DE COSTA
V.
ANZ GRINDLAYS BANK PLC.

SUPREME COURT.
G.P.S. DE SILVA, C.J.,
DHEERARATNE, J.,
RAMANATHAN, J.,
S.C. APPEAL NO. 108/95.
C.A.NO. 873/94.
L.T. NO. 2394/A.
24 JUNE, 31 JULY AND 09 AUGUST, 1996.

Industrial Law - Gratuity - Gratuity Act, No. 12 of 1983 ss. 6(2) (a), 10(1) - Reference to Arbitration under Industrial Dispute Act s. 4(1) - Jurisdiction of arbitrator - Was the reference made by the Minister ultra vires?

Industrial Dispute as defined in section 48 of the Industrial Disputes Act- Amendment to section 33(1) (e) of the Industrial Disputes Act by section 17(2) of the Payment of Gratuity Act, No. 12 of 1983.

The suggestion that the" definition of industrial dispute" could never apply to a dispute between an employer and an ex-employee cannot be supported. However when the awards relate to no dispute to which the employer and employee had been parties, there was no industrial dispute which could have been referred by the Minister for settlement by arbitration and consequently the objection to jurisdiction in such a case can be well founded.

A dispute in regard to a claim for "gratuity' can arise only upon the cessation of employment (as a retiral benefit or terminal benefit). The contention advanced on behalf of the 1st respondent Bank that the Minister has no power to refer the present dispute for settlement by arbitration because the dispute arose after the appellant resigned from service is not well- founded in the context of a dispute relating to a claim for gratuity. Hence the reference to arbitration under section 4(1) of the Industrial Disputes Act, by the Minister was not in excess of his powers (not *ultra vires*).

The matter in dispute referred for settlement by arbitration was whether the non-payment of gratuity to Mr. D. A. de Costa at a higher rate than the legal minimum as was paid to other employees by ANZ Grindlays Bank was justified. The decision of the Commissioner of Labour refusing gratuity at the higher rate could not have resolved or determined the "dispute" referred to arbitration.

Where an Industrial Dispute is referred in terms of section 4(1) of the Industrial Disputes Act for settlement by arbitration, section 17(1) requires the arbitrator to make such award as may appear to him **just and equitable.** The appellant complained of discriminatory or unequal treatment in regard to the payment of gratuity and the arbitrator was required to determine whether in the circumstances the non-payment of the gratuity claimed was **justified.** The amendment to section 33(1) (e) of the Industrial Disputes Act by section 17(2) of the Payment of Gratuity Act No. 12 of 1983 does not constitute a **jurisdictional bar** to the determination of the matter in dispute referred to the arbitrator for settlement by arbitration in terms of section 4(1) of the Industrial Disputes Act.

Cases referred to:

1. *The Colombo Apothecaries Co. Ltd. v. Wijesooriya and Others* 70 NLR 481.
2. *State Bank of India v. Sunderalingam* 73 NLR 514.
3. *Perera v. Standard Chartered Bank and Others* (1995) 1 Sri LR 73,91.

APPEAL from judgment of the Court of Appeal.

S. Sivarasa P.C. with *A.R. Surendran* and G. Ranawaka for the Appellant.

S.L. Gunasekera with Gomin Dayasiri for 1st Respondent.

K. Sripavan DSG for 2nd and 3rd Respondents.

Cur.adv.vult.

August 26, 1996.

G.P.S. DE SILVA, C.J.

The Appellant was employed by the 1st respondent (ANZ Grindlays Bank) from 1st June 1979 (X1). He resigned from the post of Manager, Grindlays Bank with effect from **1st July 1991** (X5). His gratuity was computed on the basis of 1/2 a month's salary for each year of completed service in terms of section 6(2) (a) of the Payment of Gratuity Act No. 12 of 1983. The amount so computed as gratuity was credited to the Bank account of the Appellant on 23.7.91 and the appellant was informed of that fact. The Appellant was dissatisfied with the basis upon which the Bank had computed his gratuity and by letter dated **6.9.91** (X10) addressed to the General Manager of the Bank he set out his position - "..... two of the employees (sic) resigned after my leaving were paid gratuity at 2 month's gross salary for every year

of service and after adding further 5 years to the period of service. A lady who resigned recently with 17 years of service was paid gratuity for 22 years at 2 months gross salary. I therefore kindly request you to pay me also on the same basis, that is, for 17 years and one month at 2 months gross salary for each year."It is the case for the 1st respondent Bank that the dispute in regard to the payment of gratuity arose after the appellant had resigned from service. There was further correspondence between the parties in regard to the question of enhancing the amount paid as gratuity, but no finality was reached.

On 7.5.92 the Appellant made an application to the Commissioner of Labour for an enhanced gratuity (P4). In paragraph 7 of P4 the Appellant stated that "employees who had tendered their resignations subsequent to that of the complainant (Appellant) had been paid on the scheme of 2 months salary (gross) and that the failure on the part of the employer to pay the complainant on the existing scheme violates section 10(1) of the Gratuity Act". The Commissioner of Labour, however, refused the application made by the appellant. (P4a).

On 21.2.94 the Minister of Labour referred the dispute between the Appellant and the Bank "for settlement by arbitration to an arbitrator" in terms of section 4(1) of the Industrial Disputes Act. The dispute which was referred in terms of section 4(1) was "whether the non-payment of a gratuity to Mr. D.A. de Costa (Appellant) at a higher rate than the legal minimum as was paid to other employees by Grindlays Bank is justified, and if not to what reliefs he is entitled."At the commencement of the inquiry before the arbitrator objections to the jurisdiction of the arbitrator to hear and determine the matter in dispute were raised on behalf of the 1st Respondent Bank. The arbitrator having heard submissions of both parties, overruled the preliminary objections and in the course of his order stated, "it seems to me that it is necessary to be acquainted with the antecedents and other circumstances, how the resignation of the applicant came about, to decide whether the cases cited are on all fours with the instant case. The cases cited seems to be concerned more with the terms of employment, whereas the instant case seems to be one which is not concerned at all with the terms of employment but is confined to the one principle, that there had been discrimination in the payment of gratuity ....."

Upon the arbitrator overruling the preliminary objections, the 1st Respondent Bank moved the Court of Appeal by way of a writ of Certiorari to quash the order made by the Minister referring the dispute for settlement by arbitration and the order of the arbitrator overruling the preliminary objections. The Court of Appeal quashed the order of the Minister on the ground that the order was *ultra vires* section 4(1) of the Industrial Disputes Act and also quashed the order of the arbitrator. This appeal is against the judgment of the Court of Appeal.

Special Leave to appeal to this court was granted on the following questions :-

(1) Whether the Court of Appeal erred in law in holding that the reference made by the Minister in respect of the Appellant's claim for gratuity was *ultra vires* because the dispute arose only after the cessation of the Appellant's employment by reason of resignation.

(2) Whether having regard to the fact that the Commissioner of Labour refused the Appellant's application for an enhanced gratuity in terms of section 10(1) of the Payment of Gratuity Act, the Minister had no power to make a reference in respect of the Appellant's claim for gratuity and/or the arbitrator had no jurisdiction to make any order in respect of such claim;

(3) Whether in any event the Minister had power to make the reference, and the arbitrator had jurisdiction to make any order upon that reference, in view of the provisions of section 33(1) (e) of the Industrial Disputes Act as amended by the Payment of Gratuity Act.

On the first question set out above, Mr. S.L. Gunasekera for the 1st Respondent Bank stressed that the definition of the term "industrial dispute" speaks of a dispute between "an employer" and "a workman" and that the definition of the term "employer" and "workman" uses the verbs "employs" and "works". He emphasized that the verbs used are in the present tense. Accordingly counsel argued that the expression 'industrial dispute" as defined in the Industrial Disputes Act must necessarily be one that arose between the workman and his

employer while the workman was in the employment of the employer. The argument was that it was only a dispute that arose during the subsistence of the contract of employment that falls within the definition of the term "industrial dispute." In other words, a dispute between an employer and ex-workman does not fall within the definition.

Counsel relied in support of his submission on the judgment of Tennekoon, J. (as he then was) in the case of *The Colombo Apothecaries Co. Ltd., v Wijesooriya and Others.*[1] It is relevant to note that the view expressed by Tennekoon J., is the view of the minority of the Court. The majority of the judges (T.S. Fernando, J., G.P.A. Silva, J. Siva Supramaniam, J., and Samarawickrema J.,) did not share this view. Referring to section 47 (c) Siva Supramaniam, J., observed "with great respect, I find it difficult to agree that the provisions of this section lead to a necessary inference that a dispute connected with the termination of service can be referred to an Industrial Court or a Labour Tribunal for settlement only if the dispute arose while the relationship of employer and workman subsisted."

Samarawickrema J., in his judgment referred to the last part of the definition of "workman" in section 48 of the Industrial Disputes Act and the provisions of section 2(1), 3(1), 4(1), and 4(2) and stated, "it follows that for the purposes of proceedings that may be commenced or initiated by the Minister under section 4(1) of the Act, a workman includes a person whose services had been terminated."

Mr. Gunasekera also relied strongly on the judgment of Alles J., in the case of *State Bank of India v Sunderalingam*[2] where Alles, J. stated, "I cannot see how this definition (i.e. the term "industrial dispute") can ever apply to any dispute or difference between an employer and an ex-employee who has retired from the services of his employer. Referring to this case Amerasinghe J., in *Perera vs Standard Chartered Bank and Others,*[3] made the following observation, with which I am in agreement. "In the matter before Alles, J., a trade union had applied on behalf of sub-Accountants who had retired from the services of the Bank 16 months earlier for the benefits of a salary revision awarded in ID 306 and ID 306A. The dispute in ID 306 and ID 306A did not concern sub-Accountants and the awards made has no reference to them. There was as Alles J., held, no dispute to which

they had been parties before they retired. In the circumstances, admittedly, there was no "industrial dispute" which could have been referred by the Minister for settlement by arbitration. Consequently, the objection to jurisdiction of the arbitrator was well founded in the circumstances of the case although, with great respect, **the suggestion that the definition of "industrial dispute" could never apply to a dispute between an employer and an ex-employee cannot be supported.**" (Emphasis is mine).

The material part of the definition of the expression "industrial dispute" in section 48 reads thus :- "Industrial dispute means any dispute or difference between and employer and a workman ..... connected with ..... the termination of services ..... of any person .....".

In considering the question whether the reference made by the Minister in terms of section 4(1) was *ultra vires* for the reason that the dispute arose only after the cessation of the Appellant's employment, it is of the utmost importance and relevance to note the nature of the matter in dispute. The claim of the Appellant was in respect of the payment of gratuity and this was the subject matter of the dispute, which was referred for settlement by arbitration by the Minister in terms of section 4(1). Sharvananda, J., (as he then was) in his dissenting judgment in *The National Union of Workers v The Scottish Ceylon Tea Company Ltd.*,[4] considered "the connotation of the word gratuity as used in sections 31B (1) (b) and 33(1) (e) of the Industrial Disputes Act."Having carefully reviewed the decisions in India and of this Court, the learned Judge concluded, "It is manifest that the word 'gratuity' has thus come to mean not only retiring allowance or **retiral benefit** payable on retirement but also **termination benefit** payable on termination of a long and faithful service consequent to resignation prior to retiring age. "(at page 178). (Emphasis added) (I wish to add that the majority view that section 31B(1) (b) postulated only "retiring gratuity" makes no difference for present purposes). Thus it is seen that a dispute in regard to a claim for "gratuity" can arise only upon the cessation of employment (as a retiral benefit or terminal benefit). Therefore it seems to me that the contention advanced on behalf of the 1st Respondent Bank that the Minister had no power to refer the present dispute for settlement by arbitration because the dispute arose after

the Appellant resigned from service is not well-founded in the context of a dispute relating to a claim for gratuity.

I accordingly hold that the Court of Appeal was in error in its view that the reference made by the Minister in terms of section 4(1) was in excess of his powers.

Turning now to the second matter upon which this court granted leave to appeal, Mr. Gunasekera contended-

(i) the Appellant has by P4 made an application to the Commissioner of Labour in terms of section 10(1) of the Payment of Gratuity Act No. 12 of 1983 to determine the quantum of gratuity payable to him;

(ii) in P4 he has set out the basis upon which he claimed the enhanced gratuity;

(iii) the Commissioner of Labour has held an inquiry and determined that the Appellant is not entitled to the enhanced gratuity (P4a);

(iv) the Appellant did not seek to canvass the decision of the Commissioner of Labour.

In these circumstances, Mr. Gunasekera urged, that the "dispute" was determined by the authority empowered by law to do so and that there did not exist after the date of P4A (i.e.2.12.92) any "industrial dispute" that could have been referred by the Minister in terms of section 4(1) of the Industrial Disputes Act for settlement by arbitration to an arbitrator.

With these submissions I do not agree. The Commissioner of Labour was concerned merely with the question whether there was a collective agreement, award, or other agreement which governed the gratuity payable to the appellant. On the other hand, the matter in dispute referred for settlement by arbitration was "whether the non-payment of gratuity to Mr. D.A. de Costa at a higher rate than the legal minimum **as was paid to other employees** by ANZ Grindlays Bank is

justified. "(Emphasis added). Thus it is clear that the issue before the Commissioner of Labour was fundamentally different from the dispute referred to settlement by arbitration in terms of section 4(1) of the Industrial Disputes Act. Therefore the decision of the Commissioner of Labour could not have resolved or determined the "dispute" referred to arbitration.

Finally, there is the third question upon which this court granted leave to appeal. Mr. Gunasekera submitted that the amendment to section 33(1) (e) of the Industrial Disputes Act by section 17 (2) of the Payment of Gratuity Act No. 12 of 1983 has deprived the arbitrator of jurisdiction to award a gratuity to the Appellant who is entitled to a gratuity in terms of section 5 of the Payment of Gratuity Act. It was Counsel's contention that the Appellant's right to a gratuity arose not from the Terms of Service but from the Payment of Gratuity Act. With these submissions I do not agree. Where an Industrial Dispute is referred in terms of section 4(1) of the Industrial Disputes Act for settlement by arbitration, section 17(1) requires the arbitrator to "make such award as may appear to him **just and equitable**". The Appellant complained of discriminatory or unequal treatment in regard to the payment of gratuity and the arbitrator was required to determine whether in the circumstances the non-payment of the gratuity claimed was **justified.** I hold that the amendment to section 33(1) (e) of the Industrial Disputes Act does not constitute a **jurisdictional bar** to the determination of the matter in dispute referred to the arbitrator for settlement by arbitration in terms of section 4(1) of the Industrial Disputes Act.

In the result, the appeal is allowed with costs fixed at Rs. 2500/- and the judgment of the Court of Appeal is set aside.

DHEERARATNE, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.