

IN THE COURT OF APPEAL OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an
Application in terms of
Article 140 of the
Constitution for mandates in
the nature of Writs of
Certiorari and Prohibition.

Seylan Bank PLC
No. 90, Galle Road,
Colombo 03.

Petitioner

CA/Writ/88/2019

Vs

1. The Commissioner General of
Labour,
Labour Department,
Colombo 05.
2. R. N. Ranawaka,
Assistant
Labour Commissioner,
East-Colombo District Labour
Office,
Labour Department,
Colombo 05.
3. Sarojini Tissera
Labour Officer,
East-Colombo District Labour
Office,
Labour Department,
Colombo 05.
4. Wahalantirige Maxwell
Vijaya Perera
No. 158, Allen Avenue,
Dehiwela.

Respondents

Before : **Hon. M Sampath K. B Wijeratne, J.(CA)**
: **Hon. M. Ahsan R. Marikar, J.(CA)**

Counsel: Dr. Romesh De Silva P.C. with Niran Anketell for the Petitioner. Manohara Jayasinghe, D.S.G. for the 1st, 2nd and 3rd Respondents.
Dr. Sunil Cooray with Bushan Illeperuma and Nilanga Perera for the 4th Respondent

Written Submission : 13.12.2019 (by the Petitioner)
11.02.2020 (by the 4th Respondent)

Argued on : 19.10.2023
18.01.2024

Decided on : 29.02.2024

M. Ahsan R. Marikar, J. (CA)

Introduction

- 1) The Petitioner had instituted this application against the Respondents to obtain the reliefs prayed for in the prayers of the petition dated 8th March 2019.
- 2) The reliefs sought by the petition is as follows;
 - a)** Issue notice on the Respondents;
 - b)** Grant an Interim Order restraining the 1st and/ or 2nd and/or 3rd Respondents and/or any of their officers from initiating action under and in terms of Section 8(1) of the Payments of Gratuity Act (as amended) against the Petitioner Bank in respect of gratuity ordered to be paid in

terms of “P8” to the 4th Respondent until the final hearing and determination of this application;

c) Grant a mandate in the nature of a Writ of Prohibition prohibiting the 1st and/or 2nd and/ or 3rd Respondents and or any of their officers from initiating action under and in terms of Section 8(1) of the Payment of Gratuity Act (as amended) against the Petitioner bank in respect of gratuity ordered to be paid in terms of “P8” To the 4th Respondent; AND/OR

d) Grant a mandate in the nature of a Writ of Certiorari quashing “P8” and the decisions and/or orders contained therein;

Facts of the case

- 3) The Petitioner is a Bank which was incorporated in 1987 in terms of the Companies Act No. 117 of 1982 (as amended) and was re-registered in terms of Companies Act No. 7 of 2007.
- 4) The 1st, 2nd and 3rd Respondents are officers of the Labour Department. And the 4th Respondent is a former employee of the Petitioner’s Bank who had made a complaint to the 1st Respondent in respect of gratuity purported to be payable to him by the Petitioner Bank.
- 5) Up to the year 2008, the Petitioner Bank had performed profitably. Subsequently, due to the crisis concerning Golden Key Credit Card Co. Ltd, the Petitioner Bank was subject to unexpected withdrawals and demands for repayment of moneys and deposits. This had affected the existence and viability of the Petitioner Bank. Due to that the Central Bank of Sri Lanka had intervened and taken steps to sustain the existence of the Petitioner Bank.

- 6) In the instant action, the dispute had arisen between the Petitioner Bank and the 4th Respondent. During the period the Bank was performing profitably, the Board of Directors had issued a unilateral internal memorandum titled "Gratuity Payment" as an employee friendly measure on 5th October 2004.
- 7) Subsequently, due to the aforementioned crisis the Petitioner Bank was unable to continue with the payment of enhanced gratuity made by P3 document. A memorandum had been issued by the Board of Directors of the Petitioner Bank by P5 document rescinding the enhanced gratuity payment granted by P3 document.
- 8) On the aforesaid circumstances, the 4th Respondent and some of the employees complained to the Department of Labour against the Petitioner for cancelling the enhanced gratuity payment. The 3rd Respondent had conducted an inquiry on the complaint made by the 4th Respondent which is referred to in paragraphs 21 to 29 of the petition. The Petitioner had explained in his petition that the said inquiry held by the 3rd Respondent had shortcomings and the difficulties faced by the Petitioner before the inquiry officer.
- 9) The 3rd Respondent had made an order and issued P8 document to the Petitioner to make the enhanced gratuity payment which is challenged by the Petitioner in the instant action.
- 10) Previously the Petitioner had instituted CA Writ application 420/2017 against an employee SBW Wickramaratne and later the matter had been settled between the parties and the case had been withdrawn.
- 11) Under the said circumstances the Petitioner had contended, that the 1st, 2nd and 3rd Respondents had acted illegally conducting the inquiry between the Petitioner and the 4th Respondent, without giving a proper hearing to the Petitioner.

- 12) In the event, the P8 decision issued by the 3rd Respondent is executed, it will cause grave prejudice and will be an unlawful enforcement.
- 13) On the said circumstances the Petitioner had prayed for the reliefs claimed in the prayer of the petition dated 8th March 2019.

Objections of the 4th Respondent

- 14) The 4th Respondent has contended that he was an employee of the Petitioner and his employment contract ended with effect from 19th January 2013. When the 4th Respondent retired from the Petitioner's Bank, the Petitioner had failed to pay the full entitlement of gratuity.
- 15) On that the 4th Respondent had made a complaint to the Commissioner of Labour, as the Petitioner had agreed to pay gratuity on the basis of one month's salary for each completed year of service to those who have served more than 10 years at the time of resignation or retirement.
- 16) The 4th Respondent had rendered his service expecting the aforesaid benefit offered by the Petitioner by P3 document. Although the Petitioner had stated after the Golden Key controversy the Petitioner failed to perform well, the 4th Respondent had contended that he cannot admit the facts related in the document marked and produced as P9.
- 17) Further, the Petitioner cannot unilaterally and retrospectively change the facts pertinent to P3 document by issuing the P5 memorandum.
- 18) On the aforesaid grounds the 4th Respondent was compelled to complain to the Labour Commissioner.
- 19) The Commissioner of Labour after the inquiry had directed the Petitioner to pay the gratuity in accordance to the P3 document on

the basis of one month per each year of service to those employees who had completed 10 years.

- 20) The Labour Commissioner's decision was to pay the enhanced gratuity which the Petitioner had wrongfully held back. Furthermore, the Petitioner is not presently in danger of insolvency and there was no necessity to reduce the gratuity entitlement of the 4th Respondent.
- 21) Therefore the 4th Respondent reiterates that the direction given in P8 is lawful and the Petitioner's application is misconceived in fact and Law.
- 22) On the said grounds the 4th Respondent had sought to dismiss the Petitioner's application.

Disputed facts

- 23) When this matter was taken up for argument on 19th October 2023, President's Counsel Romesh De Silva concluded his submissions. The matter resumed on 18th January 2024 and Deputy Solicitor General Manohara Jayasinghe concluded his submissions.
- 24) Considering the submissions, the facts pertinent to the petition and statement of objections, documents and written submissions submitted by the Petitioner and the Respondents the following disputed facts need to be considered to arrive at my conclusion.
- I. Has the Petitioner paid gratuity to the 4th Respondent, as stipulated in terms of Payment of Gratuity Act No. 12 of 1983?
 - II. Has the Petitioner agreed by P3, to pay enhanced gratuity of one month's salary for each year of service for employees who completed ten years of service?
 - III. If so, is the Petitioner bound by the P3 letter?

IV. If not, can the order made by the Assistant Labour Commissioner by P8 decision be enforced?

I. Has the Petitioner paid gratuity to the 4th Respondent, as stipulated in terms of Payment of Gratuity Act No. 12 of 1983?

25) The payment of gratuity is defined in Section 2 of the aforesaid Act. Further in Black's Law Dictionary 11th edition¹ the payment of gratuity is referred to as follows;

- a) *"A premium or benefit offered or given, esp. by a government, to induce someone to take action or perform a service.*
- b) *A gift, esp. in a will; generosity in giving.*
- c) *The portion of a salvage award exceeding what the salvor would be entitled to on the basis of quantum meruit. Also termed as bonus."*

26) The payment of gratuity as mentioned above should be calculated in accordance with Section 5(1) of the Gratuity Act. It is referred to as follows;

"Every employer who employs or has employed fifteen or more workmen on any day during the period of twelve months immediately preceding the termination of the services of a workman in any industry shall, on termination (whether by the employer or workman, or on retirement or by the death of the workman, or by operation of law, or otherwise) of the services at any time after the coming into operation of this Act, of a workman who has under that employer, pay to that workman in respect of

¹Garner, B.A. (2019). *Black's Law Dictionary*. 11th ed. St. Paul, Minnesota: Thomson Reuters

such services, and where the termination is by the death of that workman, to his heirs, a gratuity computed in accordance with the provisions of this Part within a period thirty days of such termination.”

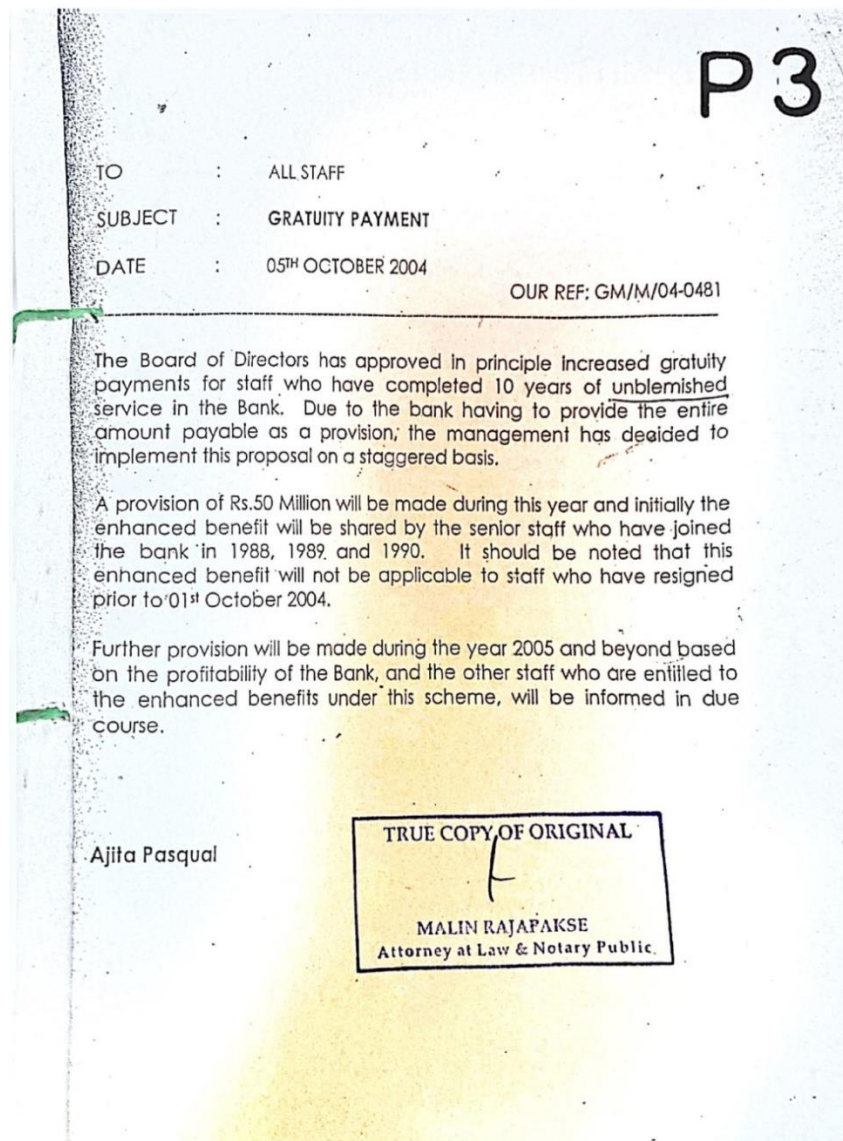
- 27) In the said Act, Section 8(1) refers to on which grounds the gratuity can be recovered in the event of non-payment of by an employer.
- 28) In the instant action, the Petitioner had sought 2 reliefs under Writ Jurisdiction. The first one is the Writ of Prohibition against the 1st, 2nd and 3rd Respondents to initiate action under Section 8(1) of the Payment of Gratuity Act. The second one is Writ of Certiorari, quashing the P8 decision taken by the Assistant Labour Commissioner.
- 29) Both parties have not disputed the payment of gratuity in accordance with the Provision of the Gratuity Act other than the enhanced payment sought by the 4th Respondent under P3.
- 30) Under the said circumstances, the payment of gratuity under Section 2 and 5 which amounts to half a month of salary during the period of 12 months is unchallenged.

II. Has the Petitioner, by P3, agreed to pay enhanced gratuity of one month's salary for each year of service for employees who completed ten years of service?

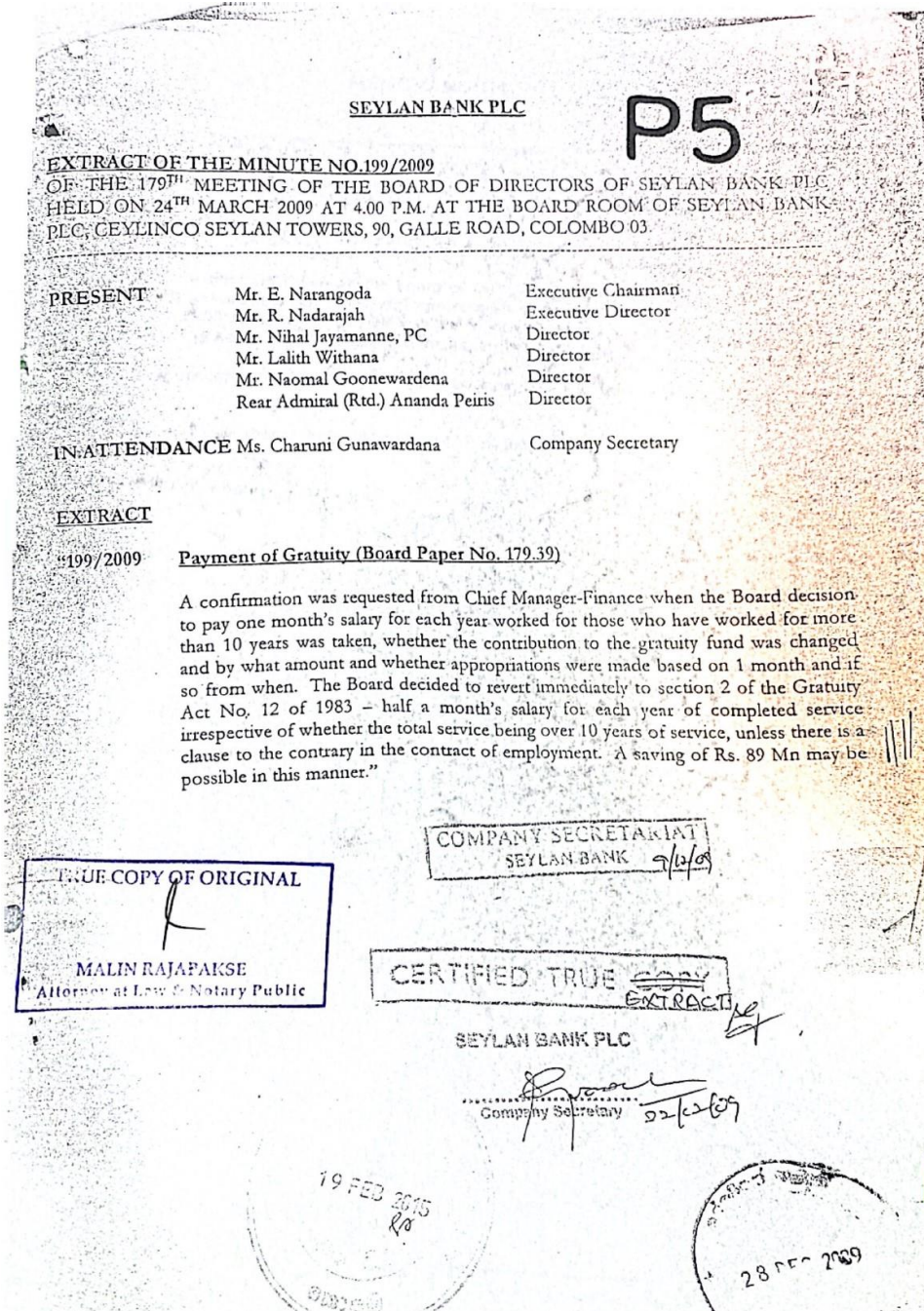
- 31) The crux of this application is the non-payment of enhanced gratuity by P3 to the 4th Respondent.
- 32) The President's Counsel Romesh De Silva appeared for the Petitioner Bank and argued that P3 document is not a

memorandum issued by the Bank and none of the Directors have signed the said document.

- 33) However, by P5 document which is the memorandum of the Board of Directors had admitted the enhanced payment on P3 document, and the said facility given in P3 document had been reverted on 24th March 2009.
- 34) My considered view is, it is necessary to incorporate the contents referred to in P3 document and P5 document. The P3 document is referred to as follows:



Subsequently, the P5 document which was the decision of the Board of Directors, reverted the P3 decision which reads as follows:



- 35) The Deputy Solicitor General Manohara Jayasinghe in his argument brought notice to this Court under Section 10 of the Gratuity Act which reads as follows;

“Where the gratuity payable to a workman is governed by a collective agreement, award of an Industrial Court or arbitrator under the Industrial Disputes Act or any other agreement. The computation of such gratuity in respect of his services shall be made in accordance with the terms of such collective agreement, award of an Industrial Court or arbitrator or other agreement as the case may be, provided that the gratuity or terminal benefits set out therein provided that the gratuity or terminal benefits set out therein are more favourable to the workman than the gratuity payable under this Act.”

The enhanced payment agreed by P3 benefits should be given to the 4th Respondent as there is no ground under any circumstance for the Petitioner to revert it and to go back and pay gratuity under the Provisions of Section 5(1) of the Gratuity Act.

- 36) This argument was rejected by the Counsel for the Petitioner. The position taken by the Petitioner is, the enhanced gratuity indicated in P3 was adopted and paid during the period the Petitioner Bank was enjoying a profitable and financially successful period. In view of that the employees identified in P3 document who have completed 10 years unblemished service in the Bank were paid enhanced gratuity after termination of their service or resignation.
- 37) However, due to the financial crisis faced by the Petitioner Bank during the period 2008 onwards the Petitioner was unable to meet the financial capabilities to make the enhanced gratuity payment which is referred to in P3 document.

- 38) In the said circumstances the enhanced gratuity payment had been agreed upon by the Petitioner when referring to the P3 document.
- 39) I will discuss whether the payment can be made or not or the decision taken by the Assistant Commissioner of Labour is correct or not in the following analyzations.

III. If so, is the Petitioner bound by the P3 letter?

- 40) This is a matter vehemently argued by both parties and the AssistantLabour Commissioner had taken his decision on P8 letter based on the P3 document.
- 41) President Counsel Romesh De Silva's argument was that the P3 letter was issued during the period that the Petitioner Bank was faring well and was making a profit. On the said grounds, the Petitioner Bank had enhanced the gratuity payment for employees who had completed 10 years of unblemished service.
- 42) The said P3 document was issued on 5th October 2004 and there is no reference that the Board of Directors had agreed or taken a decision on this. Therefore there is no agreement of enhanced gratuity payment between the employer and the employees and it is an exgratia payment during the period the letter was issued.
- 43) In considering the said argument and observing the P3 document, P3 document does not contain any decision taken by the Board of Directors of the Petitioner Bank. However, P5 document which is the extract of the minutes of the Board of Directors meeting contains to revert the enhanced payment agreed by P3 document.
- 44) In the said circumstances, at the time the P3 document was issued it was a valid document.

IV. If not, can the order made by the Assistant Labour Commissioner by P8 decision be enforced?

- 45) The question had arisen in the instant action the validity of the P8 letter issued by the Assistant Commissioner of Labour as the Petitioner in his prayer in the petition dated 8th March 2019 sought for a Writ of Certiorari to quash the P8 decision taken by the Assistant Commissioner of Labour.
- 46) In the instant application the main question to be considered is that the Board of Directors of the Petitioner had taken the decision by P5 to revert the facility of enhanced gratuity payment which was granted to the staff category referred to in P3 document.
- 47) The grounds on which the said decision was taken was due to the severe financial crisis faced by the Petitioner Bank and it was not possible to continue the payment of the enhanced gratuity payment to its employees in the manner indicated in P3 document.
- 48) On the said grounds, the Petitioner had no choice but to revert to the statutory half month's pay which is a requirement under payment of Gratuity Act No.12 of 1983.
- 49) The said decision taken by the Petitioner was for the best interest of the institution.
- 50) The objections filed by the 4th Respondent dated 19th July 2019 had admitted that there was a crisis due to the Golden Key controversy. And the 4th Respondent had not denied that the Petitioner Bank was subject to being monitored by the Central Bank and was under their supervision.
- 51) At this stage I would like to refer to the definition of a Bank. In Black's Law Dictionary², it states as follows;

²Garner, B.A. (2019). *Black's Law Dictionary*. 11th ed. St. Paul, Minnesota: Thomson Reuters

“A financial establishment for the deposit, loan, exchange, or issue of money and for the transmission of funds, organized in accordance with state or federal law; esp., a member of the Federal Reserve System.

Under Securities law, a bank includes any financial institution if a substantial portion of the institution’s business consists in receiving deposits or exercising fiduciary powers similar to those permitted to national banks and if the institution is supervised and examined by a state or federal banking authority; or a receiver, conservator, or other liquidating agent of any of the above institutions.”

- 52) In considering the aforesaid facts the Petitioner has the responsibility to protect the depositors’ funds and maintain the functioning of the institution without any failure.
- 53) At the time the Bank is monitored by the Central Bank, additional encumbrances cannot be borne by the said institution that would affect the smooth running of the institution.
- 54) The grievance before this court, forwarded by the Petitioner is that the Assistant Labour Commissioner did not consider any of the matters faced by the Petitioner during the financial crisis and had taken the decision arbitrarily, unreasonably and against the Principles of Natural Justice.
- 55) The Petitioner has brought to the notice of court, by P9 document the income and the expenditure during the crisis faced by the Petitioner Bank. It is obvious in the P8 decision the Assistant Commissioner of Labour had only calculated the gratuity payment and the enhanced gratuity payment and had not considered the grounds on which the Petitioner’s Bank took the Board of Director’s decision by P5.

- 56) In the said circumstances, I am of the view that the Assistant Commissioner should have given reasons for not considering the Petitioner Bank's failure to make the enhanced gratuity payment.
- 57) Therefore, it is obvious that the Assistant Commissioner had issued the P8 letter arbitrarily, unreasonably and violated the Principles of Natural Justice. On which the Petitioner Bank's rights had been violated and is entitled to invoke the Writ Jurisdiction of this court.
- 58) In relation to the aforesaid position I draw my attention to the following two decisions;

In ***Geeganage v Director General, Customs***³ Gunawardena J. made the following observations;

“By way of preface, I may say that the arguments put forward by the eminent President's Counsel for the petitioner might, perhaps, have been more acceptably addresses to a court exercising appellate and not supervisory jurisdiction-the latter jurisdiction being the one invoked by the petitioner in his petition seeking, under the judicial review procedure, a quashing of the aforesaid decision made by the 2nd respondent. The arguments advanced on behalf of the petitioner are based solely on factual matters inviting the Court of Appeal more or less, to substitute its view in the interpretation of factual matters or situations dealt within the written submissions.... The submissions seem to be oblivious of the distinction between appeal and review procedure. If one appeals against a decision, one is claiming that it is wrong, or incorrect. The Court of Appeal if it is persuaded of the merits

³[2001] 3 SLR 273.

of the case may allow the appeal and so it substitutes its view for that of the courts or tribunal of first instance. Under the judicial review procedure the courts is not concerned with the merits of the case, that is, whether the decision is right or wrong. In review (as opposed to appeal) the courts only considers whether the decision is lawful or unlawful.”

And in ***Podimhathmaya v The Land Reform Commission***⁴

Palakidnar J made the following observations;

“This Court can interfere where there is manifest unreasonableness in an administrative act. The test is whether the administrative authority has acted within the rules of reason and justice.”

- 59) In considering the said decisions it is obvious no authority can act arbitrarily against the provisions provided by the statute. In the instant action, I have already discussed that the Assistant Commissioner of Labour had arbitrarily without giving a hearing to the Petitioner had made the decision by P8. My considered view is the said decision had violated “*Audi Alteram Partem*” of the Petitioner.
- 60) Further the enhanced gratuity is not an entitlement by the 4th Respondent and it is a discretionary remedy and it should be granted in the event the Petitioner Bank is making fruitful profits and not at a time it is failing to maintain its functions due to the crisis which the Petitioner Bank had faced.
- 61) Furthermore, the facts pertinent to the decision of CA 891/2009 Writ cannot be considered in the instant action as the said case

⁴ [1990] 2 SLR 416.

was in pro forma set aside by the Supreme Court decision SC (Spl)
LA.No.25/2015

CONCLUSION

- 62) In view of the aforesaid facts, documents and in considering the submissions made by the Counsel I grant the reliefs prayed for in the prayer c and d of the petition dated 8th March 2019.
- 63) No cost ordered.

Judge of the Court of Appeal

M Sampath K. B. Wijeratne, J. (CA)

I agree

Judge of the Court of Appeal