# STATE BANK OF INDIA
# V.
# EDIRISINGHE AND OTHERS

SUPREME COURT
RANASINGHE, C.J.,
TAMBIAH, J.,
G.P.S. DE. SILVA, J.,
KULATUNGE, J.,
DHEERARATNE, J.,
RAMANATHAN, J.,
WADUGODAPITIYA, J.,
SC. APPEAL NO. 36/87
SC.SPL. LA NO. 19/87
CA APPLICATION NO. 1070/80
MARCH 04, 05 AND 07, 1991.

*Industrial Dispute - Writ of certiorari - Award of Arbitrator made on reference under section 4(1) of Industrial Disputes Act - Award of pension - Gratuity - Encashment of leave - Revision of salary - Power of Arbitrator.*

The 3rd Respondent was employed by the Appellant-Bank as an Accountant and resigned with effect from 1.5.75. After his resignation he claimed:

(a) A monthly pension for life of Rs. 1015/-;
(b) Encashment of unutilised leaves;
(c) Revision of salary and allowances with effect from 1.1.70 in terms of Staff Circular No. 15 of 31.3.75.

The Minister of Labour referred these disputes to arbitration by the 1st respondent under section 4(1) of the Industrial Disputes Act. The 1st respondent on 5.6.81 awaded:

(a) A pension at Rs. 1000/- per month with effect from 1.5.1979;

(b) In the event of the award of pension being held to be unlawful:

(i) Gratuity in a sum of Rs. 26,390/-
(ii) A sum of Rs. 16,800/- as 'encashment of leave'
(iii) A sum of Rs. 24,805/- as 'revision of salary and allowances.'

The Bank applied for a Writ of Certiorari to quash the award to the Court of Appeal.The Court of Appeal affirmed the award of the pension but quashed the awards respecting encashment of leave and revision of salary and allowances.

The Bank appealed to the Supreme Court and the 3rd respondent also filed a cross-appeal respectively against the orders of the Supreme Court.

The main contention is that an arbitrator's discretionary power to make a just and equitable order is circumscribed by the terms of employment unlike the powers of a President of the Labour Tribunal, the arbitrator not being appointed by the Judicial Service Commission.

**Held:**

(1) (Ranasinghe CJ and Ramanathan J dissenting) The award of pension was just and equitable and should stand.

(2) (Unanimously) The quashing of the awards respecting encashment of leave and revision of salary and allowances should stand.

*Per* Tambiah J:
"An Industrial Arbitrator is not tied down and fettered by the terms of contract of employment between the employer and the workman. He can create new rights and introduce new obligatories between the parties".

"The effect of the award is to introduce terms which become implied terms of the contract.

(3) The Industrial Arbitrator creates a new contract for the future, a Judge enforces the rights and liabilities arising out of an existing contract. An Industrial Arbitrator settles disputes by dictating new conditions of employment to come into force in the future when he cannot get the parties to agree on them; a Judge determines the existing rights and liabilities of the parties.

**Cases referred to:**

1. *United Workers Union* V. *Devanayagam* 69 NLR 289, 296.
2. *Ceylon Bank Employees Union* V. *Yatawara* 64 NLR 49, 63
3. *Hayleys Ltd.* V. *De Silva* 64 NLR 130
4. *Hayleys Ltd.* V. *Crossette Tambiah* 69 NLR 248
5. *Walker Sons & Co. Ltd.* V. *Fry and others* 68 NLR 73.
6. *Waterside Workers' Federation of Australia* V. *J.E. Alexander Ltd.* (1918) 25 CLR 462, 463.
7. *Federated Saw Mill* V. *James Moore & Son Proprietary Ltd.* (1909) 8 CLR 521
8. *Brown & Co.* V. *Ratnayake & 3 others* Bar Association Law Journal Vol. 1, PV1 p. 230, 231, 232
9. *Thirunavakarasu* V. *Siriwardena & Others* 1981, SULR 186, 191, 193
10. *Peiris* V. *Podisingho* 78 CLW 46, 48
11. *Heath & Co. (Ceylon) Ltd.* V. *Kariyawasam* 71 NLR 382.
12. *Lewis Brown & Co. Ltd.* V. *Periyapperuma* 81 CLW 30, 32

APPEAL from Judgement of the Court of Appeal in application for writ of certiorari.

*K.N. Choksy, P.C.* with *Ronald Perera* and *Brito Muthunayagam* for the appellant.

*H.L. De Silva P.C.* with *M. Bastiansz, Mrs. Premila Seneviratne, P.M. Ratnawardena* and *Janaka Silva* for the respondents.

*Cur. adv. vult.*

03 May 1991

**RANASINGHE, C.J.,**

The Appellant-Bank is a branch of the State Bank of India and carries on its business of banking in Colombo, Sri Lanka.

The 3rd Respondent had been employed by the Appellant-Bank, as an Accountant, until his resignation with effect from 1.5.75.

After his resignation from the Appellant-Bank the 3rd Respondent filed an application, in terms of provisions of the Industrial Disputes Act, claiming: that he be paid a monthly pension of Rs. 1015/- for life with effect from 1.5.75; that he be paid in respect of the leave which he was entitled to but which he had not utilised during the period of employment under the Appellant-Bank: that he was entitled to a revision of salary and allowances with effect from 1.1.70 in terms of the Staff Circular No. 15 of 31.3.1975.

The aforesaid matters in dispute between the Appellant-Bank and the 3rd Respondent, were then referred to the 1st Respondent by the Minister of Labour by virtue of the powers vested in him under the provisions of section 4(1) of the Industrial Disputes Act, for arbitration.

After inquiry the 1st Respondent made his Award, dated 5th June 1981, directing that the 3rd Respondent be paid: a pension at the rate of Rs. 1000/- per month for life with effect from 1.5.79, and that, in the event of such Award for pension being subsequently held to be wrongful by a higher tribunal, he be paid a gratuity of Rs. 26,390/-: a sum of Rs. 16,800/- on account of "encashment of leave": a sum of Rs. 24,805/- on account of "Revision of salary and allowances."

The Appellant-Bank thereupon applied to the Court of Appeal for a writ of certiorari to quash the said Award made by the 1st Respondent. The Court of Appeal, by its judgment dated 30.1.87, held that the award of a pension for life in a sum of Rs. 1000/- was just and equitable, but that the award of a sum of Rs. 16,800/- under the head "encashment of leave" and the award of a sum of Rs. 24,805/- on account of revision of salary and allowances could not be substantiated. Therefore, whilst refusing a writ to quash the Award relating to the pension, the Court of Appeal issued a writ of certiorari quashing the Award in respect of the other two items of payments.

The Appellant-Bank has now appealed to this Court - to have the judgment of the Court of Appeal awarding the said pension set aside. The 3rd Respondent has also filed an appeal - S.C. Appeal No. 37 of 1987 - against the said judgment of the Court of Appeal setting aside the Order of the Arbitrator awarding the two aforesaid sums of money as encashment of leave and revision of salary.

After the said appeal was filed, this matter was, upon an application made by learned Counsel for the Appellant-Bank directed, in terms of the provisions of Article 132(3) (iii), to be heard by a Bench of seven judges as it was submitted that the contention of the Appellant-Bank — that the 1st Respondent has, in making a monetary award, exercised a power which is considered "a traditional exercise of judicial power:" that such judicial power could be exercised only by an officer appointed by the Judicial Service Commission: that the 1st Respondent, not having been so appointed by the Judicial Service Commission, has thus acted in excess of his jurisdiction — requires a re-consideration of the correctness of the majority Judgment of the Privy Council in the case of *United Workers Union* Vs. *Devanayagam,* (1).

When this matter was being argued before this Court, learned President's Counsel for the Appellant-Bank did however, indicate to this Court that he was not pressing the submission that an Arbitrator, contemplated by the provisions of the Industrial Disputes Act, is an officer who is required to be appointed by the Judicial Service Commission. Even so, this Court, as presently constituted, proceeded with the hearing of this appeal as what has been directed to be heard by this Bench is the entirety of the appeal of the Appellant-Bank, and not a particular question of law only.

The main contention of learned President's Counsel for the Appellant-Bank is that the Arbitrator's discretion in regard to the making of a just and equitable order, is circumscribed by the terms of employment, that the Arbitrator cannot make an order which is contrary to the terms of employment: that such power is granted only to a President of a Labour Tribunal, who has expressly been given the power, under the provisions of section 31(B)(4) to grant relief or redress which is even contrary to the terms of any contract of service between the employee and his employer: that, in any event, the grant of a pension in the circumstances of this case, having regard to the provisions of the Pension Rules, B4, is not "a just and equitable" order.

Even though Rule 38 of the Rules governing the service of officers of the Appellant-Bank, 'R8' provides that the compulsory age of retirement be fifty five, yet according to 'R1' a local employee who has completed twenty five years of service under the Appellant-Bank would become "entitled to a pension." Such pension, however, will "accrue" only upon the retirement of such employee. Retirement which will result in such accrual is dependent upon such retirement being sanctioned by the Appellant-Bank. It was in the background of these provisions in the Pension Rules 'R1' that the 3rd respondent had written the letters A14 and A15, dated 30.3.75 and 2.4.75 respectively, requesting that he be allowed to retire or, in the alternative, be treated as having resigned with effect from 1.5.75. The Appallent-Bank's reply A16, dated 30.4.75, advising the 3rd Respondent of the acceptance of the 3rd Respondent's resignation amounts to a refusal on the part of the Appellant-Bank to sanction the retirement of the 3rd Respondent. If such refusal is shown to be altogether unjustified, then, would an order made by one, who is vested with the power to make a just and equitable order, granting that which should have been granted by the employer constitute an act contrary to the terms of the employment? In the view I take, as set out later, of the judgment of the Court of Appeal and of the Award of the 1st Respondent, it seems to me to be not necessary, for the purposes of this appeal, to consider what impact, if any, the absence of a provision comparable to section 31(B)(4) of the Industrial Disputes Act would have on the nature and the scope of the powers of an Arbitrator to make a "just and equiable order" in respect of an employee who had been employed on the basis of a contract of service.

The 1st Respondent's decision to award a pension is based mainly upon his view that the refusal of the Appellant-Bank to grant the 3rd Respondent sanction to retire was wholly unjustifiable and unreasonable, and that consequently a retiral situation had arisen. The Court of Appeal in affirming the decision of the 1st Respondent to award a pension has founded its decision principally upon the circumstance that the 3rd Respondent had a justifiable apprehension, in regard to the ability of the Appellant-Bank to continue its business in Sri Lanka, which had instilled in the mind of the 3rd Respondent an uncertainty in regard to the continuity of his own employment with the Appellant-Bank. The Court of Appeal has also taken the view: that the statements made in the letter A14 by the 3rd Respondent, based upon "recent legislation" was "a factually correct statement": that, though exemptions were given later, they were given "after the termination of the Respondent's service."

A consideration of the Government Gazettes tendered to this Court— dated 8.8.74 and 18.12.74, by learned President's Counsel for the Appellant-Bank, and dated 29.5.70, by learned President's Counsel for the 3rd Respondent — and also the provisions of sections 3 and 85 of the Act No. 30 of 1988, clearly show that, at the time the documents A14 and A15 were written on the 30.3.75 and 2.4.72, there was no provision of law which endangered the continuance of the business of the Appellant-Bank in Sri Lanka, and that, at the time the said letters were written, there was no justification for the 3rd Respondent to have entertained any fears in this behalf. The provisions of the Companies (Special Provisions) Law No. 10 of 1974, were brought into operation, according to the Gazette (Extraordinary) No. 123/7 of 8.8.1974, only from 1.1.75. The "direction of exemption" issued under Sec. 3(1) of the said Law No. 10 of 1974 was published in the Gazette (Extraordinary) dated 18.12.74. The revocation of the said exemptions, dated 21.5.90, was published in the Gazette (Extraordinary) only on 21.5.90, after Act No. 30 of 1988 had come into operation.

The Court of Appeal has thus misdirected itself in regard to this matter. The 1st Respondent himself does not seem to have considered these documents and the legal position arisen therefrom in determining this aspect of the case.

Furthermore, Rule 14 of the said Pension Rules, 'R1' gives the Appellant-Bank the power, even where it has granted a pension, to withdraw such pension at its discretion if at any time thereafter such employee finds employment in another Bank without previously obtaining the sanction of the Appellant-Bank. Admittedly, the 3rd Respondent has, after he resigned from the Appellant-Bank, found employment in another Bank. It seems to me that this was a relevant consideration to be taken into account in deciding whether the award of a pension, in such circumstances, is "just and equitable."

A Writ of Certiorari would lie, inter alia, where there is an error of law apparent on the face of the record—*Ceylon Bank Employees Union* Vs. *Yatawara,* (2). *Hayleys Ltd.,* Vs. *De Silva* (3); *Hayleys Ltd.,* Vs. *R.W. Crossette Tambiah* (4): De Smith: *Judicial Review of Administrative Action* (4th Ed) p.136, 404, 407

I therefore, allow the appeal of the Appellant-Bank, and set aside the judgment of the Court of Appeal which affirms the 1st Respondent's Award relating to the aforesaid pension.

The grant of the gratuity referred to above was not challanged by learned President's Counsel for the Appellant-Bank: and accordingly the grant of a gratuity in a sum of Rs. 26,390/- to the 3rd Respondent is affirmed.

The Court of Appeal has, as stated earlier, quashed the award made under the heading of "encashment of leave." It would seem that, although the Appellant-Bank had not granted the 3rd respondent, during his period of employment, the leave the 3rd Respondent was entitled to and had in fact applied for before the dispute arose, yet, the 3rd Respondent could have made use of that leave before he actually resigned. The 3rd Respondent, however, was enxious to relinquish his employment under the Appellant-Bank as quickly as possible and had not even given the three months notice of termination of service which he was required to give in terms of his contract of service. This aspect of the matter does not seem to have been considered by the 1st Respondent in deciding whether the grant of a sum of money under this head was "just and equitable".

I am, therefore, of opinion that the order made by the Court of Appeal, that this particular direction of the 1st Respondent be quashed, should be affirmed.

The Court of Appeal has also quashed the grant made by the 1st Respondent in respect of the claim made by the 3rd Respondent under the heading of "Revision of salary and allowances". The position of the Appellant-Bank has been that such revision was confined only to the Staff Officers of the Appellant-Bank in India and not to officers in Sri Lanka. Although such a distinction would seem to offend against the universally accepted principle of equal pay for work of equal value, yet, a consideration of the document A9 shows that a distinction had been made because the Sri Lankan officers had been afforded certain benefits not extended to their Indian counterparts. Here again this particular document A9 does not seem to have received the attention of the 1st Respondent in deciding whether a grant in favour of the 3rd Respondent, under this heading, would be "just and equitable." In this view of the matter, I am of opinion that the judgment of the Court of Appeal quashing the Award of the 1st Respondent under this head should also be affirmed.

For the reasons set out above, I make order, in this appeal, directing that a Writ of Certorari do issue quashing the aforesaid Award of the

1st Respondent granting a monthly pension of Rs. 1000/- for life.

Having regard to all the circumstances I direct that the parties do bear their own costs of appeal, both of this Court and of the Court of Appeal.

**RAMANATHAN, J.,–** I agree with the Judgment of My Lord the Chief Justice.

**TAMBIAH, J.**

These appeals were listed to be heard by a Bench of 7 Judges as the question involved in S.C. Appeal No. 36/87 is one of general and public importance. The question involved is whether an Arbitrator appointed by the Minister of Labour in terms of s. 4 (1) of the Industrial Disputes Act to hear and determine an industrial dispute referred to him be appointed by the Judicial Service Commission. Mr. Choksy, P.C., who appeared for the appellant in S.C. Appeal No. 36/87, however, informed this Court that he was not pursuing this point.

The statement of matters in dispute dated 5.4.1977 furnished to the Arbitrator by the Commissioner of Labour states as follows:—

> "The matters in dispute between Mr. C. Gunawardena and the State Bank of India are —
>
> (i) whether the refusal and or failure of the State Bank of India to pay Mr. C. Gunawardena a pension of Rs. 1,015/- for life with effect from 1st May, 1975, is justified and to what relief he is entitled; and
>
> (ii) whether the following claims of Mr. C. Gunawardena against the State Bank of India —
>
> (a) that he be paid in lieu of unutilised leave;
> (b) that he was entitled to a revision of salary and allowances with effect from 01st January, 1970, in terms of Staff Circular No. 15 of 31st March, 1975,
>
> are justified and to what relief he is entitled to."

The 3rd Respondent, Mr. Gunawardena, was first employed by the State Bank of India on 01st December 1949, as a Probationery Assistant. On 25th September, 1963, he was appointed a Staff Officer in the 3rd Grade of officers and on 23rd April, 1971, was promoted to the 2nd Grade of Staff Officers with effect from 01st August, 1970. On 09th October, 1973, he was promoted to the 1st Grade of Staff Officers with effect from 01st September, 1973. With effect from 01st January, 1975, he was designated Accountant, in which position there were only 2 officers superior to him, namely, the Agent and the Sub-Agent.

On 30th March, 1975, the 3rd Respondent addressed a letter to Mr. T.R. Varadachary, Managing Director, State Bank of India, Bombay, in these terms:—

"Dear Mr. Varadachary,

I am venturing to write to you on this matter on the advice of the Branch Agent, Mr. H.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 1st December, 1974. I shall be glad if the Bank would exercise its option under Rule 37 of the Rules governing the Service of Officers in the Imperial Bank of India and permit me to retire from the Bank's service as from the 1st 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 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. In fact, in the matter of the revision of salary scales of Staff Officers, Grades I, II, and III on 26th March, 1971, the adverse decision taken vis-a-vis me was due to my being a Ceylonese officer in an organisation mainly staffed by Indians and to the fact that my pension rights under the Thalgodapitiya Award would be in excess of pension 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 on a matter such as this, but due to the limited time available to me to indicate acceptance of the offer made by the Hatton National Bank Ltd., 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 of the Bank 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."

On 02nd April, 1975, the 3rd Respondent addressed a 2nd letter to the Managing Director, State Bank of India, Bombay, as follows:—

*"Dear Sir,*

*Retirement from Service*

I have already completed 25 years of pensionable service in the Bank on 1st December, 1974, and I shall be glad if the Bank would permit me to retire from its service under Rule 37 of the Rules governing the Service of Officers in the Imperial Bank of India.

In this connection I have to state that 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 most grateful if you would sanction the payment to me of a suitable gratuity in lieu of a pension.

In terms of Rule 30 of the Rules governing the service of officers in the Imperial Bank of India, I am required to give 3 months notice or termination of service. I shall be glad if you will kindly waive this requirement 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."

On 30th April, 1975, the Bank's Agent in Colombo replied as follows:—

> Dear Sir,
> *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 three 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."

At the time the 3rd Respondent ceased employment as from 01.5.1975, he was about 48 years of age and had completed about 25 1/2 years service.

The Arbitrator made his Award on 05th June, 1981. He took the view that the 3rd Respondent has satisfied Rule 15 of the Imperial Bank of India Pension and Guarantee Fund (R1) which states: "No employee on the staff in India (which by reason of Rule 2 includes Ceylon) shall be entitled to pension until he shall have completed twenty five years' service."

Twenty five years' service alone was not enough for the payment of pension, he said. The Bank must sanction his retirement as Rule 11 says: "The retirement of all officers of the Bank shall be subject to the sanction of the Executive Committee of the Central Board. Any officer or other employee who shall leave the service without the sanction as required by this Rule shall forfeit all claims upon the fund for pension."

The Arbitrator also considered Rule 38 of the Rules governing the service of officers of the Imperial Bank of India (A62) which states: "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 Bank 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 over-riding limit." He considered other instances

where Bank employees were allowed to retire before they reached 55 years of age or before completing 30 years service. One R.H. Daniel had completed only 25 years service and not 30 years. On 24th March, 1975, he sought the Bank's permission to retire on medical grounds. Under Rule 19(ii) of document (R1), a Bank employee retiring after 20 years service, irrespective of age, was entitled to pension if he could satisfy the Bank by an approved medical certificate or otherwise that he is incapacitated for further active service. The Bank referred him to the Bank's Doctor to examine him and report whether he is incapacitated for further service. The Doctor reported that he was treated for rheumatic arthritis, was suffering from nervous tension and joint pains and that he was not incapacitated but needed some rest and recommended 2 months leave. He again wrote to the Bank stating that he was not fit to carry on his duties efficiently and to treat him as a special case and permit him to retire. The Bank on 01st July, 1975, accepted his application to retire as a special case. The Bank did not act under Rule 37 of document (A62) and call upon him to retire upon completion of 25 years service.

Similarly one S.A. Paul had 25 years service and was under the age of 50 years. On 21st November, 1967, he wrote to the Bank seeking permission to retire and added that he was compelled to retire from the Bank's service as the education of the children made it necessary for him to be with his family who were residing in Jaffna. The Bank permitted him to retire and sanctioned a monthly pension for life. So also, the Bank sanctioned the retirement of two other officers, one Cleghera, who had 20 years service and one Jeffrey who had 14 years service in the Bank.

Having considered other instances where permission to retire had been sanctioned in the absence of specified requirements, the Arbitator stated that there is a clear practice at the Bank of permitting officers to retire before reaching the mandatory age of 55 years and before completing the mandatory period of service of 30 years. He concluded that in refusing to sanction the retirement of the 3rd respondent, the Bank had exercised its discretion unreasonably and maliciously and held that the 3rd Respondent was entitled to a pension and awarded him a pension at the rate of Rs. 1,000/- per month for life with effect from 01st May, 1975. The Arbitrator also concluded that there were circumstances in the instant case which amounted to a retiral situation carrying with it the eligibility for the payment of gratuity and held that if the award of pension was subsequently held to be wrong by a higher Tribunal, the 3rd Respondent be paid a gratuity of Rs.26,390/- .

On the question of payment in lieu of unutilised leave, the Arbitrator held that the 3rd Respondent had a right to encash his leave in terms of Circular (A36) and this right had been denied to him by the Bank. He held that the 3rd Respondent was entitled to the total leave of 8 months and 20 days. Setting off 2 months against notice, payment is due for 6 months and 20 days. At the rate of Rs. 2,520/- per month, the Arbitrator awarded him a sum of Rs. 16,800/-.

As regards the 3rd Respondent's entitlement to revision of salary, the Arbitrator held that in terms of Circular No. 15 of 31.3.71 (A1A) he was entitled to Rs. 24,805/- for the period 1.1.70 to 20.4.75.

The appellant then applied to the Court of Appeal for a writ of certiorari to quash the award of the Arbitrator. The Court of Appeal was of opinion that the Rules that govern the instant case were Rules 11 and 15 of the Pension Rules (R1): that there is a relevant circumstance in the 3rd Respondent's letter of 30th March, 1975, which the Bank ought to have considered, but did not, before it exercised its discretion to withhold permission to retire, namely, that in view of the recent legislation requiring the Bank to incorporate itself in Sri Lanka, the 3rd Respondent had no guarantee of the continued existence of the Bank in Sri Lanka. The Court of Appeal held that the award of Rs. 1,000/-, per month for life was a just and equitable order and refused to quash the award of pension; and that as the award of pension was upheld, the award of gratuity is no longer applicable.

As regards the claim for revision of salary, the Court of Appeal held that the Arbitrator had erred in acting on the contents of Circular (1A1) alone, and that he had not addressed his mind to the correspondence between the 3rd Respondent and the Bank. The 3rd Respondent on 20th July, 1971, wrote to the Bank and stated that the Staff Circular No. 15 dated 31st March, 1971 (1A1) does not indicate that the revised pay scales of staff officers are applicable only in India, and that he be paid the revised salary scales. The Bank on 03rd April, 1972 (A9), in reply, stated that the salary revisions are applicable only to the staff officers of the Bank in India, and added "with the benefit of higher bonus and the Bank's contributions to Provident Fund at 10% in your case, as against 5% of the officers of your grade in India, your overall emoluments are by and large, already better than those of your counterparts in India. Your retirement benefits are also higher and the formula in vogue in Ceylon for calculating the pension payable

permits larger pension to officers in Ceylon than to their counterparts in India." By a further letter of 20th July, 1971 (A1C) the 3rd Respondent was informed that the Board of Directors of the Bank in India had resolved that the salary proposals were not applicable to staff officers of the Bank at Colombo who were not India-based. The 3rd Respondent himself has accepted these terms by his letter to the Bank dated 05.11.1968. In the view of the Court of Appeal, the documents (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 and that officers in Colombo enjoyed different terms and conditions. The award under the head of 'revision of salary' was accordingly quashed.

As regards the award of Rs. 16,300/- on account of encashment of leave, the Court of Appeal held that the claim cannot be substantiated. The Arbitrator had acted on the contents of the Circular (A36) alone. He has not considered the other evidence in the case which shows that the Circular was not applicable to him and that accumulated leave to the credit of an officer lapsed at the time of cessation of office. Accordingly, the award of Rs. 16,300/- on account of encashment of leave was quashed.

Mr. Choksy, P.C., for the Bank submitted as follows:—

(i) The arbitrator has held that the 3rd Respondent is contractually and legally entitled to a pension in terms of Rule 15 of the Pension Rules (R1). Rule 15 should not be read per se but be read along with Rule 13 which states that "pensions shall begin to accrue on the first day succeeding that of retirement . . ." Pension accrues on retirement and retirement is a sine qua non for pension. The 3rd Respondent by his letter dated 02nd April 1975, requested the Bank to permit him to retire under Rule 37 of the Service Rules (A62) and in case the Bank not permitting him to retire, to treat this letter as one of resignation. The Bank opted for resignation. Upon resignation, the 3rd Respondent was not entitled to pension.

(ii) Under Rule 38 of the Service Rules (A62), a person was entitled to retire if he was 55 years of age or completed 30 years service. The 3rd Respondent did not qualify for retirement under Rule 38 as he was 48 years of age and had only 25 1/2 years service.

Though he had 20 years service, he did not qualify for retirement under Rule 19 (i) of the Pension Rules as he had not attained the age of 50 years nor under Rule 19 (ii) as he was not incapacitated. Nor did the 3rd Respondent qualify for retirement under Rule 19 (iii) of the Pension Rules as he had not attained the age of 55 years nor permanently incapacitated by bodily or mental infirmity. The 3rd Respondent was not entitled to pension as he was not qualified to retire from service of the Bank.

(iii) The Service Rule (A62) and the Pension Rules (R8) constituted part of the contract of service of the 3rd Respondent. Under these Rules the 3rd Respondent was not entitled to pension. The Arbitrator is bound by the terms of the contract of employment. A Labour Tribunal can vary the terms of contract of employment as s. 31 (B) (4) of the Industrial Disputes Act gives the power to a Labour Tribunal to grant any relief or redress notwithstanding anything to the contrary in any contract of service between a workman and his employer. There was no such provision as regards Industrial Arbitrators. If the terms of the contract of employment are silent on the question of retirement and pension, the Arbitrator can create new terms which would then become implied terms in the contract of employment between an employer and a workman in terms of s. 19 of the Industrial Disputes Act.

(iv) The Court of Appeal gave a reason, which the Arbitrator did not give, as to why the Bank ought to have considered favourably the 3rd Respondent's application to retire, namely, in view of the recent legislation requiring the Bank to incorporate itself under the Companies Ordinance, the 3rd Respondent entertained an apprehension that the Bank would cease to do business in Sri Lanka and there was uncertainty in his mind regarding his future employment. There was no reason and basis for such apprehension. S. 2 (b) of the Companies (Special Provisions) Law, No. 19 of 1974, enacted that on and after the 01st of September, 1974, no Company shall carry on any undertaking in Sri Lanka unless such Company is incorporated under the Companies Ordinance or is an exempted Company. On the 08th of August, 1974, the Minister of Foreign and Internal Trade altered the appointed date to 01st of January, 1975. In terms of s. 3 (i) of the said Law, by a "direction of exemption" published in Government Gazette No. 142/9 of 18th December, 1974, the

Minister exempted certain categories of Companies and certain specified Companies which had applied for exemption, and also any foreign Company not falling within the abovementioned categories of Companies or specified Companies from the application of the provisions of s. 2. The 3rd Respondent's letter to the Bank wherein he stated that he had apprehension about the continued existence of the Bank in Sri Lanka in view of Law No. 19 of 1974 was written after the 18th of December, 1974, i.e., on 30th March, 1975. The 3rd Respondent had an unjustified fear or apprehension. The Court of Appeal has misdirected itself when it stated that there is a relevant circumstance which the Bank ought to have considered in exercising its discretion to withhold permission to retire.

(v) In the letter dated 30th March, 1975, the 3rd Respondent stated that he had been offered a very senior post in the Hatton National Bank and that he would like to accept it. Rule 14 of the Pension Rules (R1) requires that if an officer entitled to pension wishes to accept employment at any other Bank within 2 years of the date of retirement, he must obtain the previous sanction of the Executive Committee of the Central Board. If he contravenes this Rule it in competent for the Bank to withdraw his pension in whole or in part. It is a good banking practice to insist on such a rule. The Bank may have taken into consideration the fact that the 3rd Respondent was taking up employment in another Bank in refusing permission to retire. The Court of Appeal has not considered the provisions of Rule 14.

The principal submission of Mr. Choksy, P.C. is that an Arbitrator is fettered and constrained by the terms of contract of employment and cannot depart from them.

Under s. 17 (i) of the Industrial Disputes Act, when an industrial dispute is referred under s. 4 (1) to an Arbitrator for settlement by arbitration, he is required to make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable. The dominant duty imposed on an Arbitrator is, therefore, to make an award that appears to him "just and equitable". Text Book writers and Judges of this Court have discussed the extent of the power of an Arbitrator and the kind of orders he can make.

*Ludwig Teller* in his *"Labour Disputes and Collective Bargaining" (Vol 1, p. 356)* states:—

> "Industrial Arbitration may involve the extension of an existing agreement or the making of a new one or in general the creation of new obligations or modification of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreement."

In *Walker Sons & Co. Ltd.*, v. *Fry & others (5)* the whole Court consisting of 5 judges held that an Arbitrator to whom an industrial dispute is referred by the Minister under s. 4 (1) of the Industrial Disputes Act or by the Commissioner of Labour under s. 3 (1) (d) is not a judicial officer and does not, therefore, require to be appointed by the Judicial Service Commission. Sansoni, C.J., pp. 84,85) discussing the distinction between an Arbitrator's function and a Judge's function cited with approval certain dicta in the judgment in *Waterside Workers' Federation of Australia* v. *J.E. Alexander Ltd.* (6) and in *Federated Saw Mill* v. *James Moore & Son Proprietary Ltd. (7)*

> "An Industrial Dispute is a claim by one of the disputants that existing relation should be altered, and by the other that the claim should not be conceded. It is therefore a claim for new rights, and the duty of an arbitrator is to determine whether the new rights ought to be conceded in whole or in part . . .The arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it, then proceeds if necessary to enforce the law . . .The arbitrator will have to decide, not what agreement was made, but what is to be made in regard to the future. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties . . .thus creating new rights and obligations . . .then the determination is essentially of a legislative character . . .If the dispute is industrial, it is not an ordinary legal dispute, i.e., it is not a dispute as to what are the rights and liabilities of the parties with respect to the past or existing facts. It necessarily looks to the future."

Sansoni, J. proceeded to say (p.84):

> "The distinction between the two functions (arbitral and judicial) is plain to see. The Industrial Arbitrator creates a new contract for the future,

a judge enforces the rights and liabilities arising out of an existing contract. An Industrial Arbitrator settles disputes by dictating new conditions of employment to come into force in the future where he cannot get the parties to agree on them; a judge determines the existing rights and liabilities of the parties."

In *Brown & Co.* v. *Ratnayake & 3 Others* (8) Rodrigo, J. said:

"The function of an arbitral power in relation to industrial disputes is to ascertain and declare what in the opinion of an arbitrator ought to be the respective rights and liabilities of the parties in relation to each other, as distinct from the rights and liabilities of the parties as they exist at the moment the proceedings are instituted . . .A just and equitable award is not an ultimate finding as to whether the employer is justified in terminating the employment of the employee in the sense that the employer had not committed any breach of the terms of his contract of employment with the employee . . .The omission of the word "wrongful" in the Industrial Disputes Act in respect of applications for relief is deliberate and significant, for an application for relief can arise if the termination is in accordance with the terms of his contract and not in breach of them and the arbitrator can order what he considers to be just and equitable even though that is in excess of his legal rights . . .In their natural and ordinary meaning what it (just and equitable order) means is due justice between the parties to the application. That is the dominating duty of the arbitrator and the only object of the order".

In *Thirunavakarssu* v. *Siriwardene & Others* (9) Wanasundera, J., said:

"There are some differences between civil law arbitration and industrial arbitration. An industrial arbitrator has much wider powers both as regards the scope of the inquiry and the kind of orders he can make than an arbitrator in the civil law. In short we can fairly say that arbitration under the industrial law is intended to be even more liberal, informal and flexible than commercial arbitration . . .What the award seeks to do is to resolve the dispute by formulating a new set of terms and conditions, which are fair and reasonable to both parties, and imposing such terms on the parties so that these terms and conditions will supercede the original position of the parties and provide a new relationship that would henceforth guide the conduct of the parties. These terms and conditions are statutorily made implied terms of the contract of employment."

From the above observations which I have quoted, it is clear that an Industrial Arbitrator is not tied down and fettered by the terms of contract of employment between the employer and the workman. He can create new rights and introduce new obligaitons between the parties.

Mr. Choksy, P.C., relied on s. 31 (B) (4) of the Industrial Disputes Act which empowered a Labour Tribunal to grant relief or redress to a workman notwithstanding anything to the contrary in the contract of service, between him and the employer. He said there is no such provision in the Act as regards Industrial Arbitrators. But, one must not lose sight of s. 19 of the Act which states that an award of an Arbitrator in force shall be binding on the parties and the terms of the award shall be implied terms in the contract of employment between the employer and the workman. As was pointed out by Wanasundera, J., in *Thirunavukarasu's* case (supra) what the award seeks to do is to create new terms and conditions which are statutorily made implied terms of the contract of employment. The effect of the award is to introduce terms which become implied terms of the contract. I also see that s. 33 (i) (e) enables an Arbitrator in his award to make an order as to the payment by an employer of a pension, the amount of such pension and its duration. The submission of Mr. Choksy that the Arbitrator is bound and fettered by the terms of contract of employment is untenable.

As was pointed out by the majority judgment of the Privy Council in the *United Engineering Workers Union* v. *Devanayagam* (1) "the award has to be one which appears to the arbitrator just and equitable. No other criterion is laid down. He is given an unfettered discretion to do what they think is right and fair."

The test of a just and equitable order is that those qualities would be apparent to any fair minded person reading that order (*per* de Kretser, J., in *Peiris* v. *Podisingho* (10).)

At the time the 3rd Respondent ceased employment he was about 48 years of age and had completed about 25 1/2 years service. From 1949 to 1975, he had rendered loyal and meritorious service. Mr. E.R.A. da Cunha, the then Agent for the State Bank of India, Colombo Branch, stated in evidence that he was an efficient officer and rendered loyal and faithful service to the Bank.

According to the Arbitrator, there were other officers allowed to retire before they reached 55 years of age or before completing 30 years service K.S. Daniel, S.A. Paul, Cleghorn and Jeffrey.

Mr. Choksy, P.C., submitted that Daniel was allowed to retire on medical grounds. The man was sick and the Bank accepted his application to retire as a special case and the Arbitrator has not considered this aspect of his case. But the point to be noted is that the Bank did not call upon him to retire under Rule 37 of document (A62). Nor could it be said that he satisfied the Bank that he was incapacitated within the meaning of Rule 19 (ii) or (iii) of document (R1) and therefore the Bank allowed him to retire, because the Doctor reported that he was not incapacitated but needed two months rest. The correspondence makes it clear that he sought permission to retire and the Bank permitted or sanctioned his retirement under Rule 11 of (R1).

As regards G.A. Paul, Mr. Choksy, P.C., submitted that his conduct at the Indian Club in Colombo gave cause for concern whether he could continue to work at the Bank. He was involved in the misappropriation of funds. The Bank seized the opportunity and permitted him to retire. The Arbitrator, he said, has not considered this item of evidence. Here again the Bank did not act under Rule 37 of document (A62) and call upon him to retire by reason of his conduct. The ostensible reason Paul gave was that the education of his children required him to reside with his family in Jaffna. The correspondence shows that he asked for permission to retire and the Bank permitted or sanctioned his retirement under Rule 15 of document (R1).

It seems to me, that both cases, of Daniel and Paul, are referable only to Rule 15 of document (R1).

It would appear that in Cleghorn's case, when he was Agent in Colombo, his supervision was found wanting as there was a fraud of Rs. 126,000/-. He was tansferred to Madras and when the Bank was nationalised and the Imperial Bank of India was seconded by the State Bank of India, his application to retire was allowed. But the point is that Cleghorn with 20 years service and Jeffrey with 14 years service and both under 55 years of age were given permission to retire by the Bank. It, therefore, appears to me that despite Rule 38 in the Service Rules (A52), in practice the Bank has sanctioned the retirement of officers before they reached the mandatory age of 55 years and before reaching the mandatory service of 30 years.

Mr. Choksy, P.C., argued that the 3rd Respondent had an unjustifiable apprehension and fear as regards his future employment because the Bank was an exempted Company by reason of the Gazette Notification. On March 30, 1975, after the Gazette Notification, the 3rd Respondent wrote

to the Managing Director of the Bank in India seeking permission to retire. He stated that he was writing this letter on the advice of the Bank Agent, Mr. da Cunha, and had discussed with him the various reasons which made him write this letter. He stated that the principal reason was 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." The Bank in its reply on 30th April, 1975, did not put him right and say that it was an exempted Company by reason of the Gazette Notification. Mr. da Cunha was questioned about the Foreign Companies (Special Provisions) Act and was asked the question, "The State Bank of India decided not to get incorporated". His answer was "As far as I remember we had no choice, we had to get incorporated or pack up. As a later development. I remember the Governor of the Central Bank stated that Banks (Foreign) need not be incorporated." No reference was made by him to the Gazette Notification. His knowledge was derived from the Governor of the Central Bank. Obviously the Bank was unaware of the existence of the Gazette Notification. For the first time, in this Court, a reference was made to the Gazette Notification.

This being the evidence in the case, I cannot fault the Court of Appeal for taking the view that the 3rd Respondent had fears about his future employment in view of the provisions of Law No. 19 of 1974, as that was his impression at the relevant time.

The final submission of Mr. Choksy, P.C. was that the Bank may have had good reason to refuse permission to retire as the 3rd Respondent was taking up employment in another Bank.

In the forefront of his letter, the 3rd Respondent frankly disclosed that he was desirous of accepting employment at another Bank and due to the limited time given him to accept the new appointment, he requested an early reply. There was no reply. In his second letter of 02nd April 1975, he reiterated that he has been offered employment in another Bank and concluded that if permission to retire was not granted, to treat his letter as one of resignation. The Bank in its reply advised him that his resignation has been accepted and ended "We wish you a happy future". At no stage did the Bank disapprove of his conduct in accepting employment in another Bank nor think it would be inimical to its interests. On the contrary, the Bank wished him happiness in the future. Mr. H.L.de Silva, P.C., informed us, and this was not denied by Mr. Choksy, P.C., that after he ceased

employment, the State Bank of India had used his services as a Consultant. There is no merit in this submission.

Considering the fact that the 3rd Respondent had rendered the Bank 25 1/2 years of efficient and loyal service, and also taking into consideration other instances where officers, less deserving, have been permitted to retire, though not qualified to do so, it seems to me that this is a fit case where the Bank might well have considered the 3rd Respondent's application to retire favourably and sanctioned his retirement. The award of pension appears to me to be a just and equitable order.

In *S.C. Appeal No. 37/87,* the 3rd Rspondent-Appellant wants this Court to set asids the judgment of the Court of Appeal quashing the Arbitrator's award allowing a payment of Rs. 24,805/- on account of revision of salary and allowances, and a payment of Rs. 16,800/- on account of encashment of leave.

The 3rd Respondent claimed a revision of salary on the basis of the Staff Circular of 31.05.1971 (A1A) and the Arbitrator has made an award of a sum of Rs. 24,805/- for the period 01.01.1970 to 20.04.1975 acting on the contents of the said Circular alone.

The Arbitrator has not addresed his mind to the letters (A9) and (A10). After the letter (A10) was sent to the 3rd Respondent, in view of further representations made by the 3rd Respondent, the letter (A10) was sent to him where he was clearly told that the salary proposals were not applicable to staff officers of the Bank at Colombo who are not Indian based. The 3rd Respondent was not India-based.

Mr. H.L. de Silva, P.C., submitted that the resolution referred to in letter (A10) was discriminatory and there was no rational basis for the distinction drawn between India-based officers and Sri Lankan staff officers in the Colombo Branch of the Bank. The answer to this is found in the letter (A9) written by the Bank which gave a reason, namely, that the 3rd Respondent's overall emoluments were better than those of his counterparts in India. It is also relevant to note that both Mr. Johnpulle and the 3rd Respondent, the only two Sri Lankan Staff Officers, by letter of 28.07.1971 made a joint request that they be paid the revised salary scales. The reply to both was the Bank's letter (A9). It is not the 3rd Respondent's complaint that among Sri Lankan Staff Officers there was discrimination *inter se.*

As regards the award of Rs. 16,800/- on account of encashment of leave, here again, the Arbitrator has acted on the contents of Circular (A36) alone. He has not addressed his mind to the other evidence on this matter. The Bank Agent, Mr. da Cunha, stated that the Circular is applicable to India-based officers only. He further stated that any accumulated leave to the credit of any officer lapses at the time of cessation of his employment. The 3rd Respondent, if he was entitled to any accumulated leave, could have utilised it before he left the service of the Bank. However, in his anxiety to leave the Bank's service soon in order to commence the alternate employment which he had obtained, he could not utilise the accumulated leave, if any, to his credit. Further Rule 30 of the Service Rules requires an officer who intends to resign to give the Bank 3 calendar months' previous notice in writing, failing which he shall pay to the Bank 3 months' salary. The Bank, however, by its letter of 30.4.1975, at the 3rd Respondent's request, set off the required 3 months notice against his unavailed ordinary leave.

Mr. H.L. de Silva, P.C., here again, submitted that there is no rational basis for a distinction to be drawn between India based officers and Sri Lankan officers in the Colombo Branch of the Bank in the application of Circular (A36). It is discriminatory, he said. I am inclined to agree with Mr. Choksy, P.C., that these are matters of policy to be decided by the Bank. There is evidence in this case that the 3rd Respondent made representations to the Ministry of Defence and External Affairs when he was not promoted as Assistant Manager as he was told the post was reserved for an Indian National. He was told that the Ministry could not intervene in the matter. Here too, it is not the position of the 3rd Respondent that in regard to encashment of lieu leave, among Sri Lankan officers in the Bank, there has been discrimination *inter se.*

The power given to an Arbitrator to make a just and equitable award is not unlimited. In the assessment of evidence, he must act judicially (*per* Sirimanne, J., in *Heath & Co. (Ceylon) Ltd.*, v. *Kariyawasam* (11) at p.384). The order of a Labour Tribunal is not a just and equitable one, if it is made without examination and consideration of all relevant evidence adduced at the inquiry, (*per* H.N.G. Fernando, C.J., in *Lewis Brown & Co. Ltd.* v. *Periyapperuma,* (12). This observation is equally applicable to an award of an Industrial Arbitrator.

I affirm the order of the Court of Appeal quashing the award of Rs. 24,805 on account of revision of salary and allowances and of Rs. 16,800/- on account of encashment of leave.

In the result, both appeals are dismissed. In each of these appeals there will be no costs.

**G.P.S. DE SILVA, J.** — I agree.

**KULATUNGA, J.**— I agree.

**DHEERARATNE, J.**— I agree.

**WADUGODAPITIYA, J.** — I agree.

*Appeals dismissed.*