, as these sums were paid by way of gratuity, they were paid out of the bounty of the respondent's heart, and were not disbursements or expenses expended for producing the respondent's income. The expression "gratuity" as one ordinarily understands it, denotes a payment made voluntarily, its extent depending naturally as much on the inclination of the giver as on the nature of the services that may have been rendered by the recipient. In the context in which this expression occurs in section 40 it can hardly be contended unless one adopts a cynical approach, that it carries with it its ordinary meaning. On the contrary, notwithstanding, the employment of the word "gratuity", so far as the holders of stage carriage permits were concerned, these section 40 "gratuities" were none other than forced payments."

It is thus evident that the legislature, at or about the time it enacted the Industrial Disputes Amendment Act of 1957, was using the expression "gratuity due" or "payable" in the sense of gratuity which had, *contrary to its ordinary meaning*, become a legal obligation of the employer. Provisions similar to Sections 40, 41 and 42 of the Motor Transport Act were repeated in the

Port Cargo Corporation Act No. 13 of 1958 (see Section 55 to 60), the Insurance Corporation Act No. 2 of 1961 (see Section 31 and the Ceylon Petroleum Corporation Act No. 28 of 1961).

There was another statute No. 47 of 1961 which also contemplated the placing of the obligation to pay gratuity on a legal basis (see Section 2 of the Port of Colombo Labour Reserve (gratuities) Act, No. 47 of 1961). This Act makes obligatory payment of certain gratuities and prescribes the manner of their computation including to what extent the E. P. F. contributions by the employer shall be taken into account.

A further illustration of gratuities provided for by law is to be found in the Ceylon State Mortgage Bank Ordinance (Cap. 398) originally enacted in 1931 and subsequently amended (in the relevant sections by Ordinance 11 of 1944 and Act No. 50 of 1949). Section 94 of Cap. 398 provides for the Minister making rules *inter alia* "for regulating the institution and management of pensions and provident funds for and the payment of gratuities to, the officers and servants of the Bank."

Thus one sees that although the word 'gratuity' ordinarily denotes a payment made voluntarily and depending on the inclination of the giver and the nature of the services rendered, gratuities have been made an obligation of the employer in certain areas by statutory provisions. There are also other ways in which gratuities may become an obligation of the employer and or be regarded as 'due' from him. The Industrial Disputes Act itself contemplates collective agreements, settlements of industrial disputes by conciliation, settlements by arbitration and settlements by adjudication by Industrial Courts or Labour Tribunals. In each of these cases the collective agreement settlement or the award introduced into existing contracts of service new terms and conditions which become obligations of the employer. If the agreement or settlement or award contains provision for the payment of gratuities, a situation would be created in which it can truly be said that a gratuity is "due" from the employer. There can also be cases in which a particular employer has announced a scheme of gratuity while at the same time declaring that the workmen have no absolute right to the payment of the gratuities in accordance with such scheme. The Minutes on Pensions for instance contains provisions for retiring gratuities. (I am aware that neither the Government nor its employees come under the Industrial Disputes Act, and I refer to the gratuities scheme under the Minutes on Pensions because it is the only one that is available to me to illustrate my point.) The Minutes on Pensions is prefaced by these words— "Public servants have no absolute right to any pension or

allowance under these rules". The result is that public servants who are not paid a pension or gratuity in terms of the Minutes on Pensions cannot have recourse to the courts. However the minutes create a duty on the part of the Government, a duty however which is one of imperfect obligation. As Salmond says: "A perfect right is one which corresponds to a perfect duty; and a perfect duty is one which is not merely recognised by law, but enforced. In all fully developed systems, however, there are rights and duties which, though undoubtedly recognised by the law, yet fall short of this typical and perfect form". Thus though a gratuity may be unenforceable in the regular courts of law, the duty to pay a gratuity may exist where such duty arises by reason of the existence of a scheme of gratuity payment announced and put into practice by an employer. The duty to pay gratuity may also arise by reason of the existence of a fixed and ascertainable practice in a particular sphere of employment. These instances of gratuities, though perhaps unenforceable in the Ordinary Courts of Law may be enforced through Labour Tribunals which are not part of the regular judicial structure of the country.

For the reasons set out above I would hold that the words 'any gratuity due' means 'any gratuity legally due'.

Proceeding from there, I would read section 31B (1) (*b*) in this way:

A workman.....may apply to a Labour Tribunal

(1) for relief or redress—

(*a*) in respect of the question whether a gratuity is legally due to him from his employer upon termination of his services and

(*b*) in respect of the amount of the gratuity legally due.

Now, it seems to me that in interpreting a provision of law one must give ear not only to what the legislature says but also to what it does not say. The section does not say that relief or redress may be applied for in relation to the question of a gratuity; nor does it say that an application may be made for an order on the employer to pay gratuity due. *What the legislature does is to make the relief or redress depend on the answer to a question.* Where there is an application for an order for relief or redress under section 31B (1) (*b*), the prime duty of the Labour Tribunal is to find an answer to the question whether any gratuity is legally due to the workman from his employer upon termination of his services. The answer to this question would be in the affirmative or in the negative.

If the answer is in the affirmative, the Labour Tribunal must then go on to consider the question whether it is a case for granting relief or redress in respect of the amount of such gratuity, i.e., in respect of the gratuity legally due. In view of the provisions of sub-section (4) of section 31B which enable a Labour Tribunal to grant relief or redress notwithstanding the terms contained in the contract of service, where a gratuity is found to be legally due under the terms of the contract or under a settled scheme which is being acted upon by the employer, the Tribunal would be free, if it considered it just and equitable to do so, itself to compute the gratuity payable without applying the contractual terms relating to its assessment. At the same time I should like to observe that Labour Tribunals should act reasonably in making their orders. There is nothing in sub-section (5) of section 31B that relieves them of that duty. An individual application under section 31B is not an occasion for revising schemes which have been accepted and are being operated on by the employer without any industrial dispute arising thereon. That kind of operation should be left to be dealt with by Collective Agreements and by awards which seek settlement of Industrial Disputes. It seems to me that a Labour Tribunal in dealing with individual applications under section 31B (1) (*b*) would be acting unreasonably if it seeks to depart from contractual or settled schemes of gratuity payments without compelling reasons to do so. To act otherwise would result in Labour Tribunals creating or promoting Industrial Disputes where none existed.

Where, however, a gratuity is found legally due by reason of any statutory provision or by reason of a term which has become part of the contract by reason of a statutory provision (such as for instance by reason of a Collective Agreement or an award under the Industrial Disputes Act), the Labour Tribunal will have no power in determining the amount of the gratuity to depart from the statutory rules or from the rules for computing the gratuity which have by law been deemed to be part of the terms of the contract of service. I do not think that a Labour Tribunal exercising powers under section 31B has any power to vary, disregard or ignore or depart from those terms of a contract of service which are deemed to be part of the contract of service by the operation of other parts of the Industrial Disputes Act itself or indeed by the operation of any other law.

If the answer to the question whether any gratuity is legally due is in the negative, then the power to make an order which is just and equitable would mean that the Labour Tribunal has to consider the question whether it is just and equitable in the

particular case before it to grant relief by ordering payment of a gratuity although there is nothing legally due as gratuity ; if the Labour Tribunal does decide to order payment of a gratuity it would only be granting relief against a situation where there is no legal obligation to pay a gratuity. The power to grant relief under section 31B (1) (*b*) is not confined to cases where a gratuity is legally due and remains unpaid, or where the amount legally due is considered to have been contractually fixed at a flagrantly low amount due to the inferior bargaining position of the workman ; the power to grant relief will also extend to cases where there is nothing legally due as gratuity but it would be unfair or unjustifiable conduct for the employer to refuse to pay a gratuity. In this last situation the financial position of the employer assumes added importance for it would only be natural for him to arrange his affairs and finances in the context only of his legal obligations and liabilities.

It would be appropriate at this stage to consider the meaning of the term " gratuity ". In *Independent Industrial and Commercial Employees' Union v. C. W. E.* (74 N.L.R. 344) Justice Alles said :—

> " The payment of a gratuity under section 31B (1) (*b*) is not dependent on the existence of a gratuity scheme but is a fundamental right which every employee, whose services have been terminated in whatever manner or who has voluntarily retired, is entitled to claim from his employer. "

I find it difficult to agree with this statement that a gratuity is a fundamental right. Gratuity as contemplated in section 31B (1) (*b*) is no more fundamental or legal right than reinstatement or other relief that a Labour Tribunal may order on the facts of a particular case.

It has been submitted by counsel for the respondents that the term gratuity as used in section 31B (1) (*b*) refers only to retiral gratuities. It thus becomes necessary to consider whether a Labour Tribunal has power to order payment of a gratuity under section 31B where there is termination of services of the workman at *any* stage of his employment irrespective of whether the termination is effected by the employer or by the workman or whether that power is confined to situations in which the termination is brought about by retirement or similar cause. In India the Courts in framing gratuity schemes for the future, very often provide for gratuity schemes containing only superannuation benefits. As stated by the Supreme Court of

India in *Indian Hume Pipe Co. Ltd. v. Its Workmen* (1969 (2) ILJ 830) :—

> "..... the true character of 'gratuity' as distinguished from 'retrenchment compensation' (is that) gratuity is a kind of retirement benefit like the provident fund or pension.....Gratuity paid to workmen is intended to help them after retirement whether the retirement is the result of the rules of superannuation or physical disability. The general principle underlying such gratuity schemes is that by their length of service workmen are entitled to claim a certain amount as a retiral benefit."

On the other hand one finds expressions of opinion in India which look upon gratuity as a payment for long and faithful service not necessarily limited to service up to the retiring age:—

> "It is now well settled that gratuity is a reward for good, efficient and faithful service rendered for a fairly substantial period and that it is not paid to the employee gratuitiously or merely as a matter of boon but for long and meritorious service..... Since the justification for gratuity is a long and meritorious service, schemes of gratuity ..... have always provided some qualifying period." *Hydro (Engineers) Ltd. v. Their Workmen* (1969 (1) ILJ 713).

In which sense is the term 'gratuity' used in section 31 B of our Industrial Disputes Act ? It is to be noted that while section 31B (1) (*a*) speaks of "termination of his services by his employer", section 31B (1) (*b*) speaks of "on the termination of his services". Mr. Jayawardena in support of his contention that gratuity under section 31B means only retiring gratuity submits that difference in the two phrases is significant. There is much to be said for the view that termination of the services in section 31B (1) (*b*) is intended by the legislature to refer to that kind of termination which is not brought about by the employer's act of terminating the employment or by the workman's act of tendering his resignation to the employer. I have already adverted to the very anomalous situation that has developed as a result of Labour Tribunals ordering the payment of gratuity irrespective of the length of service. Some Labour Tribunals grant gratuity only as retiral benefit, others grant it for any period however long or short ; still others require a minimum period of service before they will regard it as sufficient to qualify for gratuity. Now this kind of approach can only be incorporated in a statutory or other agreed scheme, for if one Labour Tribunal grants gratuity for any period of service, it seems inequitable for another to require, say, 5 years minimum service. Again if a workman with 5 years service qualifies for an order of payment

of gratuity, it seems inequitable that a workman with 5 years less one day should not qualify. The result of giving to the word 'gratuity' a wide interpretation is to make it equivalent merely to an order for payment of money upon termination of service at the absolute discretion of the particular Labour Tribunal; it is to drain the word 'gratuity' of its inherent implications and to leave employers and employees in utter confusion as to the circumstances in which a gratuity is payable. There are I understand 16 Presidents of Labour Tribunals each one having jurisdiction to deal with any application coming from any part of the Island. The tendency has been, upon application of the approach in *Devanayagam's* case not to create uniformity and to develop a settled principle of industrial law, but to create a jungle of single instances.

The question then arises whether the ligislature could have intended such a situation. It seems to me that what was contemplated by the legislature by the term gratuity was a payment upon his services coming to and end by reason of causes other than termination of service by the employer or by the employee. i.e., by reason of retirement under rules of superannuation, or in the absence of such rules upon reaching the age which renders the workman too old to continue in service or by reason of illness. In such cases the length of service becomes irrelevant in considering the question whether the gratuity should be ordered or not, but will be relevant only to the question of deciding the amount of the gratuity to be ordered.

It would be useful to consider the use of the word 'gratuity' in other parts of the Act. The word occurred for the first time in section 33 (1) (c) of the Act. That section reads as follows :—

> "Without prejudice to the generality of the matters that may be specified in any award under this Act (or in any order of a labour tribunal) such award or such order may contain decisions—
>
> (*a*) .....
>
> (*b*) .....
>
> (c) as to the extent to which the period of absence from duty of any workman, whom the arbitrator, industrial court (or labour tribunal) has decided should be reinstated, shall be taken into account or disregarded for the purposes of his rights to any pension, gratuity or retiring allowance or to any benefit under any provident scheme."

(The words in brackets did not occur in the text of the Act as originally enacted but came in with the establishment of Labour Tribunals under the Industrial Disputes Amendment Act, No. 62 of 1957). The phrase " to any pension, gratuity or retiring allowance or to any benefit under any provident scheme " is very significant. The arrangement of the words is indicative that the phrase " pension gratuity or retiring allowance " is one group of words and " benefit under any provident scheme " is another ; for otherwise the phrasing would have been " to any pension, gratuity, retiring allowance or benefit under any provident scheme ". In a provident scheme there are usually found provision for benefits which are not confined to the time of retirement. On the other hand the two expressions that stand on either side of the word ' gratuity ', i.e., " pension " and " retiring allowance ", are, in the one case normally and in the other case obviously intended to refer to retiral benefits. I am inclined to think that the word ' gratuity ' having regard to the company it keeps is also here used in the sense of a retiring gratuity.

Having first used the word in this sense, I think the word when it occurs elsewhere must be given the same meaning. In the case of *Independent Industrial & Commercial Employees' Union v.* C. W. E. (74 N.L.R. 344) Justice Alles said :

> " The word ' gratuity ' is used in common parlance as a retirement benefit available for long and meritorious service rendered by the employee. A gratuity has now become a legitimate claim, which a workman can make ... and is intended to help a workman after his retirement, whether the retirement is due to the rules of superannuation or physical disability or otherwise. It is a benefit which an employee who has worked faithfully and loyally for his employer can look forward to in the evening of his life and which a generous and conscientious employer considers it just and equitable to offer for loyal and meritorious service. Many model employers have gratuity schemes. A gratuity differs from a Provident Fund inasmuch as it is a benefit provided entirely by the employer, whereas a provident fund is one to which the employee himself contributes a part of his wages..... Every employer who employs permanent employees for a considerable period must know that at the termination of the employee's services provision should be made for the retiring employees. He should therefore make provision for the payment of a retiring benefit in time. "

I agree with this part of Justice Alles's judgment where he takes the view a gratuity is a retiring benefit. However, in the case of *Ambalamana Tea Estates Lt. v. Ceylon Estates Staffs' Union* (76 N.L.R. 457) the then Chief Justice H. N. G. Fernando took the view that as there is no reference to the circumstance whether or not the termination is due to the retirement of the workman from his employment, the term gratuity is not restricted to retiring gratuities; it seems to me that the Chief Justice failed to take note of the fact that the word 'gratuity ' itself is capable of bearing the meaning of a retiring allowance and the sense in which it is used in other parts of the Act. With respects I find myself in disagreement with the view of the learned Chief Justice.

Our attention has not been drawn to any case where a gratuity scheme adopted by any employer or incorporated in a collective agreement or industrial award which contains provision for payment of gratuities irrespective of whether the termination of employment came about by dismissal, resignation or retirement and, in cases of dismissal and resignation, unrelated to a minimum period of service. The very collective agreement which was marked in evidence in this case provides only for retiring gratuities, and there is no provision for payment by way of gratuities if the workmen covered by collective agreement are dismissed or resign at an age earlier than the retirement age fixed by the Agreement.

I would for these reasons hold that in section 31B (1) (*b*) the legislature had in contemplation only retiring gratuities.

The question then arises as to the position of those who resign or are dismissed.

In regard to those who resign before retirement age there can be no question of their being *granted orders for payment of gratuity* under section 31B (1) (*b*) for that is not the kind of *ex gratia* payment that is contemplated by the expression ' gratuity ' in that section. This statement however is subject to the exception that the resignation may, having regard to the circumstances in which it is made, be regarded as a voluntary *retirement* carrying with it eligibility for a retiral gratuity. I shall return to this exception later in the judgment.

In regard to whose services are terminated by the employer before the retirement age, they too would not qualify for an order of payment of gratuity *as such* under 31B (1) (*b*). But in *dealing with an application under* 31B (1) (*a*) for relief or redress in respect of the termination of a workman's employment by his employer, a Labour Tribunal may in making any order

for compensation in respect of the termination of employment by the employer take into account the possible limitation of the ultimate retiring gratuity which it might have been possible for the workman to obtain but for the untimely termination of his services by his employer. To put it in another way the workman can be compensated for any injurious affection to his prospective retiring gratuity by the act of the employer unlawfully or unjustly terminating his services prematurely. Such compensation as evaluated by the Tribunal would be in addition to any compensation of the kind that is ordinarily ordered in respect of an unlawful or injust termination. As in the case of voluntary resignation, a terminaiton of employment by the employer, when not based on cause may, having regard to all the circumstances which brought about the termination, be treated as a compulsory retirement. Circumstances which permit a resignation by a workman or a termination by the employer being treated as a voluntary or a compulsory retirement, I shall hereafter in the judgment refer to as a '*retiral situation*'.

There are a number of situations in which it is accepted practice to grant retirement benefits notwithstanding that there is a termination of services prior to a predetermined age of retirement. Sickness or physical infirmity which prevents the workman discharging his duties is one. A material alteration in the conditions of service is another. In government service constitutional changes of a radical nature have been regarded as an appropriate occasion for the grant of the right of retirement ; so too has abolition of office and a change in the official language. These may all be legitimately regarded as 'retiral situations'. Questions can for instance arise whether retrenchment, transfer or devolution or closure of the business or the undertaking can be treated as 'retiral situations'. These questions will have to be decided as and when they arise in the context of the facts of each particular case.

To turn now to the facts of the particular case before us : The six workmen were all persons who resigned prior to reaching retirement age. There was no gratuity legally due to them under any statute or by reason of any award, collective agreement contract or established custom. Having regard to the sense in which the word 'gratuity' is used in section 31B (1) (*b*), i.e., in the sense of 'retiring allowance' the Labour Tribunal would have no power to make order for payment of a gratuity to these six workmen unless the circumstances in which they resigned can be equated to a 'retiral situation. Could it be said that any reasonable employer ought to grant retirement terms to every workman of Indian origin desiring to opt for Indian Citizenship and return to India irrespective of the age of the particular

workman ? I think that the bare fact of resignation in order to opt for Indian Citizenship and to proceed to India is insufficient to treat these cases as resignations in a retiral situation. At the same time, the question arises whether there are present in each case any additional facts which might warrant resignations being treated as resignations in a retiral situation and since this question has not been examined by the Labour Tribunal or by the Supreme Court, I think the proper order which I should make in this case is to set aside both the judgment of the Supreme Court and the order of the Labour Tribunal, and send the case back to the Labour Tribunal for an inquiry into the question whether in each one of these cases the resignation could be regarded as having been made in a retiral situation.

My brother, Samerawickrame, J. who has prepared a separate judgment has himself come to the conclusion, though for different reasons, that the judgment of Rajaratnam, J. as well as the order of the Labour Tribunal should be set aside. He has also drawn my attention to the Emergency (Payment of Gratuities and other Monetary Benefits to Indian Repatriates) Regulation No. 3 of 1975 contained in Government Gazette (Extraordinary) No. 185/59 dated 17.10.1975. In setting aside the judgment of the Supreme Court and the order of the Labour Tribunal, I would remit the case back to the Labour Tribunal. The workmen or the appellant Union on their behalf may obtain gratuities under the Emergency regulations in accordance with the procedure set out therein. If gratuity under the regulations is not available to them, or if for any other reason an order of the Tribunal is desired by them, an application for an order may be made to the Labour Tribunal by motion ; and on such application being made, the Tribunal is authorised and directed forthwith to hold an inquiry into the question as to whether each of the resignations of the workmen involved in this case is or is not a resignation in a retiral situation ; if, in any particular case, the Tribunal concludes that the resignation was made in a retiral situation, the Tribunal will proceed to compute the amount of gratuity which each of such workmen would have been entitled to in accordance with the rates set out in the Emergency Regulations referred to earlier, and to make suitable order for payment of such amounts.

Before concluding this judgment I would like to make some observations of a general nature in regard to the powers of Labour Tribunals.

When an application comes up before a Labour Tribunal under Section 31 of the Industrial Disputes Act, the Labour Tribunal is not called upon to work out a scheme applicable to all workmen belonging to the class to which the applicant belongs. In such cases a Labour Tribunal cannot do better than to guide himself by reference to existing and settled schemes. I accordingly agree with Justice Rajaratnam in condemning the rejection by the President of the Labour Tribunal of the Collective Agreement as an unsafe guide. As indicated in an earlier part of this judgment, if an application for a gratuity was made under Section 31B (1) to a Labour Tribunal by a workman bound by that Agreement, no Labour Tribunal would have been free to disregard the provisions of that Agreement. I can see no reason why the position should be different in the workman applying under Section 31B (1) is a workman in respect of whom the employer is obliged by law only to " observe terms and conditions which are not less favourable " to the workman than those contained in the Collective Agreement. It would indeed be extremely anomalous and productive of disruption for the existing Collective Agreements if workmen who are in the position of those with whom we are concerned in this case, were to be placed in a more advantageous position, than those who are bound by that Agreement.

I further agree with Justice Rajaratnam that gratuity and provident fund benefits cannot be treated as cumulative. Were it otherwise, the Labour Tribunal would be entitled to order both a pension and a gratuity, in addition to any provident fund benefits that the workmen may be entitled to, for the reason that in Section 31 B (1) (*b*) the words used are 'any gratuity *or other benefits.*'

I am also in agreement with Justice Rajaratnam's statement that among the matters to be taken into account in ordering a gratuity the Labour Tribunal must have regard to the following matters—

(*a*) length of service of the workman,

(*b*) the quality of that service,

(*c*) the financial capacity of the employer.

In regard to the point made by Rajaratnam, J., that a Labour Tribunal should also have regard to the impact of any order made by him on the national economy, I agree with the comments made by my brother, Samerawickrame, J. in regard thereto in his separate judgment.

I have already indicated that this appeal must be allowed, that the judgment of the Supreme Court and the order of the Labour Tribunal must be set aside, and the case remitted back to the Labour Tribunal with the directions indicated earlier.

There will be no order as to costs.

Udalagama, J. I agree.

Tittawella, J. I agree.

SAMERAWICKRAME, J.

The appellant Union made an application to the Labour Tribunal on behalf of six workmen for payment of gratuity. The workmen were employed on Invery Group, Dickoya and terminated their service by notice as from 16.3.70 to leave Ceylon under the Indo-Ceylon Agreement Implementation Act. There was no provision for payment of gratuity to them either in their terms of employment or any contract or statute.

Section 31. B. 1. of the Industrial Disputes Act reads :—

> " A workman or a Trade Union on behalf of a workman who is a member of that Union may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters :
>
> (*a*) the termination of his services by his employer,
>
> (*b*) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits.
>
> (*c*) such other matters relating to the terms of employment or the conditions of labour as may be prescribed. "

Sections 31. B. (4) and 31. C. (1) set out what the Tribunal may do in respect of an application made to it and read :—

> " 31. B. (4).—Any relief or redress may be granted by a Labour Tribunal to a workman upon an application made under sub-section (1) notwithstanding anything to the contrary in any contract of service between him and his employer,
>
> **and**
>
> 31. C. (1).—It shall be the duty of the tribunal to make all such inquirines into that application and hear all such evidence as the tribunal may consider necessary and thereafter make such order as appears to the tribunal just and equitable ".

Among the objects for which an application may be made under Section 31. B. (1) is relief or redress in respect of the question whether any gratuity is due and the amount of such gratuity. Though the provision is not happily worded, it is clear that the first matter raised on such an application is that a gratuity is due to the workman.

The word "due" appears to mean owing or payable as a debt or obligation and in the context obligation would include a moral obligation, for in deciding any matter a tribunal may disregard anything to the contrary in the contract of service and may make such order as appears to it just and equitable. *In United Engineering Workers Union v. Devanayagam*, 69 N. L.R. 298, the Privy Council considered the following provision in Section 31 B (1) (*b*) :—

> "the question whether any gratuity or other benefits are due ....."

and held that the words "are due" do not mean "are legally due". In delivering the majority judgment, Viscount Dilhorne said :—

> "The question is one for the tribunal to determine and, in the light of Section 31. C. (1) to decide on the basis of what appears to it just and equitable. If Section 31 B. (1) (*b*) stood alone then the words 'are due' might be interpreted as meaning 'are legally due' but this sub-section must be read with Sections 31 (B). (4) and 31 C. (1) and reading it with these sub-sections it is clear that the tribunal's decision is not to be whether a gratuity or other benefit is legally due but whether it is just and equitable that it should be paid. It is not whether it is legally due but whether it ought to be paid that the tribunal is required to decide."

He was not dealing with a case in which an application had been made under Section 31 B (1) (*b*) but was considering whether that provision properly construed lent any support to the view that on an application a Labour Tribunal has to determine legal rights.

While I am of the view, with respect, that the statement of Viscount Dilhorne is correct and is sufficient for a consideration of the matter with which he was dealing, it appears to me necessary in the present context to emphasise that the question is not whether payment of gratuity to the workman is just and equitable, simpliciter, but whether payment of gratuity to the workman is a just and equitable obligation resting on the employer. This

aspect of the matter is succintly put in the last sentence of Lord Dilhorne's statement—" it is not whether it is legally due but whether it ought to be paid that the tribunal is required to decide. "

The primary meaning of gratuity is a gift made in recognition of services rendered by the recipient. As between master and servant, it was regarded as a gift made by the master, at his pleasure, which the servant had no right to claim. In the sphere of industrial relations, a gratuity is no longer regarded as a payment made gratuitously or as a matter of boon, but as a reward for long and meritorious service. It may be in a proper case be claimed by an employee and can give rise to an industrial dispute. This is exemplified by the fact that Section 33 of the Industrial Disputes Act provides for an order for payment of gratuity.

There is often not such excess or gap between the monetary receipts of an employee and the amounts spent by him on his day to day expenses as to permit him to put by anything substantial for the time when he is unable to work. A gratuity is paid to an employee to help him, after retirement, to maintain a fairly comfortable existence. It is a kind of retiral benefit like the provident fund or pension. The expectation of a gratuity makes an employee contented and secure ; as he grows old he knows that some compensation for the gradual deterioration of his wage earning capacity is being built up. It is also an inducement for him to render loyal and meritorious service and to remain in, and to give to the service of his employer, the benefit of the experience and skill which he has acquired through the years. The benefit to the employer is that he has a loyal and contented staff and does not have superannuated or disabled employees who, but for such a retiring benefit would continue in employment even though they function inefficiently. Where an employee has rendered long, faithful and meritorious service and has devoted the best years of his life to the work of his employer, it would appear to be the duty of an employer to give him a suitable gratuity on termination of his services, provided that the employer can afford, having regard to his financial condition and the return from his business, to pay it.

The financial capacity of the employer, the condition or prosperity of his business, and the profits made by him may be relevant and may have to be considered. It would not be just and equitable to decide the matter by reference to the needs or claim of the workman alone. The tribunal has to determine, whether a consideration of the relevant facts and circumstances leads it to

the view. that there has been long and meriforious service by the workman and that there is a duty or moral obligation on the employer to pay a gratuity, as a reward or return for such service.

In the absence of a gratuity scheme or collective agreement which applies to him, a workman has only a claim to a gratuity, the acceptance of satisfaction of which is dependent on various considerations. I am, therefore, with respect, unable to agree with dicta of Alles, J. in *Independent Industrial and Commerical Employees Union v. Board of Directors, Co-operative Wholesale Establishment,* 74 N. L. R. 344, in so far as they suggest that an employee has a fundamental or absolute right to a gratuity.

Dicta from judgments of the Supreme Court of India are often cited but it must be borne in mind that in India before 1972 an individual worker was entitled, apart from a provision in his contract of service, to a gratuity, only if a gratuity scheme applicable to him had been formulated, in the award of an industrial arbitrator, for the industry or for the business concern. Such awards were generally made, on demands put forward by Unions on behalf of workmen in large industrial concerns. Subject to this reservation, such dicta are useful as they contain considerations relevant to the matter of gratuity in general. In the judgment of the Supreme Court of India, in *Delhi Cloth Manufacturing Co. Ltd. v. The Workmen*, A. I. R. 1970 S. C. 919 at 930, delivered by Shah, J. there appeared the following :—

> "'Gratuity' in its etymological sense means a gift especially for services rendered or return for favours received. For sometime in the early stages in the adjudication of industrial disputes, gratuity was treated as a gift made by the employer at his pleasure and the workman had no right to claim it. But since then there has been a long line of precedents in which it was ruled that a claim for gratuity is a legitimate claim which the workman may make and which in appropriate cases may give rise to an industrial dispute.
>
> "In Garment Cleaning Works (1961) Lab. L J. 513—(A.I.R. 1962 S. C. 673) it was observed that gratuity is not paid to the employee gratuitously or as a matter of boon. It is paid to him for the service rendered to him by the employer. The same view was expressed in Baralkand Textile Manufacturing Ltd's case 1960 3 SCR 329—(A.I.R. 1960 S.C 833) Gratuity paid to workmen is intended to help them after retirement on superannuation, death, retirement, physical incapacity, disability or otherwise. The object of providing a gratuity

scheme is to provide a retiring benefit to workman who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer. It is one of the 'efficiency devices' and is considered necessary for an 'orderly and human elimination' from industry of a superannuated or disabled employees who but for such retiring benefits, would continue in employment even though they function inefficiently. It is not paid to an employee gratuitously or merely as a matter of boon ; it is paid to him for long and meritorious service rendered by him to the employer."

Some of the considerations material to the grant of a gratuity are stated to be (i) financial capacity of the employer (ii) his profit making capacity (iii) the profits earned by him in the past (iv) the extent of his resources (v) the chances of his replenishing them (vi) the claim for capital invested by him vide *Baralkand Textile Manufacturing Co. Ltd.'s case*, A.I.R. 1960 SC 338. These are not exhaustive, and there may be other material considerations which are relevant. On the other hand, it may be that in a particular case one or more of these considerations need not be taken into account. As a gratuity is a retirement benefit, the existence of any other retiring benefit such as provident fund should, in my opinion, be taken into account in both deciding whether a gratuity is due and in assessing the quantum.

If the necessary conditions are satisfied a workman who retires either because of physical disability or on superannuation will be entitled to payment of a gratuity. It is necessary to consider the position of a workman whose services are terminated by the employer otherwise than on the grounds of misconduct or any fault on his part. It is true that a gratuity is given to help an employee during the time when he is unable to work and is, in that sense, a retiral benefit. Yet, as I have indicated earlier, it is by his meritorious and faithful service during the years when he works that a workman's claim to a gratuity is acquired. Where the circumstances are such that all conditions on which he will become entitled to claim a gratuity would be satisfied, when the time of retirement is reached, the workman has a legitimate expectation of obtaining a gatuity and may in fact by faithful and meritorious service have begun to earn the right to claim it. Should his expectation be frustrated and his years of faithful service be unrewarded without gratuity because through no fault or act of his he is precluded from further service by the termination of his employment effected by his employer. I think that such a result would be harsh. To take an example, a workman has given fifteen years of faithful and meritorious service from his thirtieth

to his forty fifth year, when his employer sells his business at a very substantial capital gain to himself, and terminates the service of all his employees. I think that it is irresistible that in such circumstances some payment has to be made to the workman. Whether one calls it compensation, retrenchment compensation or by some other name it is a form of gratuity. I am, therefore, of the view that, on termination of his service by the employer on grounds other than misconduct or fault on his part, a workman is entitled to claim gratuity if the appropriate conditions are fulfilled but the tribunal should examine the circumstances to satisfy itself that they render a gratuity due. It is suggested that the term gratuity is used in the Industrial Disputes Act in the sense of retiring gratuity. Attention is called to Section 33 (1) (c) which sets out one matter in respect of which a decision may be made in the order of a tribunal and it is said that in that provision gratuity must be taken to be used in the sense of retiring gratuity by reason of its juxtaposition to pension and retiring allowance. Section 33 (1) (c) reads :—

> " as to the extent to which the period of absence from duty of any workman, whom the arbitrator, industrial court or labour tribunal has decided should be reinstated, shall be taken into account or disregarded for the purposes of his rights to any pension, gratuity or retiring allowance or to any benefit under any provident scheme. "

With respect, if the term gratuity is considered to be used in this provision in the sense of retiring gratuity, it is because of the subject matter of the provision, i.e., the context, rather than because of its juxta position with pension and retiring allowance. In any event it does not follow that it is used in that sense in other provisions of the Act. When one reads the provision in Section 31 B (1) (*b*) ' the question whether any gratuity or other benefits are due to him from his employer on termination of his services..... ' one is inclined at first glance to think that termination means dismissal or resignation though on a consideration of the entire provision in the sub section it appears to be clear that it includes retirement as well.

In *Amblamana Tea Estates Ltd. v. Ceylon Estates Staff's Union* 76 N.L.R. 457, H. N. G. Fernando, C. J. considered this matter and said :—

> " As already stated, the termination of employment in the instant case was caused solely by the act and will of the employer, in pursuance of his desire to sell the estate. In our

opinion, an employee whose services are terminated for this cause does have a just claim to the gratuity referred to in Section 31 B. Although the judgment of Alles, J. (which dealt with a case of retirement at the age limit) refers to a gratuity as being intended for the benefit of an employee after his retirement, we must note that Section 31 B does not restrict the benefit therein mentioned to retiring gratuities. What is contemplated by the section is an application by a workman for a gratuity on termination of his services, and no reference is made to the circumstance whether or not the termination is due to the retirement of the workman from his employment. "

With respect, I agree with the view of Section 31 B, taken by him. Later in his judgment he states that a person employed even for a short period can make a claim for gratuity in respect of that period if his services are terminated by the employer for reasons not within the employee's control. I am inclined to think that the period of employment, though it need not be long, should at least cover a moderate length of time and not be short. However, I am not dealing with a case of termination of employment by the employer and I, therefore, express no view but I reserve my opinion on the point.

A workman who terminates his services by voluntary resignation leaves, by his own act the service of his employer. His act militates against a claim by him for a gratuity. If he leaves his employer to obtain better and more profitable employment elsewhere, he is doing what he is entitled to do, but it is not a circumstance which tends to cast on his employer an obligation to pay him a gratuity. In certain circumstances his leaving may be detrimental to the business of his employer and may import a lack of loyalty to him and then the workman will be even less worthy of a gratuity. But one must not be dogmatic. It is possible to conceive of circumstances in which a workman who leaves his employer may have a claim for gratuity. A man may leave his employer neither to obtain more profitable employment nor in circumstances which import any lack of loyalty. A man may leave employment in Colombo and take less well paid work in salubrious Bandarawela because his wife has contacted tuberculosis and has been advised to reside there. In such a case, if other conditions are satisfied, it appears to me that a gratuity ought to be paid.

In the cases under consideration, the workers resigned in order to proceed to India under the Indo Ceylon Agreement. The departure of Indian nationals from Sri Lanka to India may be worthy of promotion by the Government of Sri Lanka. It probably meant to the employer, the Scottish Ceylon Tea Co. Ltd., the loss of some experienced workers. It has not been suggested, nor has it been shown, that there was any advantage derived by the employer from the migration of any of their workers out of the country. The President of the Labour Tribunal appears to have accepted the submission that as the workers were giving up their employment and going to India, they were entitled to gratuity. He states that the collective agreement had established the principle that labourers going to India were entitled to compensation. But the collective agreement only provided that male labourers who have reached 55 years and female labourers who have reached 50 years and retire off the estate to go to India under the pact will be entitled to gratuity. None of the workmen on whose behalf applications were made have reached the ages referred to in the collective agreement ; the oldest is aged 42 years. I am therefore of the view that the President has failed to address himself to the correct question that his failure to do so has arisen from a misconstruction of the act and/or a misconception as to the meaning of the relevant provision.

Rajaratnam, J. held that the order of the tribunal could not stand because it had made findings on certain matters without evidence. He added, " I cannot now hold sitting in appeal that the order paying some gratuity to the workman was bad in law as being a totally unreasonable order. " On the view that I have taken, the order of the tribunal is bad not because it is unreasonable but because it is vitiated by error of law. I agree that the matters set out in Rajaratnam ; J's judgment as fit for consideration by the President on the claim made, except one with which I deal later, should have been considered by him. Though the making of an order that appears to a tribunal to be just and equitable should be free from ' the tyranny of dogmas or the sub conscious pressure of pre-conceived notions ', it should also not be arbitrary but made after taking into account relevant material considerations.

I do not, however, think that upon applications for gratuities which would amount in the aggregate to no more than about the Rs. 5,000 there fell to be considered the impact of the order on the national economy. I think there could be an impact on the

national economy only in the way in which the want of a horse-shoe nail is said in the doggerel to have caused a battle to be lost. If there was in fact a serious possibility of such an impact on the national economy, the Scottish Ceylon Tea Co. Ltd. was hardly the proper party to have the sole responsibility of placing the facts relating to it before the tribunal. Under Section 46 (4), the Commissioner of Labour or his authorised representative is entitled to be present and to be heard in any proceedings before a Labour Tribunal. The Commissioner of Labour or the Attorney-General might have been noticed to appear and heard.

Whatever may be the position regarding the claim of the workmen and the obligation of the employer under the provisions of the Industrial Disputes Act, viewed as a human problem it is desirable that some provision should be made to ensure that the workmen do not return to their homeland with empty hands. It is gratifying therefore to find that emergency regulations, which are more commonly used to provide pains and penalties for varied omissions and failures, have been used to grant relief by providing for payment of gratuities to labourers returning to India under the agreement. I think it only fair that the workmen on whose behalf applications were made in these proceedings should receive the gratuities provided for by the regulations. From the material on record the amount of gratuity payable to them interms of the regulations can easily be assessed. We are exercising the jurisdiction exercised by the former Court of Appeal under Act No. 44 of 1971 and Section 8 (2) of that Act enabled the Court to make such order as was necessary to do complete justice in the case. We are, therefore, in a position to ensure relief to the workmen.

Accordingly, I would allow the appeal and set aside the judgment of Rajaratnam, J. as well as the order of the Labour Tribunal. The workmen or the appellant-union on their behalf may obtain gratuities under the emergency regulations and in the mode and by the procedure set out therein. If gratuity under the regulations is not now available to them or it is not feasible to obtain it or for any other reason an order of the tribunal is wanted or desired by them, an application for an order may be made by motion, and on such application the tribunal is authorised and directed, forthwith on the material already on record, to compute

the amount of gratuity which each of the workman would have been entitled to in accordance with the rates set out in the schedule to the Emergency. (Payment of Gratuities and Other Monetary Benefits to Indian Repatriates) Regulations contained in Government Gazette Extraordinary No. 185/59-1975 dated 17th October, 1975 and to make a suitable order for payment of such amount. In the circumstances. I make no order as to costs.

SHARVANANDA, J.

I have perused the judgment of the Chief Justice. I regret my inability to agree with his conclusions.

This appeal raises an issue of some importance relating to the concept of gratuity and its legal incidents in proceedings before the Labour Tribunals established under section 31A of the Industrial Disputes Act (Chap. 131).

The facts relating to this appeal have been fully set out in the judgment of the Chief Justice. It is not necessary to repeat them. I shall be confining myself mainly to the legal issues involved on the said facts.

For an appreciation of the problems arising in this appeal, certain sections of the Industrial Disputes Act are relevant.

Section 31B (1) introduced into the 1950 Act by the Amending Act 62 of 1957 reads as follows :—

> "A workman or a Trade Union on behalf of a workman who is a member of that Union may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters :
>
> (*a*) the termination of his services by his employer,
>
> (*b*) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits,

(c) such other matters relating to the terms of employment or the conditions of labour as may be prescribed."

As Viscount Dilhorne said : "Section 31B (1) is the gateway through which a workman must pass to get his application before a tribunal, but it is sections 31B (4) and 31C (1) which state the powers and duties of a tribunal on an application "— *United Engineering Workers' Union v. Devanayagam* (69 N.L.R. 289 at 299 P.C.). These sections spell out the jurisdiction of the Labour Tribunals both with respect to the cause or subject matter and the relief to be granted by it. They are inter-related. Section 31B (4) provides as follows :—

"Any relief or redress may be granted by a Labour Tribunal to a workman upon an application made under subsection (1) notwithstanding anything to the contrary in any contract of service between him and his employer."

Section 31C (1) defines the powers and duties of a Labour Tribunal on an application made to it :

"It shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary and thereafter make such order as appears to the tribunal *just and equitable.*"

Section 33 of the Act sets out the kinds of decisions that a Tribunal's order may contain. Section 33 (1) (*e*) states that "the decision may provide for the payment by an employer of a gratuity or pension or bonus to any workman, the amount of such gratuity or pension or bonus and the method of computing such amount and the time within which such gratuity or pension or bonus shall be paid". Since the power to prescribe other matters relating to employment and conditions of labour in relation to which an application can be made (section 31B (1) (c)) has not been exercised, the applications that can be entertained by a Labour Tribunal must relate to termination of services only and to liabilities arising

therefrom. Section 31 B (1) (a) specifically postulates the termination of the workman's services by his employer. The relief of reinstatement in service is available thereon. Section 31B (1) (*b*) is however independent of section 31B (1) (*a*). The later subsection is directed, to the reliefs available on the termination of services, whether the termination be by the employer or by the workman. " The absence of the word ' such ' between the words ' from his employer on ' and the words ' termination of his services ' in clause (*b*) is a pointer to the fact that the clause is not dependent on clause (*a*) ".—per de Krester, J in Hatton *Transport Agency Co. Ltd. v. George* (74 N.L.R. 473 at 477.) A workman can bring about the termination of his services by himself resigning or discontinuing his services. On such termination, the question whether any terminal benefit should be paid to him has to be determined by the Tribunal on the facts and circumstances of the particular case. In this context, the use of the words " are due " to him from his employer " is significant. Controversy has raged on its interpretation whether " are due " must be construed to mean " are legally due ". A quietus was considered to have been given to that dispute by the Privy Council in *Devanayagam's* case (69 N.L.R. 289). Viscount Dilhorne, after consideration of the relevant sections of the Act, was of the view that " section 31B (1) (*b*) must be read with sections 31B (4) and 31C (1) and reading it with these sub-sections it is clear that the Tribunal's decision is not, to be whether a gratuity or other benefit is legally due, but whether it is just and equitable that it should be paid. It is not whether it is legally due, but whether it ought to be paid that the Tribunal is required to decide. " This view has been accepted by the Supreme Court in *Ceylon State Mortgage Bank v. Fernando* (74 N.L.R. 1); *Ceylon Estate Officer's Union v. Superintendent, Galahandawatte Estates* (74 N.L.R. 182) ; *Independent Industrial & Commercial Employees' Union v. Co-operative Wholesale Establishment* (74 N.L.R. 344) ; *Silva v. Southern Freighters Ltd.* (74 N.L.R. 239) ; *Hatton Transport Agency Ltd. v. George* (74 N.L.R. 473) ; *Amblamana Tea Estate Ltd., v. Ceylon Estate Staffs Union* 76 *N.L.R.* 457 *(DB)* ; *Swedeshi Industrial Works Ltd v. de Silva* (77 N.L.R. 211) ; and *G. C. de Silva v. Sirisena* (81 C.L.W. 14).

The provision in section 31B (4) that the Tribunal, in granting relief or redress, is entitled to supersede the terms of the contract of service militates against the contract-oriented view that "are due" must be construed to mean "are legally due". The jurisdiction of the Tribunal is not invoked by the workman for the enforcement of his contractual rights. Grant of terminal benefits which the terms of his contract of employment might not by themselves justify is the means by which labour practices regarded as unfair are frustrated, and dependence on the kindly paternal benevolence of employers is replaced by legitimate expectations of fair and reasonable terminal benefits. In terms of section 31C (1), the decision of the Tribunal is not an adjudication according to the strict law of master and servant. The Tribunal is not fettered by the limitations of the contract of employment but is guided by what is just and equitable in each particular case. The yardstick of justice and equity itself changes with changes in social, political and economic outlook and with changes in the conditions of individual and national life. A Court of Law proceeds on the footing that no power exists in the Court to depart from the contracts made by parties. The Court reaches its limit of power when it enforces contracts which the parties have made. In a Court of Law, what is 'due' has to be measured and determined within the framework of the contract of employment. A Labour Tribunal is not so hamstrung. The contention that the jurisdiction of the Tribunal is concerned only to inquire whether the contract between the parties provided for gratuity, bonus and other fringe benefits, in order to ascertain whether such benefits are legally due to the workman and that in case there was no contract between the parties to that effect, it had no jurisdiction to direct the employer to provide those benefits involves reading words into section 31B (1) (*b*) which are not there and which, if they were, would seriously impair or cut down the rights of the applicant.

Gratuity and other benefits referred to in section 31B (1) (*b*) are not ex gratia payments that can be given or withheld by the employer at his pleasure. In the sphere of employer-employee relationship, in order to ensure social security gratuity and similar benefits have come to be commonly expected as due, though they have not yet acquired the quality of enforceability in a Court of Law.

A Tribunal administering social justice, in the exercise of just and equitable jurisdiction, is not inhibited by limitations of legal rights and legal obligations and is free to give effect to concepts of social justice, to secure social harmony and industrial peace. The Tribunal grants that relief whenever circumstances justify it though there has been no legal stipulation for same. In granting relief, the Tribunal has to address itself the question not whether gratuity or other benefit is "legally due", but whether in accordance with current social norms it is "justly due"—not by way of legal obligation, but as social or moral obligation in order to redress the unequal bargaining position of employer and employee. That way, the Tribunal's jurisdiction to order what it considers just and equitable by way of relief or redress remains wholesome without being clogged by the terms of the contract that are weighted against the employee. With all respect, I agree with the opinion of Their Lordships of the Privy Council that the decisions in *Richard Pieris & Co. v. Wijesiriwardena* (62 N.L.R. 233) and *The Electric Equipment Co. v. Cooray* (64 N.L.R. 71) which interpret "are due" as meaning "legally due" do not represent the correct view and should not be followed. In my view, the words "are due" mean "justly due" according to prevailing concepts of equity, justice and fair practice. Schemes of gratuity and other benefits operating in similar sectors of employment may serve as helpful guides and offer satisfactory criteria for the determination of what is just and equitable. But they would not be conclusive. There may be features in the schemes which may not harmonise with notions of justice and equity and justify departure therefrom.

What benefit is due has to be determined in the context of the jurisdiction of the Tribunal to make a "just and equitable" order. It is all one indivisible process. The question of what is due cannot be divorced from what is a just and equitable order to make. The Tribunal is not called upon first to decide whether anything is due and then to proceed to determine whether it is just and equitable to hold that it is due. Two independent stages of inquiry are not contemplated. At the end of the inquiry, the Tribunal has to determine whether it is just and equitable that the benefit should be held to be due. Any attempt to decide first "what is due" without reference to the justice and equity of the case would amount to putting the cart before the horse.

The Legislature, when it conferred on the Tribunal the power to make such order as may appear to the Tribunal to be just and equitable (section 31C (1)), made justice between the parties to the application, in accordance with the norms prevailing in the industry, the objective. In the achievement of such end, the Tribunal may disregard schemes of gratuity and other benefits operative in other sections of the industry if they do not survive the test of being just and fair, or if they contain unfair provisions produced by economic compulsions. A Tribunal acting reasonably is the judge of such provisions. The decision arrived at by it in the exercise of its powers to do, what it considers just and equitable may, for good reason, go beyond the terms of any existing contract or scheme. If it considers such contract or scheme inequitable or inadequate, not only has it the power, but it is its duty to override it, unless of course it is a statutory scheme. In the discharge of its functions, the Tribunal must however have in mind the all pervasive purpose of preventing investigating and settlement of industrial disputes.

The question that arises in this consolidated appeal is whether the Labour Tribunal was justified in granting relief or redress by way of gratuity to the workmen who, after long periods of service, have voluntarily resigned in order to return to India in terms of the Indo-Ceylon Agreement of 1964. From the point of view of the interests of the State, no impediment should be placed in the way of such repatriates. They should be encouraged to wind up and quit Sri Lanka

Now, what is the connotation of the word 'gratuity' as used in sections 31B (1) (*b*) and 33 (1) (*e*) of the Industrial Disputes Act ? The primary meaning of the word 'gratuity' is that it is a gift of money in addition to salary or wages voluntarily made to a retiring employee for services rendered by him. This imports the conception of a gift or boon otherwise described as 'ex gratia' payment. In industrial law, this meaning has undergone a fundamental change in its attribute of voluntariness. Gratuity can no longer be regarded as an ex gratia payment or merely as

a matter of boon. As stated by the Supreme Court of India in *Delhi Cloth and General Mills Co. Ltd. v. the Workman* (1970 A. I. R. S. C. 919 at 930) :

> " Gratuity in its etymological sense means a gift specially for services rendered or return for favours received. For some time, in the early stages in the adjudication of industrial disputes, gratuity was treated as a gift made by the employer at his pleasure and the workman had no right to claim it. But, since then, there has been a long line of precedents in which it has been ruled that a claim for gratuity is a legitimate claim which the workman may make and which may give rise to an industrial dispute. "

In the case of *Indian Hume Pipe Co. Ltd. v. the Workman* (1960 A.I.R. S.C. 251), the Supreme Court observed :

> " Gratuity is a kind of retirement benefit like the Provident Fund or pension. At one time it was treated as payment gratuitously made by the employer to his employee at his pleasure, but gratuity has now come to be regarded as a legitimate claim which workmen can make. "

The granting of bonuses, gratuity, pension and the like to employees today is not out of charity. They are given in order to make the employees more contented and to enable them to have a sense of satisfaction and security without being always on the brink of insecurity about their future. Though entitlement to same has not yet acquired the quality of enforceability in a Court of Law and the employer cannot, in a Court of Law, be compelled to give what he is not legally bound to give, yet those benefits are recognised by Labour Tribunals as part of the remuneration of the workers for their services and as their dues or rights on termination of employment. Where an employer has the financial capacity, the workman would be entitled to the benefit of gratuity. However, long and faithful or meritorious service is a condition precedent to the award of gratuity ; for, gratuity still remains a reward for faithful service rendered for a fairly substantial period.

The question next arises, on what basis is gratuity awarded ? Is it awarded as superannuation, or does it represent payment for long and faithful service ? It has been contended by Counsel for the respondent that the term ' gratuity ', as used in section 31B (1) (*b*), refers only to retiral gratuities. According to him, gratuity paid to workmen is intended to help them after retirement on superannuation, physical incapacity, disability or otherwise. He stressed that the object of providing gratuity is to provide a retiring benefit. He relied on the observatoin in *Indian Hume Pipe Co. Ltd. v. the Workmen* (A.I.R. 1960 S.C. 251) that :

> " Gratuity is a kind of retirement benefit like the Provident Fund or pension. Gratuity paid to workmen is intended to help them after retirement, whether the retirement is the result of the rules of superannuation or physical disability. The general principle underlying such gratuity schemes is that by their length of service, workmen are entitled to claim a certain amount as retiral benefit. "

He argued that since gratuity is in the nature of a retiral benefit, it can only be granted when a workman retires from service on account of superannuation, physical incapacity or other allied cause and not when he resigns, when still physically able to work even though he had put in a long period of faithful service.

On the other hand, Counsel for the appellant submitted that the only consideration for the grant of gratuity is whether the workman has, to his credit, a long period of faithful or meritorious service prior to the termination of his services, whether by retirement or resignation.

In *Express Newspaper Ltd. v. Union of India* (A.I.R. 1958 S.C. 578 at 628), the Supreme Court of India stated :

> " A gratuity is a scheme of retirement benefit, and the conditions for its being awarded have been thus laid down in the Labour Court decisions in this country.
>
> It was observed in the case of *Workmen employed under the Ahamedbad Municipal Corporation* v. *Ahamedbad Municipal Corporation* (1955—Lab. A.C. 155 at 158) :

"The fundamental principle in allowing gratuity is that it is a retirement benefit for long services, a provision for old age. . . "

These were cases, however, of gratuity to be allowed to employees on their retirement. The Labour Court decisions have however awarded gratuity benefits on the resignation of an employee also. In the case of *Cipta Ltd. v. the Workmen* (1955—2 Lab. LJ 355), the Court took into consideration the capacity of the concern and other factors therein referred to and directed gratuity on full scale on voluntary retirement or resignation after 15 years continuous service.

Similar considerations were imported in the case of *Indian Oxygen Ltd.* (1955—1 Lab. LJ 435) where also the Court awarded gratuity on retirement or resignation of an employee after 15 years of continuous service..... It will be noticed from the above that even in those cases where gratuity was awarded on the employee's resignation from service, it was granted only after the completion of 15 years continuous service and not merely on a maximum of three years' service as in the present case. Gratuity being a reward for good, efficient and faithful service rendered for a considerable period, there would be no justification for awarding the same when an employee voluntarily resigns and brings about a termination of his services, except in exceptional circumstances.... The other exception is where the employee has been in continuous service of the employer for a period of more than 15 years."

In *Hydro (Engineers) Ltd. v. their Workmen* (A.I.R. 1969 S.C. 182), the Supreme Court expressed the view that:

"It is now well settled that gratuity is a reward for good, efficient and faithful service rendered for a fairly substantial period and that it is not paid to the employee gratuitiously or merely as a matter of boon, but for long and meritorious service. Since the justification for gratuity is a long and meritorious service, schemes of gratuity have always provided some qualifying period and fixed the minimum period for qualifying for gratuity on voluntary retirement at 15 years."

In *Silva v. Southern Freighters Ltd.* (74 N. L. R. 239), Samerawickrame J. was of the view that :

> " A Workman who terminates his employment after a period of service which cannot be regarded as long does not appear to be entitled to the payment of gratuity ".

In *Ceylon Estate Officers Union v. The Superintendent, Galahandawatte Talawakele* (74 N.L.R. 182), Sirimane J. held that the fact that the employee brought about the termination of his services by his own conduct was no bar to his claim for gratuity from his employer.

In *Hatton Transport Agency v. George* (74 N.L.R. 473), de Kretser J. observed at page 477 :

> " In my opinion, it is open to a workman on termination of his services with his employer for any reason whatsoever to raise the question whether or not in the particular circumstances of that termination it is not just and equitable that gratuity should be paid to him. "

Again, in the Divisional Bench case of *Amblamana Tea Estates Ltd. v. Ceylon Estates Staff Union* (76 N. L. R. 457), H. N. G. Fernando C. J., delivering the judgment of that Court, stated that section 31B does not restrict the benefit therein mentioned to retiring gratuities—" what is contemplated in that section is an application by a workman for gratuity on termination of his services, and no reference is made to the circumstances whether or not the termination is due to the retirement of the workman from his employment ". He might have referred relevantly to section 33 (1) (*e*) also which states that the order of a Tribunal may contain decisions as to the payment by an employer of *a gratuity or pension or bonus.* That section does not warrant any in-built limitation restricting gratuity to retiring gratuity.

In that well-known book, 'The Law of Industrial Disputes ', at page 815, O. P. Malhotra, the author, summarises the Indian Law as to when gratuity is payable :

> " It is well known that a scheme for gratuity is an integrated scheme and it covers all cases of termination of services in which gratuity can be legitimately claimed. From the

decided cases, it appears that workmen become entitled to gratuity under the following circumstances *after they have put in a requisite number of years of service*—

(i) retirement on superannuation ;

(ii) retirement on physical incapacity ;

(iii) *voluntary retirement or resignation ;*

(iv) termination of services otherwise than dismissal or misconduct ;

(v) retrenchment ;

(vi) dismissal for misconduct after putting in a prescribed number of years and subject to deduction of financial loss.

However, the length of service of a workman varies for the purpose of voluntary retirement, resignation, termination of services for other reasons and dismissal. "

The above statement of the law corresponds, according to existing authorities, to our law.

In India, the Payment of Gratuity Act No. 39 of 1972 was passed to provide a scheme for the payment of gratuity to employees. Section 4 of the Act provides that " gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years : (*a*) on his superannuation, or (*b*) on his retirement or resignation, or (*c*) on his death or disablement due to accident or disease ".

It is manifest that the word ' gratuity ' has thus come to mean not only retiring allowance or retiral benefit payable on retirement, but also terminal benefit payable on termination of a long and faithful service consequent to resignation prior to retiring age.

Preponderance of view is in favour of regarding gratuity as a payment for long and faithful service. The other view that gratuity means only retiring gratuity—superannuation benefit—which cannot be granted if the workman should resign before

the fulness of time, even though he had served faithfully for a long period, is not supported by any local authority. I have checked up the number of awards and orders of Labour Tribunals cited by Counsel for the employer, alleged to be in support of the 'retiring gratuity' interpretation, but I did not come across any decision that bore out that proposition or the distinction. If Counsel for the employer-respondent with his thoroughness, was not able to invoke in support of his proposition any order of a Labour Tribunal or Industrial Court, I feel justified in stating that that view or meaning of gratuity relied on by Counsel for the employer has not found acceptance in the Labour Tribunal from 1957 to date. In the case of *Industrial and Commercial Employees' Union* (74 N. L. R. 344) where Alles J. took the view that gratuity is a retiring benefit, the applicant was a person who actually retired in 1966 on his reaching the maximum age of retirement of 60 years, and he thereafter claimed retiring gratuity. There was no question of premature resignation and claim for gratuity. One should be slow to jettison all local authorities on the strength of a view casually expressed in an isolated case where the present issue or conflict of views did not arise for consideration. At most, the view expressed by Alles J. was an obiter dictum only. On a consideration of all the above reasons, I do not agree with the view that in section 31B (1) (*b*) the Legislature had in contemplation only 'retiring gratuity'. In my considered view, a workman becomes entitled to payment of gratuity on his resignation or premature retirement also, provided he had rendered faithful service for a considerable period.

In determining the length of the period of faithful service which would qualify the workman to gratuity on the termination of his services the original principle governing the grant of gratuity must be borne in mind by the Tribunal that it was regarded as a retirement benefit—a provision for old age, being a reward for good, efficient and faithful service rendered for a long period. The reason for requiring a large minimum period for earning gratuity in the case of voluntary resignation is to see that workmen do not go from one employer to another, collecting gratuity after putting in short periods of service but stick to one employer. But this does not mean that gratuity can be earned only when one retires from service altogether by reason of superannuation or physical disability. Provided there had been faithful service for a substantial period, a person, on termination of such

service, has a claim for gratuity. The answer to the question 'What is a substantial period ?' depends on the circumstances of each case. Ordinarily, ten years of continuous service should represent the lower limit and fifteen years the upper limit of the minimum period required to qualify a worker for entitlement to gratuity. Once a worker has earned his gratuity by his service, he does not lose it except for grave misconduct. It is still available to him whatever be the motivations for his resignation or premature retirement from that service. The workman should not be placed in life-time bondage by being denied the benefit of gratuity, once he has earned it, on the ground that he had not reached superannuation or physical disability. Wage labour is qualitatively different from slave or serf labour, inasmuch as the workman is free to sell his capacity for work. This legal freedom should be meaningful to him and should not be illusory. He is entitled to look forward to engage himself in gainful occupation with the proceeds of the gratuity earned by him. But, what is to be discouraged is short periods of service for entitlement to grauity. Once a worker has put in a long innings of service, the prospect that, age and health permitting and employment-opportunity being available, he may yet be able to serve another innings should not disentitle him to an order for payment of gratuity on his resignation before reaching retirement age.

The respective years of service of the workmen involved in these appeals were admitted by the respondents. They were 13, 15, 16, 27, 28 and 31 years of service. There was nothing urged by the respondents against the quality of service rendered by these workmen. It has to be presumed that they rendered faithful service for a long period. The workers had thus qualified themselves for payment of gratuity. The respondents have not established any financial incapacity on their part to make the payment of gratuity earned by those workmen. The burden rested on the respondents to establish the fact of their financial incapacity to meet the demand of gratuity if they were to resist the prima facie claim of those workmen. Their financial position was a matter within their peculiar knowledge.

The main ground of resistence by the respondents before the Labour Tribunal was that in view of the provisions of the Collective Agreement No. 3 of 1967, no gratuity was payable to

any of these workmen. The appellant Trade Union, of which the said workmen were members, was not a party to the said Collective Agreement. That Agreement was entered into betwen the Ceylon Workers' Congress and the Ceylon Estate Employers' Federation, and the appellant Trade Union was accordingly not bound by the provisions of the said Agreement under section 8 of the Industrial Disputes Act. In August, 1967, the Minister made order under section 10 (2) of the Act for every employer in any tea or rubber estates in Ceylon on whom the Agreement was not binding to observe either the terms and conditions set out in Part B of the said Agreement or terms and conditions which were not less favourable than the terms and conditions set out in the said Part B.

Neither section 8 nor section 10 of the Act make the appellant Union bound by the terms of the Collective Agreement. It was open to the appellant Union, which was not a party bound by the Agreement, to agitate against the said Agreement, demonstrate its inadequacies and desiderata and criticise its provisions with a view to showing that the Agreement was not a model agreement which could be a safe guide for Labour Tribunals to base their orders on. The said Collective Agreement was glaringly defective in making no provision in respect of gratuity to persons whose services got terminated before they reached 50 years of age. In the order made by the Labour Tribunal in these applications which are the subject matter of these appeals, the President has given good reasons for disregarding the provisions of the said Collective Agreement. The Labour Tribunal was not bound to apply the provisions of the Collective Agreement. For good reasons it can depart from such Agreement. When the Labour Tribunal is setting out its reasons for so departing, it is not criticising the Collective Agreement. No additional sanctity attaches to such Agreement because the Minister has made order under section 10 (2) extending its application. The Supreme Court has held in this case that before an order is made for the payment of gratuity in a case which is not covered by the recognized terms and conditions, due regard must be paid, after necessary inquiry, into the following matters :—

(*a*) length of service of the workman ;

(*b*) the quality of that service ;

(c) the financial capacity of the employer ; and

(d) the impact of that order on the national economy and trade, if that same order can be treated as a precedent.

The Legislature has not prescribed any prerequisite for making orders for gratuity. The Tribunal's obligation is to make such order as may appear to it to be just and equitable on the material available to it. If the employer-respondent, for whatever reason, does not dispute his capacity to pay gratuity, the Tribunal has to assume the ability of the employer to pay. The order must be just and equitable between the parties. Before such an order is made, the Tribunal is not concerned to hold a preliminary inquiry as to the impact of that order on the national economy and trade. The Tribunal should not widen the ambit of its inquiry by going into irrelevant questions. The cost of such preliminary inquiries will be prohibitive and beyond the capacity of the applicant to bear. The question of " impact on the national economy " is a matter res inter alios acta. Further, a number of ' ifs ' and imponderables will be involved in that question. The workman should not feel aggrieved that the interest of the employer and of the State should coalesce to resist his claim to gratuity.

In my view, on the agreed statements of facts, the Labour Tribunal acted properly in refusing to apply the provisions of the Collective Agreement No. 3 of 1967 to the facts of the case before it, as the relevant provisions relating to the gratuity scheme appeared to be manifestly unjust. It was brought to the notice of the Tribunal that other employers who were themselves parties to the same Collective Agreement had settled questions of gratuity somewhat outside the Collective Agreement. *Settlement on Meddacombra Group* was cited as a case in point. In that case TD—173, it was agreed, under the Head of *Payment of Gratuity to these Retiring to India,* that " those retiring to India will be paid Rs. 30 for males and Rs. 25 for females for each year of service in the pre E.P.F. period *irrespective of age,* or Rs. 150, whichever is higher ". Another case is *Ottery Estate, Dickoya,* where it was agreed :

Gratuities to workers retiring to India :

> The new employers will pay Rs. 30 to a male worker and and Rs. 25 to a female worker for a year for the pre E.P.F. period. No worker will get less than Rs. 150. No age basis will be applied to make payments of gratuities in these cases

The Collective Agreement No. 3 of 1967 further did not contemplate the situation that arose in this case. In the circumstances, the Tribunal was justified in taking the view that the terms of the Collective Agreement could not be applied without modifications to the applicants. The Tribunal thought it fair to evolve a formula for the computation of gratuity based on the period of service. In my view, the Supreme Court erred in setting aside the order of the Labour Tribunal and in awarding gratuity in a much lower scale than what the applicants were entitled to on a just and equitable basis

I allow the appeal and set aside the judgment of the Supreme Court and restore the order of the President, Labour Tribunal. The appellant Union will be entitled to costs in this Court and in the Supreme Court.

Appeal allowed and case remitted to the Labour Tribunal.