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DIGEST

"When a tribunal is invested by Act of Parliament or by rules with a discretion without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the rules did not fetter the discretion of the judge why should the Court do so?

Similarly, it has been held by the Court of Appeal, in *Hope v. Great Western Railway Company*[8], that the discretion to grant or refuse a Jury in King's Bench cases is in truth, as it is in terms, unfettered. It is, however, often convenient in practices to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, though in matters of discretion on one case can be an authority for another. As Kay, L. J., said in *Jenkins v. Bushby*[9] at 495: the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion.

A discretion necessarily involved a latitude of individual choice, according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae,* once the facts are ascertained."

When a discretion necessarily involves a range of individual choice the manner in which it has to be exercised would depend on facts and circumstances of each case. On the other hand it is needless to stress that the discretion given under Section 770 is a very wide one and same has to be exercised cautiously which being a power expressly and plainly conferred on the Judge who hears the appeal.

On the other hand if a particular party in a partition case who should have been made a respondent is not made a respondent in the appeal, then granting relief to the appellant (in this case to the 4th defendant) will not help such a party to safeguard his rights and making him a respondent would not act to the prejudice of the appellant. For the above reasons I conclude that 1st and 2nd defendants named in the District Court case should be added as respondents to the appeal pending in the High Court.

In view of the above necessity has now arisen to consider which Court should exercise this power given by Section 770 of the Civil Procedure Code. The impugned judgment of the High Court is already set aside. Perusal of the above section shows that 'if at the hearing of the appeal, if it appears to Court at such hearing that any person who was a party to the action in the Court against whose decree the appeal is made, but who has not been made a party to the appeal, the Court has the discretion to issue the requisite notice of appeal for service. In the case at hand the appeal had been taken up for hearing in the High Court of Civil Appeal (although it was originally pending before the Court of Appeal) under the provisions of High Court of the Provinces (Special Provisions) – Amendment – Act No. 54/2006. Thus it becomes clear that it is the High Court of Civil Appeal that has to exercise this power now and, I direct the High Court in terms of Section 770 of the Civil Procedure Code that 1st and 2nd defendants in the District Court case (also named as 1st and 2nd defendant – respondent – respondents in the caption to the present petition) be made respondents to the appeal preferred by the 4th defendant and to issue the requisite notices of appeal on them.

The Learned Judges of the High Court of Civil Appeal are further directed to take such other appropriate steps under the Civil Procedure Code and to conclude the appeal expeditiously. The plaintiff – respondent – appellant will however, be entitled to Rs. 15,000/- as costs payable by the 4th defendant-appellant – respondent.

J. A. N. DE SILVA, C. J. - I agree.

MARSOOF P C, J. - I agree.

Appeal allowed.

Directions given to High Court.

MARK RAJANDRAN VS. FIRST CAPITAL LTD., FORMERLY, COMMERCIAL CAPITAL LTD.,

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, ACTING C. J.
RATNAYAKE, J., AND
EKANAYAKE, J.
S. C. H. C. (C. A.) LA NO. 289/2009
WP/HCCA/COL. NO. 67/2007 (F)
D. C. COLOMBO NO. 17543/MR
JUNE 7TH, 2010

Oaths and Affirmations Ordinance – Section 4 – provisions as to how an oath should be given – Section 5 – only exemption to Section 4 – Supreme Court Rules – Rule 2 – every application for special leave to appeal should be made by way of petition & affidavit – Rule 6 – an application contains allegation of facts which cannot be verified by reference to the judgment or order of the Lower Court in respect of which, leave is sought, should the petitioner annex in support of such allegation an affidavit?

The petitioner preferred an application for leave to appeal to the Supreme Court from a judgment of the Provincial High Court of the Western Province (Sitting in Colombo).

When the matter was taken up for support the respondent took up a preliminary objection to the affidavit filed by the petitioner in terms of the provisions of the Oaths and Affirmations Ordinance.

The respondent contended that in the affidavit, the petitioner has averred that he is a Christian and had made oath. Having averred that he being a Christian in the affidavit, in the jurat, the petitioner had affirmed to the averments before the Justice of Peace.

The respondent took up the objection on the basis that the affidavit filed by the petitioner is not in terms with the provisions contained in the Oaths and Affirmation Ordinance, and therefore there is no valid affidavit and accordingly, the petitioner has not complied with the Supreme Court Rules of 1990.

Held:

(1) Rule 2 read with Rule 6 of the Supreme Court Rules, 1990, clearly indicate that an application for leave should be made by way of a petition with affidavit and documents in support of that application.

(2) The Oaths and Affirmations Ordinance, deals with the law relating to Oaths and Affirmations in judicial proceedings and for other purposes. Whilst Section 4 deals with the provisions, where oaths to be made by persons, the exemptions to the said, Section is referred to in Section 5 of the Oaths and Affirmations Ordinance.

(3) If a person does not come within the category of religions referred to in Section 5 of the Oaths and affirmations Ordinance, the exemption would not be applicable to him to make an affirmation instead of the oath he should have made.

Per Dr. Bandaranayake, Acting C. J., -

> "Rule 2 read with Rule 6 of the Supreme Court Rules, 1990 clearly indicate that an application for leave should be made by way of a petition with affidavits and documents in support of that application. In such circumstances, it is the affidavit that breathes life into the petition. It would therefore be futile to attempt to support an application, where leave is sought against the judgment without a valid affidavit."

Cases referred to:

(1) *Ratwatte v. Sumathipala* (2001) 2 SLR 55

(2) *Kumarasiri and another v. Rajapaksha* (2006) 1 SLR 395

(3) *Nanayakkara v. Kyoto Kyuma* S. C. (Spl.) L. A. No. 115/2008 S. C. S.CM 1.10.2009

AN APPLICATION for leave to appeal from a judgment of the Provincial High Court of the Western Province (sitting in Colombo), on a preliminary objection taken.

K. Kanag Iswaran, P. C. with *M. U. M. Ali Sabry* an *L. Jayakumar* for the Plaintiff – Appellant – Petitioner.

Romesh de Silva P. C. with *Harsha Amarasekera* for the Respondent – Respondent.

Cur.adv. vult.

June 07th, 2010

DR. SHIRANI BANDARANAYAKE, ACTING, C. J.

This is an application for leave to appeal form the judgment of the Provincial High Court of the Western Province (sitting in Colombo) (hereinafter referred to as the High Court) dated 01.10.2009. By that judgment the High Court had affirmed the judgment of the District Court dated 02.02.2007 and dismissed the appeal instituted by the plaintiff-appellant-petitioner (hereinafter referred to as the petitioner).

The petitioner preferred an application for leave to appeal before this Court.

When this application was taken up for support, learned President's Counsel for the defendant-respondent-respondent (hereinafter referred to as the respondent) took up a preliminary objection on the basis that the affidavit dated 05.11.2009 filed by the petitioner, is not in terms with the provisions contained in the Oaths and Affirmations Ordinance and therefore the petitioner has not complied with the Supreme Court Rules of 1990.

Learned President's Counsel for the respondent contended that in the affidavit, the petitioner has clearly averred that he is a Christian and had made oath. However, having averred that he being a Christian in the affidavit and making oath, in the jurat, the petitioner had affirmed to the averments before the Justice of Peace.

In support of his contention, learned President's Counsel for the respondent referred to the decisions in *Ratwatte v. Sumathipala*(1) and *Kumarasiri and another v. Rajapaksha*(2). Learned President's Counsel for the respondent also drew our attention to section 4 of the Oaths and Affirmations Ordinance

which sets out the provisions as to how oaths should be given and submitted that the only exemption to the provisions contained in section 4 of the Oaths and Affirmations Ordinance, is given in section 5 of the said Ordinance.

The Oaths and Affirmations Ordinance, deals with the law relating to Oaths and Affirmations in judicial proceedings and for other purposes. Whilst section 4 deals with the provisions, where oaths to be made by persons, the exemptions to the said section is referred to in section 5 of the Oaths and Affirmations Ordinance. The said section 5 reads as follows:

"Where the person required by law to make an oath-

(a) Is a Buddhist, Hindu or Muslim, or of some other religion according to which oaths are not of binding force; or

(b) Has a conscientious objection to make an oath, he may, instead of making an oath, make an affirmation."

It is therefore clearly evident that since the petitioner does not come within the category of religions referred to in section 5 of the Oaths and Affirmations Ordinance, the exemption would not be applicable to him to make an affirmation instead of the oath he should have made.

In *Ratwatte v. Sumathipala (supra)* the Court of Appeal had to consider whether the affidavit was defective in a matter, where the deponent had stated that he is a Christian and had made oath whilst the jurat had stated that the deponent had affirmed. In that the Court of Appeal had held that the affidavit in question was defective. In *Kumarasiri v. Rajapaksha (supra)*, the Court of Appeal had considered not only the validity of the affidavit, but also the necessity

in having an affidavit along with the petition to consider an application for revision. In considering the question of filing a valid affidavit, Somawansa, J. had stated that it is the flesh and blood of the affidavit, which gives life to the skeleton in the petition.

Considering sections 4 and 5 of the Oaths and Affirmations Ordinance, stated above, it is quite clear that the affidavit filed by the petitioner is not in terms with the aforesaid provisions and therefore cannot be accepted as a valid affidavit.

Learned President's Counsel for the petitioner, contended that although reference has been made in Rule 6 of the Supreme Court Rules 1990 of filing an affidavit, the said filing of an affidavit is not a mandatory requirement and therefore there is no necessity to file an affidavit along with the petition, which has clearly set out the facts relevant to the application. It was further contended that the requirement of an affidavit arises only when there is a necessity to ascertain facts which cannot be verified and therefore the application could be considered only on the petition even though the affidavit filed is defective.

Rule 2 of the Supreme Court Rules, 1990 states that every application for special leave to appeal to the Supreme Court should be made by way of a petition together with affidavits and documents in support thereof as prescribed by Rule 6.

A careful perusal of Rule 2 of the Supreme Court Rules, 1990 as stated in *Nanayakkara v. Kyoko Kyuma*[3] clearly indicates that affidavit is filed in support of the application as prescribed by Rule 6 of the Supreme Courts Rules, 1990. The emphasis is given to the petition and the affidavit and the

other documents become secondary to the petition, as they are filed for the purpose of supporting the application.

Rule 6 of the Supreme Court Rules, 1990, clearly refers to the instances, where an affidavit and other documents have to be filed by the petitioner along with his application. Accordingly when an application contains allegations of fact, which cannot be verified by reference to the judgment or order of the lower Court, in respect of which, leave is sought, the petitioner **shall** annex in support of such allegation an affidavit or other relevant documents.

Rule 2 read with Rule 6 of the Supreme Court Rules, 1990 clearly indicate that an application for leave should be made by way of a petition with affidavits and documents in support of that application. In such circumstances, it is the affidavit that breathes life in to the petition. It would therefore be futile to attempt to support an application, where leave is sought against the judgment of the High Court without a valid affidavit.

For the aforementioned reasons, the preliminary objection raised by learned President's Counsel for the respondent is upheld. This application is accordingly dismissed.

There will be no costs.

RATNAYAKE, J. – I agree.

EKANAYAKE, J. – I agree.

Preliminary objection upheld.

Application dismissed.

SINGER INDUSTRIES (CEYLON) LTD., VS. CEYLON MERCANTILE INDUSTRIAL AND GENERAL WORKERS UNION AND OTHERS

SUPREME COURT
J. A. N. DE SILVA, C. J.
TILAKAWARDENA, J.
EKANAYAKE, J.
SC 78/08
SC SPL LA 121/08
CA (WRIT) 1192/2005
JULY 17, 2009
SEPTEMBER 1, 3, 2009

Payment of gratuity – in excess of that provided in the payment of Gratuity Act 12 of 1983 – Referred for arbitration – Award – No final agreement between Company and Union? Reference valid? Contract of Industrial Employment – General Principles of Law of Contract applies? Offer – counter offer – acceptance – principles applicable? Approach by an arbitrator?

The petitioner sought to quash the arbitral award which ordered the petitioner to pay ¾ of monthly salary as gratuity for each years of service to its employees with more than 20 years of service. It was contended that, the 1st respondent Union made a proposal for the payment of gratuity in excess of that provided by the payment of Gratuity Act. The Appellant Company then made an offer to pay ¾ of monthly salary as gratuity to employees with more than 20 years for each completed year of service beyond the 20th year. This was rejected by the 1st respondent Union, who made a counter proposal that employees with more than 20 years be paid one month's salary for each year of service. This was rejected by the appellant Company. The Arbitrator ordered the appellant company to pay ¾ as gratuity for each year of service to its employees with more than 20 years of service – on the basis that the employer had shown its willingness to pay, the amount ordered by the 4th respondent.

The employer company sought to quash the order on the basis that there was no agreement reached.

The Court of Appeal upheld the arbitral award.

Special leave was granted by the Supreme Court

Held

(1) There is overwhelming evidence before the arbitrator to conclude that no agreement existed at any time with regard to enhanced gratuity.

(2) In industrial relations the principles of offer and the acceptance should not be strictly followed is not the correct proposition of the law. For a contract to be concluded there should be an offer and acceptance – only then a conscience will exist in the minds of such contracting parties.

(3) Ordinary Principles of Law of Contract such as 'offer' and 'acceptance' and 'consideration' apply to the formation of a valid industrial contract.

Per Chandra Ekanayake, J.

> "However with the objective of 'adjusting' and 'declaring' the rights of parties consistent with the need to ensure fairness and equity, the State has brought in legislative regulations to restore the balance of power between the parties. Therefore industrial contracts unlike normal contracts are partly contractual between the employer and employee and also partly non contractual in that the State by means of legislature or through industrial adjudication may prescribe many of the obligations that an employer may owe its employees."

(4) Agreements arising from collective bargaining between employer and trade unions on behalf of employees also can have an impact on industrial contracts. However such agreements do not ipso factor become part of individual contract of employment, unless terms agreed and acted upon by the parties and incorporated as terms in such contract of employment or specifically included in a collective agreement.

(5) A counter offer is an alternative proposal made by the offeree in substitution for the original offer when the purported acceptance of an offer contains a counter offer it is not accepted at all, and is equivalent to a rejection by the original offer, such a counter offer may however in its turn be accepted by the original offeror, and

this result in a contract. In the case at hand there was no evidence that the counter offer by the 1st respondent was accepted by the offeror.

Per Chandra Ekanayake, J.

"Payment of gratuity is regularized by the provisions of the Gratuity Act. Thus unless there is an existing scheme or collective agreement or award of an Industrial Court Providing more favorable terms of gratuity, he would not be entitled to claim such benefits. The burden of proving the existence or a valid collective agreement with regard to gratuity in excess of what is mandated by law fairly and squarely rests on the employee who assets same."

(6) In the assessment of evidence, an arbitrator appointed under the Industrial Disputes Act must act judicially. Where his finding is completely contrary to the weight of evidence, his award is liable to be quashed by way of certiorari.

Per Chandra Ekanayake, J.

"It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives of both employer as well as the employee should be considered in a balanced manner and undoubtedly just and equity must apply to both these parties."

APPEAL from the judgment of the Court of Appeal.

Cases referred to :-

(1) *Muthukuda vs. Sumanawathie* – 1964 65 NLR 205 at 208-209

(2) *Municipal Council of Colombo vs. Marasinghe* – 71 NLR 223 at 225

(3) *Health and Co (Ceylon) Ltd. vs. Kariyawasam* – 71 NLR 382

(4) *All Ceylon Commercial and Industrial Workers Union vs. Nestle Ltd* – 1999 – 1 Sri LR 343

Sanjeewa Jayawardena with *Senani Dayaratne* for petitioner-appellant.

Stanley Fernando PC with *D. V. Dias* and *Palitha Perera* for 1st respondent-respondent.

Mrs. M. N. B. Fernando DSG for 2nd and 3rd respondent-respondent.

Cur.adv. vult.

October 07th, 2010

CHANDRA EKANAYAKE, J.

The Petitioner – Appellant (hereafter referred to as the appellant) by petition dated 05.06.2008 (filed together with an affidavit) has sought special leave to appeal from the Judgement of the Court of Appeal dated 29.04.2008 pronounced in CA (Writ) Application No. 1192/2005 (annexed to the petition marked P9). By the aforesaid application the Petitioner has sought the following other reliefs also in addition to special leave:

(i) to set aside the aforesaid judgement of the Court of Appeal marked P9. and/or in the alternative thereto,

(ii) vary the same in such a manner and subject to such terms as to this Court shall seem meet in the exercise of the appellate jurisdiction of this Court and to issue a mandate in the nature of writ of certiorari quashing the impugned arbitral award dated 29.04.2005 annexed to the petition marked P2 – (X10 in P1) and the gazette notification produced marked P2(a).

Further interim reliefs too had been sought as per sub paragraphs (f) and/or (g) of the prayer to the petition.

The appellant had instituted C. A. (Writ) Application No. 1192/2005 in the Court of Appeal, seeking inter alia, to quash the purported arbitral award of the 4th respondent-respondent (hereinafter sometimes referred to as the 4th respondent) dated 29.04.2005, which ordered the petitioner to pay ¾ ths of a month's salary as gratuity for each year of service to its employees with more than 20 years service. It is the contention of the appellant that, in the year 1991 during the course of negotiations aimed at reaching a collective agreement

between the petitioner and its manual workers and supervising staff, the 1st respondent union (CMU) made a proposal for the payment of gratuity in excess of that provided for by the Payment of Gratuity Act, 12 of 1983 – i.e., in excess of ½ month's salary for each completed year of service. In response to the said proposal the appellant had made an offer to pay ¾ th of a month's salary as gratuity to employees with more than 20 years service, for each completed year of service beyond the 20th year of service (vide A18 in P1). The said offer made by the appellant was rejected by the 1st respondent, who made a counter proposal that employees with more than 20 years service, be paid one month's salary for each year of service – (vide A19 in P1). The appellant Company in turn had rejected the said counter proposal and specifically stated that the said initial offer made by the appellant could not be varied (vide A20 in P1). The stance taken by the appellant in the present petition is that no agreement or consensus was reached in respect of enhanced gratuity payments, but a formal collective agreement was executed in 1994 in pursuance of a process of collective bargaining including a salary increase and other financial benefits and same did not specifically provide for the payment of gratuity in excess of that is provided by the Payment of Gratuity Act No. 12 of 1983 – i. e. half a month's salary for each completed year of service – (P1).

It was further argued that thereafter in 1996 during the negotiations aimed at revising the 1994 collective agreement (A3 in P1) the 1st respondent had made the following proposals with regard to payment of gratuity in excess of that provided for by the Payment of Gratuity Act No. 12 of 1983;

i. employees with 10 to 20 years' service be given 3/4ths of a month's salary as gratuity for each year of service;

ii. employee with 20 to 25 years' service be given one month's salary as gratuity for each year of service;

iii. employees with 25 to 30 years' service be given 1 and 1/4th of a month's salary as gratuity for each year of service; and,

iv. employees with more than 30 years' service be given one and half months' salary as gratuity for each year of service. (vide A4 in P1)

When the appellant company rejected the said proposal by A5 the 1st respondent had submitted an amended proposal (vide A6 in P1) to the following effect;

1. employees with less than 20 years' service be given ¾ th of a month's salary as gratuity for each year of service and

2. employees with more than 20 years' service be given one month's salary as gratuity for each year of service.

The aforesaid amended proposal too being rejected by the appellant (vide A7 in P1) the 1st respondent ordered its members to strike work with effect from 20.05.1997 and after 6 weeks the members of the 1st respondent resumed work on 28/06/1997, upon referral of the said dispute with regard to enhanced gratuity, to arbitration by the 4th respondent-arbitrator.

The statement of the matter as referred to arbitration was as follows: "Whether the demand of the Ceylon Marcantile Industrial & General Workers' Union (C M U) for a gratuity on the basis of ¾ of a month's salary for each year of service to the employees who have more than 20 years of service at M/s. Singer Industries (Ceylon) Ltd. is

justified and if not, to what relief the said employees are entitled."

At the conclusion of the arbitral proceedings the 4th respondent proceeded to make the impugned award P2 dated 29.04.2005 purporting to hold as follows:

"Going through the proceedings the statements and the documents marked by both parties, I hold the view that the respondent had shown its willingness as far back as 1991 to give a maximum of ¾ th salary as gratuity for those who serve for more than 20 years in the company. For the last 14 years ir seems that the members of the CMU had been living with that expectation."

Thereafter the appellant sought to quash the said arbitrator's award in CA (WR) Application No. 1192/2005 and the Court of Appeal by its judgment dated 29.04.2008 dismissed the application for a writ of certiorari and upheld the arbitrator's award. Being aggrieved with the aforesaid Court of Appeal judgment the appellant sought special leave to appeal upon the questions of law set out in paragraph 14 of the aforementioned Petition dated 05.06.2008.

When the application was supported on 11.09.2008 this Court had proceeded to grant special leave to appeal only upon the questions set out in paragraph 14(a), (b), (c), (d), (e), (h) and (o) of the said petition which read as follows:

(a) Did the Court of Appeal err by failing to appreciate that no agreement had ever been finally reached between the CMU and the Petitioner in respect of any enhanced gratuity payments in excess of that mandated by the Gratuity Act No. 12 of 1983?

(b) Accordingly, did the Court of Appeal err by failing to appreciate that the learned arbitrator had erred in law by holding that the petitioner company could be compelled to make gratuity payments to its employees in excess of that mandated by the Payment of Gratuity Act No. 12 of 1983?

(c) Did the Court of Appeal err by failing to appreciate that the arbitrator had erred by holding that the petitioner had made a binding and enforceable offer to make enhanced gratuity payments to its employees in excess of that mandated by the Payment of Gratuity Act No. 12 of 1983?

(d) Did the Court of Appeal fail to take cognizance of the significant fact that neither the collective agreement signed in 1991, nor the collective agreement signed in 1994, provided for any enhanced gratuity payments?

(e) Did the Court of Appeal err by not appreciating the fact that the CMU had in fact rejected the offer made by the Petitioner in 1991 to pay ¾ ths of a month's salary as gratuity to employees with **more than** 20 years' service, for each competed year of service beyond the 20th years of service?

(h) Without prejudice to the foregoing, in any event, did the Court of Appeal err by failing to appreciate that the petitioner's proposal made in 1991 (which was firmly in the realm of an offer), was in any event, to pay only ¾ ths of month's salary as gratuity to employees with more than 20 years service, for each completed year of service **beyond the 20th year of service**, and **not for each completed year of service?**

(o) Did the Court of Appeal fail to consider the effect of the substantial passage of time between 1991 and the strike in 1997?

Counsel for the appellant is seeking to assail the judgement of the Court of Appeal amongst other grounds inter alia, mainly on the basis that the Court of Appeal was in error when it failed to appreciate that in the absence of a finally reached agreement between the 1st respondent (CMU) and the petitioner Company in respect of any enhanced gratuity payments in excess of that is mandated by the Gratuity Act No. 12 of 1983 holding that the petitioner Company could be compelled to make gratuity payments in excess of that is mandated by the said Act.

It is common ground that the terms of reference to arbitration were the terms enunciated in paragraph 5 above. The pivotal question that had to be determined by the arbitrator was whether an agreement was finally reached between the 1st respondent (CMU) and the appellant company in respect of enhanced gratuity payments meaning:- in excess of what has been awarded by the Gratuity Act No. 12 of 1983.

In view of the above necessity has now arisen to examine the arbitrator's (4th respondent's) award dated 29.04.2005. The arbitrator had made order to be effective from 10.06.1997, (which being the date on which the industrial dispute was referred to arbitration by the Minister), that the first respondent company to pay 3/4ths of a month's salary as gratuity for each year of service to the employees who have more than 20 years service at the appellant company. It appears further that the arbitrator had acted on a wrong premise namely that the appellant company had shown its willingness as far back

as 1991 to give such enhanced gratuity. Thus this leads to examination of evidence on record had in this regard. On behalf of the present 1st respondent namely the CMU, one Senadheera Pathirage Leelaratne had testified. His uncontradicted position had been that discussions between the company and the 1st respondent-CMU for enhancement of gratuity commenced from 08.10.1996, and several proposals and amendments were suggested but no agreement was arrived upon with regard to the same. It is observed that the arbitrator had based the above finding heavily relying on the premise that the appellant company had shown its willingness as far back as 1991 to give 3/4ths of a month's salary as gratuity for those who had served for more than 20 years in the company and the expectations the employees had for the same. What becomes clear from A7 – more particularly under sub head 'Gratuity' – is that the company is unable to consider a deviation of the formula stipulated by law for this purpose. The above witness's position had been that since the discussions failed the 1st respondent (CMU) directed the employees to launch a strike by letter dated 16.04.1997 (A 12) after the expiry of 2 weeks from the date of A12 and accordingly the workers of the appellant company launched a strike. The said strike had been concluded on the agreement to refer the dispute for arbitration and same had given rise to the making of the arbitral award P2.

It would be important to stress here that the above witness of the 1st respondent had commenced cross-examination by admitting that the appellant company was already paying the gratuity as required by law and their claim is for a higher amount than that is mandated by law. This is amply clear by evidence given by him in cross-examination (as appearing at pages 86 and 87 of the brief:-

"ප්‍ර: ඒ අනුව තමන් බාර ගන්නව නේද නීතියෙන් ගෙවිය යුතු පාරිතෝෂික ප්‍රමාණය වගඋත්තරකාර ආයතනය විසින් සේවකයන්ට ගෙවන බව?

උ: ඔව්.

ප්‍ර: තමන් ඉල්ලා සිටින්නේ නීතිය අභිබවා යමින් පාරිතෝෂික ප්‍රමාණයක් ලබා දෙන ලෙස නේද?

උ: අන්‍යෝන්‍ය එකගතාවයක් ඇති වී නීතියට පරිබාහිරවයි අපි ඉල්ලා සිටින්නේ.

ප්‍ර: පණතෙන් නියම කරන ලද ප්‍රමාණයට වඩා පාරිතෝෂික මුදල් ප්‍රමාණයක් ගෙවන ලෙස නේද තමුන් ඉල්ලා සිටින්නේ?

උ: ඔව්.

ප්‍ර: ඒ අනුව නීතියෙන් ගෙවන ලද ප්‍රමාණයට වඩා සමාගම විසින් ගෙවිය යුතුයි යන ස්ථාවරයේ නේද තමන් සිටින්නේ?

උ: ඔව්."

However, it appears that he had taken up the position that the company agreed to pay a higher gratuity than what is mandated by the said Act. He has attempted to substantiate his above position by relying on a letter dated 21.10.1991 marked as A18 addressed to the 1st respondent by the Employers' Federation of Ceylon. Perusal of A18 makes it clear that the appellant company had firmly stated that it cannot better the offer it had already made on this point of gratuity. i.e. – to pay a maximum of ¾ ths of a month's salary for those who served for more than 20 years i. e. from the 21st year, and further this offer, as mentioned at the discussion is tied down to agreement being reached on the following matters:

(a) Guarantors for hire purchase contracts,

(b) Housing loans,

(c) Designations in electronic department,

(d) Presence of foremen during overtime.

Further it goes on to say that these are the matters on which the 1st respondent wanted finality with the management. Thus what has to be inferred from A18 is – it was nothing more than an offer made by the appellant company. By letter dated 31.10.1991 (A19) the aforesaid offer in A18 was rejected by the 1st Respondent (CMU) who made a counter proposal as per clause 3 of the same under sub head 'gratuity' – to the following effect:

> "We propose that the demand for one month's salary for each year of service be limited to those who serve for a minimum period of 20 years, having regard to the Company's proposal."

This is well established by the testimony of the 1st Respondent's witness's cross-examination. As appearing at Page 90 of the brief, his evidence was that what was embodied in A 18 was a suggestion subject to other conditions and it was not a promise. Further his evidence was that there was no agreement in A 18 and even with regard to A19 (which being the reply to A18) his specific position had been that there was nothing to indicate that they had agreed to the above conditions. The item 3 'Re-gratuity' appearing in A19 clearly indicates that it was only a proposal.

The only witness who testified on behalf of the appellant company was Wasantha Wijemanna. His uncontradicted position in evidence was that the stance taken in the letter of Employers' Federation of Ceylon sent on behalf of the appellant – [A20] was a proposal of this member (meaning the appellant) was already conveyed by their letter of 21.10.1991

(A 18) and same cannot be varied. Further it is clear from his evidence that there was no agreement to pay any gratuity in excess of what is mandated by the law in any of the existing Collective Agreements marked by the 1st respondent as A2 – one in 1991, A3 –one in 1994, A 23 – one in 1997 and A24 – one in 2000. On the other hand it has to be noted that the Collective Agreements signed by this same Union (1st respondent) and several other companies which were marked in evidence as A15, A16 and A21 in fact have made specific provision for the payment of enhanced gratuity. Having considered the above evidence I am inclined to hold the view that there had been overwhelming evidence before the arbitrator to conclude that no agreement existed at any time with regard to enhanced gratuity as claimed by the 1st respondent.

At this point it becomes relevant to examine the reasons given by the arbitrator for his award. As appearing at page 9 of his award under item 11 he goes no to state that:

> "In the field of industrial relations the principles of offer and acceptance should not be strictly adhered to. In the law of contracts a counter offer can destroy an offer but in labour relations I hold the view that a counter offer or a counter proposal can keep the original offer alive. I therefore reject the contention of the respondent company, that there was no understanding between the parties to pay an enhanced gratuity although an enhanced gratuity was not embodied in the Collective Agreement A2 and A3."

Further goes on to say:

> "It appears that the respondent had indicated its willingness to consider the gratuity question favourably which

gave the employees of the company an expectation in that regard but when the respondent repeatedly delayed the matter the membership of the union had become restless and finally gone on strike."

It is needless to say that as held by the arbitrator viz: - 'in industrial relations the principles of offer and the acceptance should not be strictly adhered to' – is not the correct proposition of law. For a contract to be concluded there should be an offer and acceptance – only then a consensus will exist in the minds of such contracting parties. In this context it is apt to quote the following observations of Weerasooriya, SPJ, in *Muthukuda vs Sumanawathie*[1] at 208 and 209 with regard to the requirement of offer and acceptance in a contract:

"It is an elementary rule that every contract requires an offer and acceptance. An offer or promise which is not accepted is not actionable, for no offer or promise is binding on the person making the same unless it has been accepted."

Further per C. G. Weeramantry in his treatise on – 'The Law of Contracts' Vol. I at page 109, (paragraph 105):

"Most agreements are reducible to an offer by one party and its acceptance by other. The search for offer and acceptance is convenient and adequate as an aid to determining with precision the moment at which agreement is reached, and perhaps the exact terms of the contract."

At page 123 (paragraph 124) author further goes on to say that:

"A counter offer is an alternative proposal made by the offeree in substitution for the original offer. When the

purported acceptance of an offer contains a counter offer, it is no acceptance at all, and is equivalent to a rejection of the original offer. Such a counter-offer may, however, in its turn be accepted by the original offeror, and thus result in a contract."

In the case at hand there was no evidence that the counter offer by the 1st respondent was accepted by the offeror. It has to be borne in mind that 'Industrial Contract' or 'Contract of Employment' is not defined in the Industrial Disputes Act and/or any other labour law in Sri Lanka unlike in United Kingdom where there is Contract of Employment Act. In the absence of such laws, the general principles of law of contract apply to the creation of a contract of industrial employment. Thus the ordinary principles of law of contract such as 'offer' and 'acceptance' and 'consideration' therefore apply to the formation of a valid industrial contract. A contract of service in industrial relations therefore can be entered into by the parties having capacity to do so and for a consideration. Then what is it that makes an industrial contract different from an ordinary contract?

The general presumption is that parties to a contract have equal bargaining power thus the terms of the contract are mutually negotiated. However in the industrial contracts, it is regarded that the employer has superior bargaining power over the employee. Thus such a contract is referred to as a contract between unequal partners where the employer is considered the economically stronger party and the employee the weaker partner. With the objective of adjusting and declaring the rights of parties consistent with the need to ensure fairness and equity, the state has brought in legislative regulations to restore the balance of power between the parties. Therefore industrial contracts unlike the normal contracts, are partly contractual between the employer

and employee, and also partly non contractual, in that the State by means of legislature or through industrial adjudication, may prescribe many of the obligations that an employer may owe to his employees. In Sri Lanka, Industrial Disputes Act, Payment of Gratuity Act, EPF & ETF Acts are some of the legislation introduced in this regard. Per O. P. Malhotra in his book titled "The Law of Industrial Disputes" – 5th Edition – Vol. I at page 188:

> "One of the recurring problems in the industrial law is, how far the relationship between an industrial employer and his employees is explicable in terms of contract. The relation is partly contractual in that mutual obligation may be created by an agreement made between the employer and workman. For instance the agreement may create an obligation on the part of the employer to pay a certain wage and corresponding obligation on the workman to render services. The relation of industrial employment is also partly non-contractual, in that the State, by means of legislation or through industrial adjudication, may prescribe many of the obligations that an employer may owe to his employees."

Agreements arising from collective bargaining between employers and trade unions on behalf of employees also can have an impact on industrial contracts. However such agreements do not *ipso facto* become part of individual contract of employment, unless terms agreed and acted upon by the parties and incorporated as terms in each contract of employment or specifically included in a collective agreement.

What has to be noted in this case is that there had been no evidence to conclude that there was an agreement with regard to enhanced gratuity in excess of that is mandated by law. But what appears to have taken place between the

parties were negotiations to arrive at a satisfactory agreement with regard to enhanced gratuity. This is what is popularly known as 'Collective Bargaining'. S. R. de Silva in his famous book on – 'The Legal Framework of Industrial Relations in Ceylon' – has opted to define (at page 66) 'collective bargaining' as –

> "negotiations about working conditions and terms of employment between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more representative workers' organizations on the other, with a view to reaching agreement."

In other words collective bargaining is another term for settling industrial disputes through mutual negotiations between an employer on the one hand, and one or more representative workers organizations on the other, with a view to arriving at an agreement.

However the question of payment of gratuity to a workman is regulated by the provisions of the Gratuity Act. Thus unless there is an existing scheme or collective agreement or award of an Industrial Court providing more favourable terms of gratuity to a workman, he would not be entitled to claim such benefits. Thus the burden of proving the existence of a valid collective agreement with regard to gratuity in excess of what is mandated by law fairly and squarely rests on the employee who asserts the same. The general principles of contract law would necessarily apply to the creation of a collective agreement. For the above reasons I am inclined to hold the view that the arbitrator was in grave error when he concluded that –

> 'In the law of contracts a counter offer can destroy an offer but in labour relations a counter offer or a counter proposal can keep the original offer alive."

What has to be examined now is the impugned judgement of the Court of Appeal in CA/WR/1192/2005 dated 29.04.2008 (P9). The learned Judge of the Court of Appeal by the aforesaid judgement has proceeded to conclude as follows – (as appearing at page 8 of P9):-

"(a) The findings and the decision of the arbitrator is in accordance with the evidence led in the inquiry.

(b) The petitioner had shown its willingness to give a maximum of 3/4^{ths} of a month's salary as gratuity for those who served for more than 20 years in the company and in their expectation of the gratuity particularly the 1st respondent has agreed and has undertaken to abide by some conditions detrimental to them.

(c) Considering all the relevant facts the arbitrator has correctly concluded that the respondent company (the petitioner in this application) has to pay 3/4^{ths} of a month's salary as gratuity for each year of service to the employees who have more than 20 years at Singer Industries Limited."

On the above footing the learned Court of Appeal Judge had dismissed the application for writ of certiorari without costs.

The arbitrator had concluded that the respondent company had shown its willingness as far back as 1991 to give a maximum of 3/4th of month's salary as gratuity for those who had served more than 20 years. Having considered the evidence that had been available before the arbitrator I am unable to agree with the above conclusion that the respondent had shown such willingness as far back as 1991. That appears to be a finding which was not supported by

evidence led in the arbitration and in fact appellant's only witness, Leelaratne's evidence had been totally contrary to the above. In the light of the above the only legitimate conclusion one could arrive upon the evidence is that there had been no final agreement between the 1st respondent, (CMU) and the appellant company in respect of enhanced gratuity payments. From the evidence available on record there is nothing to infer that the petitioner company had shown its willingness to give 3/4ths of a month's salary as gratuity for those who have more than 20 years service as concluded by the learned Court of Appeal Judge.

It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives both of employer as well as the employee should be considered in a balanced manner and undoubtedly just and equity must apply to both these parties. In the case of *Municipal Council of Colombo vs Munasinghe*(2), His Lordship the Chief Justice H. N. G. Fernando, held that:

> "When the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is 'just and equitable', the Legislature did not intend to confer on an Arbitrator the freedom of a wild horse. An award must be 'just and equitable' as between the parties to a dispute; and the fact that one party might have encountered 'hard times' because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other party to make undue concessions. In addition, it is time that this Court should correct what seems to be a prevalent misconception. The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily