THE STATE BANK OF INDIA

v.

EDIRISINGHE AND OTHERS

COURT OF APPEAL.
BANDARANAYAKE, J. AND WIJETUNGA, J.
C.A. APPEAL No. 1070/80.
OCTOBER 15, 16, NOVEMBER 10, 11 AND 12, 1986.

Certiorari–Industrial Disputes Act, s.4 (1), 33 (1) (e) and 48–Retirement–Resignation–Termination of employment–Retiral situation–Pension–Gratuity–Arbitration–Award–Arbitral power–Judicial power–Appointment by Judicial Service Commission–Jurisdiction–Objection to Jurisdiction.

The petitioner counted 25 years service in the State Bank of India. When he was 48 years old he sought permission to retire so as to be able to accept an appointment in the Hatton National Bank. The petitioner pointed out that there was risk to the continuity of his service as the Bank would have to be incorporated in Sri Lanka if it was to continue business in Sri Lanka. If the Bank was not prepared to permit retirement he was resigning. The Bank wrote back treating him as having resigned and waived the requirement of three months' notice. On his seeking retiral benefits like pension etc. the Minister appointed the 1st respondent as arbitrator to resolve the dispute. The arbitrator made monetary awards in favour of the petitioner under three heads: pension or gratuity, encashment of unutilised leave and revision of salary. The main questions were whether there was a retiral situation in the circumstances of the termination of the petitioner's employment and whether the relief granted by the arbitrator was in the exercise of judicial power and in excess of jurisdiction or, as it should have been, in the exercise of arbitral power. The arbitrator was also accused of bias and using intemperate language.

Held–

(1) The petitioner's was a fit case where the Bank should have exercised its discretion in favour of treating the petitioner as having retired because of the changed circumstances of the risk of the employment getting terminated if the Bank failed to comply with the requirement then operative of incorporation in Sri Lanka and the fact that 25 years' service was sufficient to entitle him to a pension. There was therefore a retiral situation in petitioner's case.

(2) (*a*) The dominant duty of an arbitrator is to make an award which is just and equitable which duty is identical to that imposed on a Labour Tribunal or Industrial Court. The power to grant relief is limited by the duty to make a just and equitable order and it is also limited by the terms of reference and the existing law. Yet it is wide and not fettered by the terms of the contract between the employee and workman. It should be an order which decides what the agreement between the parties should be in the future.

(*b*) There was uncertainty in the mind of the workman regarding his future employment. He was compelled to volunteer resignation or termination of his services. This was a retiral situation.

(3) The nature of the award does not reflect the exercise of judicial power but is consistent with the exercise of arbitral power.

(4) In a retiral situation as arose here it is accepted practice to give retirement benefits notwithstanding that there is a termination of services prior to a predetermined age of retirement. Ordinarily retirement in full time on pension results in a continuing relationship between employer and workman regarding payment of pension. The award which the arbitrator made of a pension of Rs. 1,000 a month for life is within the permissible rules and decides the relationship between the parties for the future. In awarding this pension the arbitrator correctly exercised his powers of making a just and equitable order.

(5) The Industrial Disputes Act (s. 33(*i*) (*e*)) permits an arbitrator to make an award of gratuity. The arbitrator exercised his discretion in awarding gratuity on good grounds in a reasonable and proper manner in justice and equity. Here however as a pension was awarded the question of granting a gratuity in the alternative does not arise.

(6) There is no provision in the Rules for the encashment of lieu leave. Hence the award under the head of unutilised leave cannot be substantiated.

(7) The new salary proposals of the Bank were applicable only to Indians serving in India. The officers in Colombo enjoyed different terms and conditions of employment which the petitioner had accepted. Hence the award under the head of Revision of Salary Allowance cannot stand.

Cases referred to:

(1) *The United Engineering Workers' Union v. Devanayagam – (1967) 69 NLR 289 P.C.*

(2) *The National Union of Workers v. The Scottish Ceylon Tea Company Limited – (1975) 78 NLR 133, 158.*

(3) *Walker Sons & Co., Ltd. v. Fry – (1965) 68 NLR 73.*

(4) *South Ceylon Democratic Workers' Union v. Selvadurai – (1962) 71 NLR 244.*

(5) *Heath & Company (Ceylon) Ltd. v. Kariyawasam – (1968) 71 NLR 382.*

(6) *Nadaraja Ltd. v. Krishnadasan – (1975) 78 NLR 255.*

(7) *Attorney-General of Australia v. Regina – [1957] AC 288.*

(8) *Senadhira v. The Bribery Commissioner – (1961) 63 NLR 313, 318.*

(9) *Piyadasa v. The Bribery.Commissioner – (1962) 64 NLR 385.*

(10) *Ranasinghe v. Bribery Commissioner – (1962) 64 NLR 449.*

(11) *Moosajees Ltd. v. Fernando – (1966) 68 NLR 414.*

(12) *Liyanage v. The Queen – (1965) 68 NLR 265.*

(13) *Ceylon Transport Board v. Gunasinghe – (1968) 72 NLR 76, 80, 81.*

(14) *Ceylon Transport Board v. Samastha Lanka Motor Sewaka Samithiya – (1962) 65 NLR 566.*

(15) *Hayleys Ltd. v. R. Crosette-Thambiah – (1961) 63 NLR 248, 256.*

(16) *Shell Company of Ceylon Ltd. v. Pathirana – (1962) 64 NLR 71.*

(17) *Y. G. de Silva v. Associated Newspapers of Ceylon – (1963) Bar Association Law Journal Vol. 1, P.C. 111.*

(18) *Associated Provincial Picture House Ltd. v. Wednesbury Corporation – [1948] 1 K.B. 223.*

Cur. adv. vult.

APPLICATION for a mandate in the nature of a Writ of Certiorari.

Dr. H. W. Jayewardene, Q.C. with *Ronald Perera, Miss T. Keenawinna* and *Miss K. Wattage* for petitioner.

H. L. de Silva, P.C. with *M. Bastiansz, Miss L. N. Adittiya de Silva* and *Chanaka de Silva* for 3rd respondent.

January 30, 1987.

BANDARANAYAKE, J.

The petitioner seeks a mandate in the nature of a Writ of Certiorari to quash an award made by the 1st respondent, an Arbitrator appointed by the Minister of Labour under s. 4(1) of the Industrial Disputes Act to hear and determine a dispute between the 3rd respondent and the petitioner. The award determined that–

(*a*) the 3rd respondent was entitled to a pension for life in a sum of Rs. 1,000 per month or a gratuity in a sum of Rs. 26,390; and to payment of other benefits being sums of money on account of–

(*b*) Encashment of leave in a sum of Rs. 16,800; and on account of–

(*c*) Revision of salary allowance in a sum of Rs. 24,805.

The petitioner is a Branch of the State Bank of India and carries on the business of Banking in Sri Lanka.

The 3rd respondent, Gunawardene was first employed by the Bank on 1st December 1949 as a Probationary Assistant. He rose to the position of Accountant on 1st January 1975 and had over 25 years service at the Bank at the time of termination of employment on 30th April 1975. The Bank treated the 3rd respondent as having resigned from service before entitlement to pension or gratuity according to the Bank's Rules and consequently refused to pay him a pension or gratuity or any other payment whatever.

It was in these circumstances that the dispute was referred to the 1st respondent. The statement of the matter in dispute dated 5.4.77 was furnished to the 1st respondent by the Commissioner of Labour and has been marked 'A' in arbitration proceedings A 1617. Both the petitioner and the 3rd respondent also submitted statements regarding the dispute. The statement of matters in dispute between Mr. G. Gunawardene and the State Bank of India are stated by the Commissioner of Labour as follows:

(1) whether the refusal and/or failure of the State Bank of India to pay Mr. G. Gunawardene a pension of 1,015 per month for life with effect from 1/5/75 is justified and to what relief he is entitled; and

(2) Whether the following claims of Mr. Gunawardene against the State Bank of India:

(*a*) that he be paid in lieu of unutilized leave,

(*b*) that he was entitled to a revision of salary and allowances with effect from 1.1.70 in terms of Staff Circular 15 of 31.3.71.

are justified and to what relief he is entitled.

The award was attacked by Dr. H. W. Jayewardene, Q.C., for petitioner under several headings which may be summarised thus:

(*a*) The award was in direct contradiction to the terms and conditions of employment as evidenced by the "Rules governing the service of officers in the Bank of India, A 62(R8) and the Rules and Regulations of the Pension and Guarantee Fund of the Bank R1, as these Rules constitute part of the contract of service of the 3rd respondent.

(*b*) The award displays complete bias and a refusal to be guided by applicable principles of justice. The arbitrator has indulged himself in unfair criticism. The arbitrator has ignored the duty to act judicially. He has failed to hold an even hand between conflicting interests and failed to make a just and equitable order as enjoined on him by the law.

(*c*) This was an industrial dispute not capable of being referred to arbitration.

(*d*) Sections 4 and 15 to 20 limit the arbitrator's powers. He can lay down terms and conditions for the future. An award becomes an implied term of the contract of employment. This award is outside the scope of his powers, in that the 3rd respondent first asked for permission to retire and if refused indicated his decision to resign and resigned from his employment–vide his letters to the Bank marked A14 dated 30.3.75 and A15 dated 2.4.75 and the Bank's acceptance of his resignation by letter A16 dated 30.4.75. According to the Rules, upon resignation 3rd respondent was not entitled to a pension or any other benefit. But after the employee terminated his own employment he asks the arbitrator for a new contract which included a right to a pension after resignation which the arbitrator has awarded. The power to make a just and equitable order does not give a power to displace the contract of employment. Thus the arbitrator acting outside the scope of his powers has made a monetary award which is the traditional exercise of judicial power. The only power an arbitrator is authorised to make is to make an award which decides what the agreement between the parties should be in the future and not to act as a judge and determine the rights of parties which is what he has done. The effect of the award is not the exercise of arbitral power but the exercise of judicial power which was beyond his jurisdiction. Since the award was judicial in nature Art. 170 of the 1978 Constitution required the presiding officer of a Tribunal exercising judicial power to be appointed by the Judicial Service Commission. The arbitrator was not so appointed in this instance. Therefore his award must be struck down.

Learned counsel for respondent objected to petitioner's counsel's submissions as to (*c*) and (*d*) above on the grounds that–

(i) the objection that the arbitrator who in this case had exercised judicial power was not appointed by the J.S.C. in terms of Article 170 of the 1978 Constitution was a new point being taken for the first time and not mentioned in the petition.

(ii) that an objection to jurisdiction was never taken before the Tribunal.

(iii) the objection is in reality an objection taken against the decision of the Minister who made a reference under s. 4(1). The Minister of Labour is not a party-respondent. Court must hear the party whose decision is sought to be struck down.

(iv) Section 4(1) read with s. 48 defines an Industrial Dispute to include a termination of service; A 'termination' is an ending and does not always mean termination by an employer. So concept of a dispute widened and included any dispute connected with termination.

I am inclined to the view that this being an application for a writ of certiorari, if the award is *ultra vires* for want of jurisdiction, then this Court must consider the position and issue a writ to quash the proceedings if *ultra vires*. The Constitutional provision Article 170 requiring Tribunals to be appointed by the Judicial Service Commission became operative in September 1978. The reference to arbitration was made by the Minister on 5.4.77 when the Privy Council decision in *Devanayagam's case* (1) was binding where it had been held that a Labour Tribunal was not exercising judicial power. Again, the Minister need not be made a party as the attack is not on the legality of the direction made by the Minister but to the award made by the arbitrator. The objection of respondent's counsel is therefore overruled.

Evidence.–There is little dispute about the material facts. The evidence led at the inquiry before the arbitrator consists of the two sets of Rules (i.e) Rules governing the service of officers in the Bank-A62(R8) and the Rules and Regulations of the Pension and Guarantee Fund of the Bank (R1) the evidence of the 3rd respondent and the General Manager (Planning) of the Bank, E.R.A. da Cunha who had earlier been the Bank's agent in Colombo between 1971 and 1976. The arbitrator was also assisted by submissions made by

counsel on both sides. The interpretation to be placed on certain rules were in dispute however as were the inferences to be drawn upon a comparison of the Bank's conduct in dealing with the termination of the services of other officers with that of the 3rd respondent.

Immediate circumstances which led to the termination of the 3rd respondent's employment.—The 3rd respondent addressed the following letter (A14) to T. R. Varadachary, Managing Director, State Bank of India of Bombay, India dated 30.3.75:

"Dear Mr. Varadachary,

I am venturing to write to you on this matter on the advice of the Branch Agent Mr. E. R. A. da Cunha.

I have been offered a very senior post in the Hatton National Bank Ltd., and I would like to accept it. I have already completed 25 years of pensionable service with the State Bank of India on 1.12.74. I shall be glad if the Bank would exercise its option under Rule 37 of the Rules governing the service of officers in the (Bank) and permit me to retire from the Bank's service as from 1st day of May 1975.

As you may be aware there are very limited opportunities for me for advancement in service at this Branch. I have also enumerated to Mr. da Cunha the various reasons which prompted me to make this decision after careful thought. The principal one is the fact that in view of recent legislation requiring the Bank to incorporate itself in Sri Lanka I have no guarantee of the continued existence of this Bank in Sri Lanka. In fact in the matter of the revision of salary scales of staff officers Grades I, II and III on 26.3.71 the adverse decision taken vis a vis me was due to my being a Ceylonese officer in an organization mainly staffed by Indians and to the fact that my pension rights under the Thalogodapitiya Award would be in excess of pensions drawn by other Indian officers.

In the event of the Bank being unwilling to extend the benefit of Rule 37 to me I shall be most grateful if you would sanction the payment to me of a suitable gratuity in lieu of a pension in consideration of my long and devoted service.

I regret having to trouble you.... but due to the limited time available to me to indicate acceptance of the offer made by the Hatton National Bank I shall thank you to advise Mr. da Cunha and me by cable if possible of your willingness to release me and the quantum of relief which you may consider appropriate in the circumstances.

I am very grateful to the management for the excellent training afforded me as a probationer, the kindness and courtesy shown to me as an officer and the appreciation of my services by your promotion of me to the First Grade of Officers."

A15 was the 2nd letter dated 2.4.75 sent by the 3rd respondent to the Managing Director, State Bank of India, Bombay, India. It reads:

"Retirement from Service

Dear Sir,

I have already completed 25 years of pensionable service in the Bank on 1.12.74 and I shall be glad if the Bank would permit me to retire from its service under Rule 37 of the Service of Officers Rules.....I have been offered a Senior appointment with the Hatton National Bank Ltd. In the event of the Bank being unwilling to extend the benefit of Rule 37 to me, I shall be grateful if you would sanction the payment to me of a suitable gratuity in lieu of pension.

.....Kindly waive the requirement of 3 months' notice of termination of service under Rule 30 and accept in lieu thereof the unavailed leave due to me as at date and grant me the encashment of the excess leave available. In the event of the Bank not permitting me to retire from its service, please treat this as my letter of resignation as from 1st May 1975."

To the above the Bank's Agent in Colombo wrote A16 dated 30.4.75 to the 3rd respondent which reads:

"Resignation from Service

With reference to your letter of the 2nd April and with reference to paragraph 3 thereof we have to advise that your resignation from the Bank's service has been accepted as at the close of business on date, and the 3 months' notice period required has been set off against the unavailed of ordinary leave due to you as desired by you.

We wish you a happy future."

In this background I now set out *terms of service of officers*–A62. Important terms and conditions relevant to the dispute are:

1. These rules embody the terms and conditions of service of officers in the Imperial Bank of India. They apply to all officers appointed Probationary Officers or Staff Officers on or after 1.7.36 etc.

2. In these rules unless there is anything repugnant in the subject or context–

(*g*) 'India' includes Pakistan, Burma, Ceylon;

13. No person shall be appointed an officer unless he has passed the Final Examination of the English, Scottish, Irish, or Indian Institute of Bankers Examination....."

30. An officer shall not resign from the Bank without giving the Managing Director 3 calendar months' notice in writing of his intention to do so, failing which he shall pay to the Bank a sum equal to his substantive salary for 3 months:

Provided that if the Bank is satisfied that an officer is incapacitated from further service by bodily or mental infirmity or if the Bank is for any other reason willing to waive its right to notice from an officer such officer may be permitted to resign without notice or payment in lieu of notice;

37. An officer may at the discretion of the Central Board or its Committee be called upon to retire from the Bank's service upon completion of twenty-five years service.

38. All officers shall retire at fifty-five years of age or upon the completion of thirty years service whichever occurs first.

Provided that the Central Board or its Committee may extend the period of service of an officer beyond thirty years should such extension be deemed desirable in the interests of the Bank subject however to the age limit of fifty-five years which shall be an overriding limit;

Note.– For the purposes of Rules 37 and 38 service shall count.....in the case of an officer first engaged by the Bank as a Probationary Officer or Probationary Assistant from the commencement of his service with the Bank.....

Section 12 – Leave

A.– General Rules

97. The rules relating to leave shall not be deemed to confer upon officers the right to claim leave because it has been earned.

Ordinary leave and furlough shall at all time be granted at the convenience of the Bank and the Committee of the Central Board or the Local Board may refuse leave to any officer.....when such course is considered necessary to meet the exigencies of service.

B.– Ordinary Leave

112. An officer shall earn ordinary leave at the rate of one-eleventh part of his service on duty viz: one calendar month for every eleven complete calendar months of duty and one day for every eleven days of the balance.

113. The period of ordinary leave admissible at any one time to an officer of Asiatic domicile shall be 5 calendar months and no further ordinary leave shall be earned by such officer who has 5 calendar months due to him.

114. The period of ordinary leave admissible at any one time to an officer of Asiatic domicile shall be 3 calendar months and no further ordinary leave shall be earned by any such officer who has 3 calendar months due to him.

115. The period of ordinary leave due to an officer shall be the period which he has earned under these rules diminished by the period actually taken.

119. Officers of Asiatic domicile shall not be eligible for furlough.

I now turn to the *Pension & Guarantee Fund.*

Rules – R1

1. The Fund intended to be hereby created..... shall be called "The Imperial Bank of India Employees' Pension and Guarantee Fund" and its objects and business shall be to provide pensions to the Bank's employees .....

2. In these rules ...."India" includes Pakistan, Burma, Ceylon.

11. The retirement of all officers of the Bank shall be subject to the sanction of the Executive Committee of the Central Board..... any officer..... who shall leave the service without sanction as required by this rule shall forfeit all claim upon the fund for pension.

14. If an officer of the Bank who is entitled to pension under these rules wishes to accept employment in any other Bank at any time or any other commercial employment within 2 years from the date of retirement, he shall obtain the previous sanction of the Executive Committee of the Central Board. Should he undertake such employment without the sanction required under this rule it shall be competent for the trustees to withdraw the pension payable to him either in whole or in part at their discretion.

Provided that an officer..... permitted by the Executive Committee to take up a particular form of commercial employment during his leave preparatory to retirement shall not be required to obtain subsequent permission for his continuance in such employment after retirement;

15. No employee on the staff in India shall be entitled to pension *until he shall have completed twenty-five years service in India* and no employee on the staff in London shall be entitled to pension until he shall have completed forty years service except as hereinafter provided.

19 (i) An employee retiring from the Bank's service after having completed twenty years service with the Bank shall be entitled to pension provided the employee has attained the age of fifty years if employed on the staff in India;

(ii) An employee retiring from the Bank's Service after having completed twenty years service on the staff in India..... shall be entitled to pension irrespective of age if he shall satisfy the authority competent to sanction his retirement by approved medical certificate or otherwise that he is incapacitated for further active service.

(iii) An employee who has attained the age of fifty-five or who shall be proved to the satisfaction of the authority competent to sanction his retirement to be permanently incapacitated by bodily or mental infirmity from further active service, may at the discretion of the trustees be granted a proportionate pension.

20. The maximum pension (except in cases which the trustees in their discretion may unanimously consider special) shall not exceed Rs. 750 per mensem *and in no case shall exceed Rs. 1,000 per mensem* in the case of employees on the staff in India.

The Arbitrator's decision and the grounds for same.– Reference has already been made to the matters in dispute communicated to the Arbitrator by the Commissioner of Labour – Document 'A'. The Arbitrator in his order dealing with the claim for pension makes specific reference to Rules 2(*g*), 38, 37, 19 of the service rules–A62(R8) and to Rules 11 an 15 of the Pension Fund Rules–R1.

He next makes reference to the letters written by the 3rd respondent to the Managing Director – A14 and A15 – seeking the exercise of the Banks discretion for permission to retire because of uncertainty of the future because of impending Governmental requirement for the Bank's incorporation in Sri Lanka and consequently is considering another job offer by a Bank. He next deals with submissions made on behalf of the workman's Counsel that Rule 15 of A62 gives a contractual entitlement to pension and describes the Bank's refusal as "unjust, unreasonable, discriminatory and inequitable".

He goes on to recite that counsel pointed to instances of others being allowed to retire before reaching 55 years or having 30 years service, to wit: the cases of Daniel, Paul, Cleghorn and Jeffry submitting that the refusal in the instant case amounted to discrimination and comes to a finding that there has been a clear practice of the Bank permitting retirement before reaching 55 years or before completing 30 years' service.

The arbitrator next dealt with the submissions of Counsel for the Bank who contended that a workman's eligibility for pension is governed by retirement and not resignation and that in this instance the 3rd respondent had resigned. Therefore the crux of the issue is whether the 3rd respondent retired. The 3rd respondent has himself requested permission to retire – A14 but later resigned – A15 and therefore he is not eligible for pension. The arbitrator came to a finding

that the "Bank refused to exercise discretion in a reasonably unreasonable way and maliciously withheld permission to retire. I hold Gunawardene is entitled to a pension".

The arbitrator next adverted to the question of gratuity. Having considered the submissions of counsel for the Bank that–

(*a*) there was no scheme of gratuity and therefore Gunawardene was not entitled to gratuity;

(*b*) that resignation was not a "retiral situation" guided by the judgment of the Supreme Court reported at 78 N.L.R. 133 *The National Union of Workers v. The Scottish Ceylon Tea Company Limited* (11);

(*c*) the issue before arbitrator (according to document 'A') does not relate to payment of gratuity and therefore there is no question of alternative relief;

the arbitrator examined the question as to how a gratuity can arise giving several reasons stating that he is required to give a just and equitable order and not just enforce an employer's legal rights. Reference was made to the minority judgment of Sharvananda, J. in the case adverted to when His Lordship extended "retiral" situations to include even a resignation. Reference was also made to the unreported case – S.C. Application 656/75 – by Vythialingam, J. which dealt exhaustively with the question of a 'retiral' situation. The question the arbitrator posed to himself was whether there were circumstances in the case which amount to a 'retiral' situation carrying with it the eligibility for the payment of gratuity. The arbitrator considered the other cases referred to in the evidence as also being 'retiral' situations accepted by the Bank and treated them as examples of discrimination against the employee–"This case is stinking with discrimination!" Learned counsel for petitioner took exception to the use of intemperate language in an order of an arbitrator.

On the question of payments in lieu of unutilized leave the arbitrator held that the 3rd respondent was subjected to numerous deprivations by the Bank during the period of his service on the pretext of "exigencies of service". The arbitrator relied on the terms of Staff Circular No. 8 marked A36 referring to a right to encashment of ordinary leave standing to an officer's credit, in making an award in this respect of Rs. 16,300.

On the other question regarding the entitlement to revision of salary and allowances the 3rd respondent made his claim upon the contents of Staff Circular No. 15 of 31.3.71 and annexure marked "A1" and "A1 (*a*)". The arbitrator accepting the contents of these documents alone made an award in favour of the 3rd respondent in a sum of Rs. 24,805 for the period 1.1.70 to 20.4.75.

The claim to Pension or Gratuity–Submissions of petitioner's Counsel:

It was the contention of learned counsel for the petitioner that–

(*a*) the 3rd respondent in letter A14 requested permission to retire asking the Bank to exercise its option under Rule 37 of A62. Rule 37 however gave a discretionary power to the Central Board of the Bank or its Committee *to call upon an officer to retire* from the Bank's service. The Bank did not choose to do so. The Bank cannot be faulted for that. This rule was inapplicable to meet the employee's request. Furthermore, Rule 38 dealt with compulsory retirement on reaching the age of 55 years or upon completion of 30 years' service. The employee did not fulfil either of these requirements. He was about 48 years of age and had only 25 years service at the time of his request in A14. He therefore did not qualify for retirement under any of the rules. For instance, he may have qualified under rule 19(i) if he had reached 50 years as he had over 20 years service or he may have qualified under Rule 19(ii) if he was incapacitated or under Rule 19(iii) if he was 55 years. Again, counsel pointed to the provisions of Rule 14 of R1 which requires that if an officer entitled to a pension, wishes to accept employment in any other Bank at any time within 2 years from date of retirement, he must obtain the previous sanction of the Executive Committee of the Central Board. If he contravenes this rule it is competent for the trustees to withdraw his pension either in whole or in part. The 3rd respondent said he was offered a senior post at the Hatton National Bank and was considering the offer in A14. This must be taken into account. This rule exists because the employee would know the Bank's business and organisation, the identity and accounts of its customers and other business secrets and it is good Banking practice to insist on such a rule. In all these circumstances the employee's *resignation* wiped out any claim to pension for past services. The award however creates new terms and conditions in the teeth of the contract of service. It is therefore arbitrary and unjust.

(*b*) In view of the *resignation* of the employee there was no dispute capable of being referred to arbitration.

(*c*) The award was in fact a judicial pronouncement made in the exercise of judicial power quite outside the scope of his duties. This is apparent upon an examination of the award. The monetary awards made was the traditional way in which a Court enforced rights. In the exercise of a duty to arbitrate an arbitrator cannot in fact exercise judicial power. Where he does so the award must be struck down as only a person appointed by the Judicial Service Commission can exercise judicial power. Article 170 of the 1978 Constitution provides that any tribunal exercising judicial power, i.e. a person equated to a 'judicial officer' must be appointed by the J.S.C. The majority decision of the Privy Council in the *United Engineering Workers' Union v. K. W. Devanayagam* (1) has been superceded by the Constitutional provision. This came about because of general dissatisfaction with the said view of the majority which coincided with the minority view in *Walker Sons & Co., Ltd. v. Fry and Others* (3) that a Labour Tribunal does not exercise judicial power. The matter is no longer in issue because of the Constitutional provision but it was submitted with respect to those Courts that the preferable view was that expressed by the majority of the Supreme Court in *Walker Sons & Co., Ltd. v. Fry* aforesaid and the minority view of the Privy Council in *United Engineering Workers' Union v. Devanayagam* aforesaid. In any event the Privy Council decision was in respect of a Labour Tribunal case. Therefore counsel invited the Court to hold that in exercising judicial power the arbitrator has acted *ultra vires*.

(*d*) On the question of payment in lieu of unutilized leave petitioner's counsel relied on the written submissions of petitioner's counsel at the arbitration inquiry contained in document D in the record. It had been the submission of counsel that there was no provision in the rules for such a payment and in fact Rule 97 of A 62 states that leave is granted at the convenience of the Bank. The evidence of witness da Cunha was that accumulated leave lapses at time of cessation of employment. The workman without taking leave prior to retirement suddenly resigned. He did not even give the requisite notice of resignation. But requested that it be waived and the

Bank obliged. In any event Staff Circular A36 on which the 3rd respondent relied was a circular that did not apply in Sri Lanka but applied only to Indian Officers serving in India.

(*e*) As regards Revision of Salary claimed it was Counsel's position, relying on the submissions contained in document 'D' that Staff Circular 'A1' and "A1 (*a*)" did not apply to Ceylonese officers. Consequent to representations made by the 3rd respondent and another Ceylonese officer John Pillai, the Board of Directors in India themselves resolved that these circulars do not apply in Ceylon. This was communicated by the agent to the 3rd respondent by A9 and A10. The award under this head is therefore quite unjustified and arbitrary upon a misconception that these were discriminatory tactics.

(*f*) The arbitrator referred to four other cases where officers had been permitted to retire before satisfying the conditions of Rule 38 and upon such comparison treated the instant case as an example of *discriminatory* treatment afforded to the 3rd respondent. Counsel submitted that this inference was unfounded and erroneous.

Those cases are:

(i) *Daniel's case*–He had rheumatoid arthritis and was hospitalized. He had served 25 years and wished to retire. These special circumstances warranted special consideration and retirement was sanctioned. The arbitrator has not considered this.

(ii) *Paul's case*–Had served 25 years. His conduct at the Indian Club, Colombo raised suspicions as to his integrity and reasonable fears as to his suitability to continue in employment in a Bank. On his seeking retirement the Bank grabbed the opportunity and let him do so.

(iii) *Cleghorn's case*–Appointed agent in Colombo. A fraud of Rs. 126,000–his supervision was found wanting–transferred to Madras–when Bank was nationalized (Imperial Bank succeeded by State Bank of India) he wanted to retire and was allowed to do so. That was in 1961.

(iv) *John Pillai's case*–Joined the service with 3rd respondent–later was placed senior to the 3rd respondent–took his Banking examinations later–this had

nothing to do with the 3rd respondent's resignation or pension. Mr. H. L. de Silva, P.C., for respondent however pointed out that under Rule 13 of A62 John Pillai did not have the qualifications to have been initially employed as he had not passed the Banker's Final examinations.

Conclusions

It has been held by the Supreme Court that although the power conferred by s. 17(1) of the Industrial Disputes Act on an arbitrator is a wide one, it must be exercised in accordance with justice and equity and not arbitrarily, that is to say an arbitrator was under a duty to act judicially: (1) *South Ceylon Democratic Workers' Union v. Selvadurai* (4); (2) *Heath & Company (Ceylon) Ltd. v. Kariyawasam* (5); and (3) *Nadaraja Ltd. v. Krishnadasan* (6). Nevertheless the functions of an arbitrator do not involve the exercise of judicial power in the sense in which that power is exercised in the Courts. In *Attorney-General of Australia v. Regina* (7), Lord Simmonds held that:

> "It is desirable to repeat that the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order" – (1957) 2 A.E.R. p. 49 (P.C.).

The above finds expression in Article 170 of the 1978 Constitution of Sri Lanka. "Judicial Officer" is declared to mean, amongst others, a presiding officer or member of a tribunal established for the adjudication of a labour dispute. Thus the President of a Labour Tribunal would be within this definition and would exercise judicial power. But this Article also says that the said definition does not include a person who performs arbitral functions. Further no Court has jurisdiction to determine the question whether a person is a 'Judicial Officer' within the meaning of the Constitution.

1 : 1 **Did the arbitrator exercise judicial power?**

It was the submission of Dr. H. W. Jayewardene, Q.C. that in the instant case however the Arbitrator had in fact exercised judicial power. He identified the criteria for this submission as the fact that the arbitrator had made monetary awards against the petitioner under three heads, i.e.:–

(*a*) pension or gratuity;

(*b*) encashment of leave; and

(*c*) revision of salary.

Monetary award he characterised as the traditional exercise of judicial power. As early as the Bribery Tribunal cases to wit: *Senadhira v. The Bribery Commissioner* (8) Sansoni J. had concluded that it was difficult to define the precise limits of 'judicial power'. His Lordship held that as the Tribunal could inflict punishment by way of fine or imprisonment the Tribunal had been given a power of enforcing its decisions and concluded that the Tribunal when pronouncing upon guilt was exercising a judicial power. However, Tambiah, J. in *Piyadasa v. The Commissioner* (9) held that 'enforcement' was not an indispensible element of judicial power. His Lordship also correctly pointed out that the power of enforcement was not regarded as an essential element of judicial power in the United States of America either.

The essential elements of judicial power discernible from the decisions cited and discussed in the above cases appear to be–

(*a*) settlement of a dispute,

(*b*) with reference to existing legal rights and duties,

(*c*) with a view to pronouncing a binding decision,

(*d*) even without a power of enforcement.

Accordingly Tambiah, J. held that a Bribery Tribunal was vested with judicial power.

This decision was canvassed in *Ranasinghe v. Bribery Commissioner* (10) and approved of by the Supreme Court and later by the Privy Council although these Courts did not discuss the content of judicial power.

The Industrial Disputes Act No. 43 of 1950 introduced mediation, conciliation and arbitration as methods of preventing or settling industrial disputes. Significant changes were introduced by the Industrial Disputes (Amendment) Act No. 62 of 1957 which created Labour Tribunals. In a series of cases the Act came under attack on the basis that arbitrators, Industrial Courts and Labour Tribunals were in fact Courts and therefore appointments to these bodies made by any authority other than the Judicial Service Commission were inconsistent with the Constitutional provisions. *Walker v. Fry (supra)* (3) and *United Engineering Union and Devanayagam (supra)* (1) were the leading judgments on the question.

The Supreme Court in *Walker v. Fry (supra)* (3) by a majority held that the *Labour Tribunals* were judicial bodies. On appeal which came before the Privy Council as *Devanayagam's case (supra)* (1) *the Board laid down that none of the institutions created by the Act were intended as a Judicial Tribunal.* The Privy Council approved of the minority opinion in *Walker v. Fry (supra)* (3) in viewing the legislative plan of the statute as a whole in order to determine the question whether a Labour Tribunal was analogous to a Court of law. A basic premise for the majority decision in *Walker v. Fry (supra)* (3) appears to be the difference between the dispute settlement machinery introduced by the original Act and the Labour Tribunals introduced in 1957. The fact that Labour Tribunals ascertained existing legal rights and liabilities and declared them prompted the majority of the Court to equate such a tribunal to a Court of law. In *Walker v. Fry (supra)* (3) Sansoni, J. also stated that–

> "A perusal of the orders made by the Industrial Court misapprehending its functions and powers and true nature of duties it was authorized to perform under the Act heard evidence and ultimately made orders *which only a duly appointed judicial officer is entitled to make.* It decided certain disputed questions of fact– (1) whether certain workmen were in fact employed by the petitioner (2) whether the discontinuance of certain workmen was justified or not (3) whether the claim of the petitioner or of the workmen was correct in regard to the rates of wages to be paid. It then made order giving relief on these matters which only a duly appointed judicial officer could have done... whether it is an Industrial Court or an arbitrator acting under this Act, it seems to me that the only power they are authorised to exercise is arbitral power, that is, to make an award which decides what the agreement between the parties would be in the future. They are not authorised to exercise judicial power which is what they have done in the cases before us."

The applications concerning the arbitrators' awards were set down for further argument before another Bench as they were not argued. In *Moosajees Ltd. v. Fernando* (11) acting on the decision in *Liyanage v. Queen* (12) it was decided that an arbitrator is not entitled by virtue of the separation of powers to exercise judicial power and therefore has no jurisdiction to adjudicate upon existing rights.

Thus it was recognised that an arbitrator who made an order the nature of which amounted to an exercise of judicial power acted in excess of powers.

It must also be noted that it was in *Liyanage v. The Queen (supra)* (12) that the Privy Council declared the source and basis of the principle that judicial power was impliedly vested in the judicature alone to the exclusion of the executive and the legislature. The 1978 Constitution has expressly vested judicial power in the Courts and officers exercising such power must be appointed by the Judicial Service Commission.

Viscount Dilhorne delivering the majority judgment in *Devanayagam's case (supra)* (1) accepted the proposition that–

> "there are many positive features which are essential to the existence of judicial power, yet which by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power, if, as is a common characteristic of so-called administrative tribunals the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also".

The Privy Council also agreed with the unanimous view of the Supreme Court in *Walker v. Fry (supra)* (3) that arbitrators and Industrial Courts were not intended by the legislature to exercise judicial power but mere arbitral functions. It was also held that a Labour Tribunal, an Industrial Court and an arbitrator are all required to do what is *just and equitable*.

It is in this background that the submissions of petitioner's counsel that in fact the arbitrator has exercised judicial power which he could not have done has to be viewed. The dominant duty of an arbitrator is to make an award which appears to him *just and equitable* which duty is identical to that imposed on a Labour Tribunal or Industrial Court. This was the view of the Privy Council in *Devanayagam's case* and is binding authority even today. This duty has been defined as follows:

> "The test of a just and equitable order is that those qualities would be apparent to any fair-minded person reading that order"–(1970) 78 C.L.W. 46, 48.

Again, an arbitrator is under a duty to act judicially–*Ceylon Transport Board v. Gunasinghe* (13). The view that the duty to make a "just and equitable order" requires the Court's discretion to be exercised reasonably and not arbitrarily–*Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya* (14).

The freedom to give reliefs which cannot be given by a Court of law does not permit the Tribunal to misdirect itself on an extraneous matter which formed the main reason for its decision–*Hayleys Ltd. v. Crosette-Thambiah* (15). The powers of a Labour Tribunal are limited by the terms of reference and the existing law. In *Shell Company of Ceylon Ltd. v. Pathirana* (16) and approved by the Privy Council in *Devanyagam's case,* it was held that the power to grant relief is only limited by the duty to make a just and equitable order which is wide in view of the power to grant relief notwithstanding anything to the contrary in any contract of service. It is not fettered by the terms of the contract between an employer and a workman; and it should be an order which decides what the agreement between the parties should be in the future.

Now, is the award granting a pension or gratuity specifying the payment of sums of money in the circumstances the exercise of judicial power? Gratuities were ordered by a Labour Tribunal in a 'retiral situation'–*The National Union of Workers v. The Scottish Ceylon Tea Company Limited (supra)* (2). As stated earlier the duty to make a just and equitable order was the same whether it be a Labour Tribunal or arbitrator. Section 33(1) (*e*) of the Industrial Disputes Act makes provision that any award under the Act may contain decisions as to the *payment* by any employer of a gratuity or pension, *the amount of such gratuity or pension and the method of computing* such amount and *the time within which such gratuity or pension shall be paid.*

Again, the dicta of Viscount Dilhorne quoted in that a single feature or a combination of them yet may fail to establish a judicial power is in my view applicable in the present context. The feature relied upon is not in my view characteristic only of judgments of Courts of law. Upon a consideration of the nature of the award I am of the opinion that the award does not reflect the exercise of judical power but is consistent with the exercise of arbitral power. I accordingly reject the submissions of learned Queen's Counsel in this regard. The awards made may properly have been made in the exercise of arbitral power.

1:2 Excess of Power

I now turn to the next question whether the award of the payment of a *pension* or in the alternative, a *gratuity* has been made in excess of powers. Such an excess of power could be occasioned by an abuse of discretionary power, the reliance of irrelevant considerations in reaching a decision or patent unreasonableness. Here, the main point of the petitioner is that the Rules do not permit retirement before time or resignation plus pension and the award is coloured by bias and an unfounded and unjustifiable emphasis placed on what the arbitrator termed discriminatory tactics.

On the Rules, learned President's Counsel of the respondent submitted that the respondent had made a mistake in requesting permission to retire under Rule 37 of A62–vide A14. That was not the rule which should have been considered. Instead, Rules 15 and 11 of the *Pension Rules,* R1, are those that properly govern the situation under consideration. I reproduce them for convenience–

Rule 15: No employee on the staff in India shall be entitled to pension until he shall have completed 25 years. The respondent had this qualification and could claim entitlement to pension.

Rule 11: Retirement shall be subject to the sanction of the Executive Committee. Any officer who shall leave without sanction shall forfeit all claim upon pension fund.

The submission of counsel was that before it reached stage 2 of Rule 11 the Bank could well have in a fair and proper exercise of discretion allowed the respondent to retire. The issue here was whether there has been a fair and proper exercise of discretion in refusing respondent's request. Counsel submitted there was not.

The question I am faced with then is whether there are factors or matters the Tribunal could have considered as that which the Bank ought to have taken into account in considering the request for *permission* to retire.

I would say, in the first place, the Bank in the light of his service record should have, despite A14 considered his request in the light of Rules 15 and 11 of the Pension Rules, R1 as they are no doubt the

applicable rules. Rule 37 of A62 under which the respondent applied is obviously mistaken and inappropriate. It amounts to saying–"Please ask me to retire". If the Bank considered the request properly as stated above the Bank would note that the respondent has reached an age of entitlement to pension. Now, is there an acceptable reason why the Bank's discretion could have been exercised favourably. There appears to be one, namely, that in A14 the respondent says–

> "..... there are very limited opportunities for me to advance in service in this branch.... the principal one is the fact that in view of the recent legislation requiring the Bank to incorporate itself in Sri Lanka I have no guarantee of the continued existence of this Bank in Sri Lanka."

This was a factually correct statement. There was in fact a law passed requiring foreign companies to incorporate in Sri Lanka but later exemptions were given. This law was after termination of respondent's services. So there was uncertainty in the mind of the workman regarding his future employment. Tennekoon, C.J., in the majority judgment dealing with payment of retirement benefits had this to say–

> "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, a material alteration in the conditions of service. 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 regarded as 'retiral' situations.

These questions will have to be decided as and when they arise in the context of the facts of each case–*National Union of Workers v. Scottish Ceylon Tea Company Ltd. (supra)* (2). Sharvananda, J. as he then was widened the scope of the payment of retirement benefits to include a duty to pay a workman for long and faithful service irrespective of a retiral situation in expressing the minority view. This view has been endorsed by His Lordship in *Y. G. de Silva v. Associated Newspapers of Ceylon* (17). When the workman here says that he fears that the Bank may close its branch in Colombo it amounts to fear of an impending abolition of office or loss of career. This in my view

would be a situation in justice and equity where the accepted practice in the light of the previous experience of the Bank in taking into account special situations would demand a retirement benefit for a workman who has already served 25 years. Thus there was good ground, a relevant circumstance stated in A14 which should have been taken into account by the employer, reaching a decision in this instance. The Bank has apparently not considered this factor in reaching its decision to withold permission. There is no evidence that it did. The arbitrator has in the course of his order referred to entitlement to pension under Rule 15 and has stated that withholding permission to retire under Rule 11 was unjust. The Arbitrator has rejected the petitioner's submission that entitlement is governed by retirement and not resignation. The petitioner is arguing from after the fact of resignation. What the arbitrator holds is that the first question to be considered is the correctness of the exercise of discretion in not agreeing to the request for retirement before the actual retirement. So he holds that the withholding of permission was unreasonable. It is a fact that the Bank had the right to allow the request in its discretion. This is a proper evaluation of the claim to pension upon the Bank's rules. The Tribunal has in my mind correctly exercised its discretionary powers in making a just and equitable order. His decision is supported by the evidence. The quantum of the award–a sum of Rs. 1,000 per month for life is within the permissible limits of the rules and decides the relationship between the parties for the future. Ordinarily retirement in full time on pension results in a continuing relationship between employer and workman regarding payment of pension. In the result the prayer for a mandate in the nature of a Writ of Certiorari to quash the award of pension made by the arbitrator must be refused.

1:3 Award of Gratuity

Here the arbitrator has examined the state of the law in regard to the payment of gratuity. The judgment of Sharvananda, C.J. in *Y. G. de Silva v. Associated Newspapers of Ceylon (supra)* (17) already referred to had not been delivered at the time of the award. Nevertheless for the reasons I have given in dealing with the award of Pension it is apparent that a 'retiral' situation as envisaged by Tennakoon, C.J. had arisen in this instance. The arbitrator has applied the rationale of that judgment, i.e. by reference to 'discrimination' the arbitrator seeks to establish a 'retiral' situation as explained by Tennakoon, C.J., i.e. the employee was *compelled* to volunteer

resignation or termination of his services. Therefore it must be taken as a 'retiral' situation which entitled him to gratuity. On the question of discrimination, there were those four instances where the Bank had permitted early retirement. The circumstances set out in A14 too could be categorised as special circumstances attracting a favourable exercise of discretion. But it was not so treated.

The industrial Disputes Act permits an arbitrator to make an award of gratuity–s. 33(1)(*e*). The definition of 'Industrial Dispute' under s. 48 includes a termination of services (however caused). The arbitrator makes a just and equitable award. Gratuity is a retirement benefit that may be incidental to or granted in the absence of pension. There need not be a scheme of gratuity. It is incidental to the terms of reference.

In the above circumstances the arbitrator has exercised his discretion in awarding gratuity on good grounds in a reasonable and proper manner in justice and equity. I cannot fault this alternative award. I do not see any abuse of discretionary power on the part of the arbitrator. Again, patent unreasonableness as a ground of challenge was described in *Associated Provincial Picture House Ltd. v. Wednesbury Corporation* (18) as–

> "Where a decision is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere; to prove a case of that kind would require something overwhelming."

Learned counsel for the petitioner referring to the phraseology used by the arbitrator and the extent to which he has used the yardstick of discrimination submitted it was without warrant and indicative of patent unreasonableness in the awards made. In regard to 'discrimination' what the arbitrator in effect says is that there was a special situation in the respondent's plea for permission to retire after 25 years when he was about to reach 50 years of age which should have had a special response. Compare that response with the responses of the Bank to the special situations in the cases of Daniel, Paul, Cleghorn, John Pillai and Jeffry. There is an unexplained difference. The occasional outbursts of overemphasised or intemperate language does not in my view go anywhere near showing patent unreasonableness as explained affecting the validity of the award. Nor does it show bias against the Bank. An arbitrator is entitled to express disapproval of an employer's conduct strongly. Having regard to the fact that the employer is a Bank the quantum of the

award is reasonable. For these reasons I refuse the application for a writ of certiorari to quash the alternative award of gratuity. As I have upheld the award of pension, the award of gratuity is no longer applicable.

1:4 Encashment of lieu leave

The evidence of witness da Cunha, the Managing Director was that any accumulated leave to the credit of an officer lapses at time of cessation of employment. There is no provision in the Rules–A64 for the payment to an officer an account of unutilized leave. The workman if he was entitled to leave could have utilized it before he left the service of the Bank. The respondent however, anxious to take up his new employment left the Bank without utilizing any accumulated leave. The workman did not even give the Bank the requisite three (3) months notice but prayed that it be waived which was granted. Circular A36 upon which the workman based his claim was meant only for Indians.

The arbitrator has acted on A36 in the context of his findings of discrimination. I find that on the reverse of A36 is a seal indicating that the document originated in the Madras office. That lends credence to da Cunha's testimony that this circular was meant only for Indians. That would represent the policy of the Bank in making special provisions for Indian nationals working abroad. The Bank is entitled to this. This being the policy of the Bank affecting all Ceylonese officers working at the Colombo branch, including John Pillai, the allegation of discrimination against the respondent, even if it be true, cannot affect the Bank's right to have separate provisions for its expatriate employees in respect of encashment of lieu leave. Thus the award of a sum of Rs. 16,300 under the head of unutilized leave cannot be substantiated. There is nothing to support the respondent's evidence on this point except the circular A36 itself. The question cannot be resolved on A36 alone. The issue of a writ quashing the award under this head is therefore warranted for error of law within jurisdiction.

1:5 Revision of Salary

The workman claimed revision of salary on the basis of staff circular '1A1' of 31.3.71. The workman made respresentations to the Bank by A7 asking that '1A1' be made applicable to him. The agent replied by A9 that the circular was not applicable to Ceylonese officers but

only to officers of the Bank serving in India. In view of further representations the Board of Directors themselves resolved that the salary proposals were applicable only to Indians serving in India and this was conveyed to the respondent by A10. The officers in Colombo enjoyed different terms and conditions of employment. The workman has accepted these terms by A27.

The arbitrator has made an award of a sum of Rs. 24,805 for the period 1.1.70 to 20.4.75 acting on the contents of document '1A1' alone. This he cannot do. Documents A9 and A10 explain the application of '1A1', A9 and A10 represent the general policy of the Bank for the revision of salaries of its nationals which is not within the purview of the arbitrator to reject. There was thus an error of law within jurisdiction. Consequently the award under the head of 'Revision of Salary' needs to be quashed by certiorari.

For the reasons enumerated above with which my brother Wijetunga, J. agrees I refuse a mandate in the nature of a Writ of Certiorari to quash the award made by the arbitrator under the heads of Pension and numbered (1) in the final award. I also refuse a Writ of Certiorari to quash the alternative award of a gratuity made by the arbitrator and numbered (iv) in his final award. This alternative award of gratuity is irrelevant and inapplicable as the award of pension stands.

I allow the application for a Mandate in the nature of a Writ of Certiorari to quash the award under the head–Encashment of leave in a sum of Rs. 16,800 and numbered (ii) in the final award of the arbitrator.

I also allow the application for a Mandate in the nature of a Writ of Certiorari to quash the award under the head–Revision of salary allowance in a sum of Rs. 24,805 and numbered (iii) in the final award of the arbitrator. The petitioner will pay a sum of Rs. 1,050 as costs.

WIJETUNGA, J.–I agree.

Application for certiorari in respect of pension and gratuity refused but allowed in respect of encashment of lieu leave and revision of salary allowance.