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

In the matter of an Application under Article 140 of the Constitution for a mandate in the nature of Writs of Certiorari and Prohibition.

Court of Appeal Case No:
CA/WRIT/102/2022

Pradeshiya Sanwardhana Bank,
No. 933,
Kandy Road,
Wedamulla,
Kelaniya.

PETITIONER

Vs.

1. A.D.W.J. Weerasinghe,
Assistant Commissioner of Labour,
Department of Labour,
District Labour Office,
Puttalam.

1A. Lakmini Wasanthi Lelwala Guruge,
Assistant Commissioner of Labour,
Department of Labour,
District Labour Office,
Puttalam.

2. K.D. Manoj Priyantha,
Commissioner of Labour (Industrial Relations),
Department of Labour,
Labour Secretariat,
No. 41, Kirula Road,
Colombo 05.

2A. K.L.A. Perera,
Commissioner of Labour (Industrial Relations),
Department of Labour,
Labour Secretariat,
No. 41, Kirula Road,
Colombo 05.

3. B.K. Prabath Chandrakeerthi,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat,
No. 41, Kirula Road,
Colombo 05.

3A. H.M.D.N.K. Wataliyadda,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat,
No. 41, Kirula Road,
Colombo 05.

4. T.M. Kulasena,
Halabe,
Monnakulama,
Nikaweratiya.

<u>RESPONDENTS</u>

Before:	Mayadunne Corea, J Mahen Gopallawa, J
Counsel:	Ranil Samarasooriya with Shashiranga Sooriyapatabandi for the Petitioner. Mihiri de Alwis, S.S.C., for the 1st to 3rd Respondents. Chathura Galhena with Dharani Weerasinghe for the 4th Respondent.
Argued on:	14.05.2026.
Written Submissions:	For the Petitioner on 03.07.2026. For the 1st to 3rd Respondents on 02.07.2026. For the 4th Respondent on 05.06.2026.
Decided on:	31.08.2026

<u>Mayadunne Corea J</u>

The Petitioner in this application sought, *inter alia*, the following reliefs:

"*b)* *Grant and issue an order in the nature of a Writ of Certiorari quashing the certificates and/or letters dated 14th September 2020 (P33), 19th October 2020 (P35), 9th February 2021 (P37) and 22nd October 2021 (P39) issued by the 1st, 2nd and 3rd Respondents and the certificated dated 16th November 2021 issued by the 1st Respondent and filed in MC Anamaduwa case no. 29501/21 (P42)*

c) *Grant and issue an order in the nature of a Writ of Prohibition prohibiting 1st, 2nd and 3rd Respondents from implementing the decisions in certificates and/or letters dated dated 14th September 2020 (P33), 19th October 2020 (P35), 9th February 2021 (P37) and 22nd October 2021 (P39) issued by the 1st, 2nd and 3rd Respondents and the certificated dated 16th November 2021 issued by the 1st Respondent and filed in MC Anamaduwa case no. 29501/21 (P42)*"

The facts of this case, in brief, are as follows. The 4th Respondent was employed at the Nawagattegama Branch of the Petitioner bank. It is alleged that an internal audit had revealed that the 4th Respondent, together with the Branch Manager, had committed fraud and misappropriated funds. Consequently, the 4th Respondent was placed on compulsory leave by letter dated 22.06.2018. On or about 30.06.2018 the 4th Respondent had informed the Petitioner that upon reaching his retirement age the 4th Respondent wishes to retire (4R2).

Following reports submitted by the external investigating officer and the Employee Committee, which disclosed the 4th Respondent's involvement in the fraud and misappropriation of funds, the 4th Respondent was interdicted from service by letter dated 15.11.2018 (P12). On about 21.12.2018 upon reaching the retirement age the Petitioner retired. However, it is alleged that upon retirement the 4th Respondent had not been paid his gratuity.

Thereafter, a charge sheet dated 30.10.2019 was served on the 4th Respondent, (P13) and a disciplinary inquiry was conducted. Based on the findings of the inquiring officer, the Board of Directors of the Petitioner bank decided to terminate the services of the 4th Respondent with effect from 15.11.2018.

It is alleged that subsequently, the CEO of the Petitioner bank had informed the 4th Respondent that he had been found guilty of the charges of fraud and misappropriation of funds, which had caused the Petitioner Bank to suffer a loss of Rs. 12,437,998.68 to which the 4th Respondent had replied and denied responsibility. The 4th Respondent was further informed that a portion of the said loss would be recovered from the gratuity payable to him. Accordingly, a sum of Rs. 2,441,958.58 was set off against the gratuity payable to the 4th Respondent, leaving a further sum of Rs. 9,974,180.23 to be recovered from him.

The 4th Respondent lodged a complaint with the District Labour Office against the Petitioner in respect of the non-payment of gratuity. In his complaint the 4th Respondent had alleged that even after one and half years of retirement, the Petitioner has failed to pay his gratuity which the employer is required to pay within 30 days of the service coming to an end. By letter dated 2.10.2020(P34), the Petitioner had informed the 1st Respondent that they had withheld the gratuity payment as there were allegations of fraud against the employee and if found guilty, the Petitioner had the right to forfeit the gratuity payment (P34).

The 1st Respondent subsequent to an inquiry directed the Petitioner to deposit the gratuity payable to the 4th Respondent, as set out in P33 which was cancelled and later replaced by P35. Similarly, the 2nd and 3rd Respondents replying to Petitioner's queries issued further letters (P37 and P39, respectively), further explaining the decision to pay gratuity and directing the Petitioner to pay gratuity to the 4th Respondent. Thereafter, due to the Petitioner's failure to comply with the directions to pay the gratuity, the 1st Respondent instituted proceedings against the Petitioner in the Magistrate's Court of Anamaduwa (P42). Aggrieved by the aforesaid decisions and directions, the Petitioner bank has filed the present Writ application.

<u>The Petitioner's contention</u>

The Petitioner challenges the acts of the Respondents on the following grounds:

- The Petitioner is entitled to forfeit the gratuity of the 4th Respondent in terms of section 13 of the Payment of Gratuity Act, No. 12 of 1983.
- The Respondents have failed to conduct a proper inquiry by taking into account the relevant considerations, including the commission of fraud and misappropriation of funds by the 4th Respondent.
- The Respondents have failed to provide reasons prior to the issuance of the letters marked P33, P35, P37 and P39 and institution of proceedings marked P42.
- The Respondents have acted arbitrarily, unreasonable, in absence of authority and in violation of the rules of natural justice and principles of due process.
- The Respondents have acted ultra vires the Payment of Gratuity Act.

<u>The Respondents' contention</u>

The Respondents raised the following objections:

- The Petitioner has suppressed and misrepresented material facts.
- The Petitioner has failed to come to Court with clean hands.
- The Respondents have acted in accordance with the law.
- Undue delay

At the argument stage, the Petitioner curtailed his contentions to two main grounds namely;

- The 1st Respondent had no jurisdiction to entertain or hear the application seeking for gratuity as it is within the jurisdiction of the Labour Tribunal.
- The inquiry conducted was in violation of rules of natural justice as no fair hearing was given.

Analysis

Let me now consider the Petitioner's contentions along with the Respondents' objections. It is common ground that the 4th Respondent had been an employee of the Petitioner. The 4th Respondent was suspended from service and thereafter interdicted pending an inquiry. The 4th Respondent had been issued with a charge sheet. Before the commencement of the inquiry, the 4th Respondent, upon reaching retirement age, had retired. It is also not disputed that upon retirement, the 4th Respondent had not been paid gratuity within the time period provided in the Payment of Gratuity Act.

For a better understanding, I would consider the sequence of events as submitted by the parties.

- On 21.5.2018, upon an audit carried out the auditors found a fraud. (P7)
- On 22.06.2018, the Petitioner was placed on compulsory leave.
- On 23.7.2018, preliminary inquiry found allegations against 4th Respondent. (P10)
- On 15.11.2018, The 4th Respondent was interdicted. (P12)
- On 21.12.2018, the 4th Respondent retired.
- On 30.10.2019, the 4th Respondent was charge sheeted. (P13)
- On 18.2.2020, the Petitioner complained to the Commissioner on non-payment of gratuity.
- On 19.2.2020, 4th Respondent was informed about the domestic inquiry.
- On 2.9.2020, the inquiry before the Commissioner concluded.
- 19.10 .2020, Petitioner is ordered to pay the gratuity by the Commissioner.
- On 16.6.2021, the 4th Respondent's services are terminated with effect from 15.11.2018.
- On 16.11.2021, the Magistrate's Courts proceedings commence.

<u>The 4th Respondent's complaint to the Labour Commissioner</u>

Nearly one and half years after the 4th Respondent reached his retirement age, the 4th Respondent had not been paid his gratuity which resulted in him lodging a complaint to the Commissioner. Upon the receipt of the complaint, the Commissioner had held an inquiry. The payment of gratuity is an obligation under the Payment of gratuities Act.

As per the Payment of Gratuity Act, the long title states as follows;

> *"AN ACT TO PROVIDE FOR THE PAYMENT or A GRATUITY BY EMPLOYERS TO THEIR WORKMEN, FOR THE AMENDMENT OF THE LAND ACQUISITION ACT, THE LAND REFORM LAW AND THE INDUSTRIAL DISPUTES ACT, AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO."*

Under the provisions of the Payment of Gratuity Act, an employer who has more than fifteen employers are liable to pay Gratuity. In the Instant case all parties were not at variance that the Petitioner falls within the scope of the Act to pay Gratuity to its employees. Further it was also not a disputed fact that the 4th Respondent had completed the period of service contemplated in the Act. This would be a prudent time to consider the relevant provisions of the Act~~.~~ Section 5(1) of the Act reads as follows;

> *"5 (1) 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 a period of service of not less than five completed years under that employer, pay to that workman in respect of 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 of thirty days of such termination."*

Hence, pursuant to section 5 of the Act, the employer is bound to pay gratuity within the time period stipulated thereon. In this instance, it is not disputed that the 4th Respondent has not been paid the gratuity as contemplated by the Act within the stipulated time period. This has resulted in the 4th Respondent making the complaint to the 1st Respondent. The Petitioner contended that they had the right to withhold the payment of gratuity as the

Petitioner was contemplating on issuing a charge sheet against the 4th Respondent for fraudulent acts. However, the Petitioner has been unable to demonstrate to this Court the provision under which an employer has the right to withhold payment of gratuity upon cessation of employment in the Payment of Gratuity Act. However, it is contended that the Petitioner has the right to forfeit gratuity under section 13 of the Payment of Gratuity Act. Let me now consider section 13 of the Act, which reads as follows;

> *"13. Any workman,to whom a gratuity is payable under Part II of this Act and, whose services have been terminated for reasons of fraud, misappropriation of funds of the employer, willful damage to property of the employer, or causing the loss of goods, articles or property of the employer, shall forfeit such gratuity to the extent of the damage or loss caused by him."*

A plain reading of the section clearly demonstrates that an employer cannot forfeit gratuity using this section at the whims and fancies of such employer. The right to forfeit is conditional. For section 13 to operate, there should be a termination of employment, and the termination should be for the reasons set out in the Act. It is clear that, at the time the 4th Respondent made a complaint to the Commissioner, there was no termination of his services. In fact, the 4th Respondent had been interdicted. Thereafter a charge sheet had been issued, but before the commencement of the inquiry, he had reached the retirement age and therefore, had retired. Hence, in considering the sequence of events, the inquiry against the 4th Respondent had not commenced nor had he been found guilty of any charges when he reached the retirement age. Therefore, in the absence of a finding of guilt, the 4th Respondent's services cannot be terminated, especially for the reasons set out in section 13 which enable the employer to forfeit the gratuity. If so, at the time the Commissioner commenced the inquiry, there cannot be a forfeiture upon the grounds enumerated in section 13.

At this stage, it is also pertinent to note that the 4th Respondent becomes an employee of the Petitioner upon his receiving the letter of appointment (P3, P4) which commences the contractual relationship between the parties. As per clause 2(f) of the letter of appointment, the 4th Respondent becomes subject to the rules and regulations and the disciplinary procedure of the Petitioner. The said clause reads as follows;

> *"(ඊ) නිවාඩු, විනය හා අනෙකුත් සේවා කොන්දේසි සම්බන්ධයෙන් දැනට බලපවත්වන ව්‍යවස්ථාවන්ට හා බැංකුව මගින් වරින් වර පනවනු ලබන ව්‍යවස්ථාවන්ට ඔබ යටත් වනු ඇත."*

Accordingly, the 4th Respondent is subject to the disciplinary code of the Petitioner and the said disciplinary code has been marked and tendered as P9.

In the instant case before us, as stated above, it is clear that the disciplinary process against the 4th Respondent had commenced before he reached the retirement age. However, before it was concluded he had retired upon reaching the retirement age. In such a circumstance, how the said retirement comes in to effect is stipulated in clause 40.3 of the said code which reads as follows;

> *"40.3. යම් සේවකයෙකුට විරුද්ධව විනයානුකූලව කටයුතු කිරීමට අදහස් කර තිබෙන අවස්ථාවකදී හෝ එසේ කටයුතු කරගෙන යන අවස්ථාවකදී, ඔහු විශ්‍රාම ගන්නා වයසට එළඹෙන්නේ නම්, ඔහුගේ එම විශ්‍රාම ගැන්වීම කරනු ලබන්නේ, ගනු ලබන විනයානුකූල ක්‍රියා මාර්ගයට යටත්වය. එවැනි නියෝගයකින් පසු අවශ්‍ය විටකදී, කරනු ලබන විනය නියෝගය වන්නේ ඔහුට හිමි පාරිතෝෂික මුදලෙන් යම් කොටසක් කපාහැරීමය."*

In this instance, it is clear that the 4th Respondent's retirement becomes subject to this provision. As per the said clause, the 4th Respondent's retirement is subject to the disciplinary process that has commenced. The said clause allows the deduction of gratuity. The Counsel for the Respondent argued that, even if such provision was there in the internal disciplinary procedure, it cannot the override the provisions of the statute and also the said provision has not been tendered to the Commissioner of Labour at the inquiry. It is also observed that there is no time period contemplated to conclude the disciplinary inquiry. In such circumstances, can an employer prolong a disciplinary inquiry and withhold the payment of gratuity in definitely or for a long time? In my view this will be against the provisions of the Act.

<u>The Petitioner's main argument</u>

The Petitioner's main contention is that, in view of section 13 of the Payment of Gratuity Act, the Commissioner of Labour has no jurisdiction to entertain the application of the 4th Respondent as the jurisdiction is vested with the Labour Tribunal. Hence, it is argued that the decision of the Commissioner is *ultra vires*. Let me now consider the said objection.

<u>Can the Commissioner accept the 4th Respondent's complaint on nonpayment of gratuity?</u>

It is the contention of the Petitioner that they have forfeited the gratuity that has to be paid to the 4th Respondent as he had been involved in fraudulent activities for which he was suspended and later sent on compulsory leave. Hence, it is the Petitioner's contention that, in view of the provisions of the Payment of Gratuity Act read with section 31(b)(c) of the Industrial Disputes Act, the power to decide on the forfeiture is with the Labour Tribunal. The Petitioner in support of his contention relied on the case of ***M.A. Lanka (Pte.) Ltd v. Commissioner General of Labour and others*** **CA WRT 387/2013, CA Minutes 21.11.2017**. I have considered the said case, where~~,~~ the Court specifically considered the time period involved.

It appears that the 4th Respondent made the application to the Commissioner of Labour on the 18.02.2020. (4R4). The Petitioner contends that the 4th Respondent had been served with a charge sheet on 30.10.2019 (P13). The said charge sheet contains 17 charges. The 4th Respondent had been requested to answer the said charges on or before 05.03.2020. The Petitioner had replied on 19.12.2019 denying the said charges. Thereafter, on 29.04.2020, a disciplinary inquiry on the 4th Respondent had been fixed. (P21). However, as the disciplinary inquiry had not commenced on that day, the disciplinary inquiry had been postponed on several occasions and as per P25, it had been refixed for 09.09.2020. However, the Petitioner had not filed any material to demonstrate when the disciplinary inquiry against the 4th Respondent had commenced and concluded. As per the document marked P30, the 4th Respondent had been informed on 16.06.2021 of his termination. Hence, the exact date the 4th Respondent was found guilty is not clear and has not been informed to this Court. However, the 4th Respondent had been informed on 22.07.2021 by the document marked as P31 that, since he had been found guilty of financial fraud, the amount quantified would be deducted from his gratuity. Hence, it is clear that for the first time, the 4th Respondent had been informed of his termination and of the exact amount of the loss caused to the bank and that the fact that the date that the said amount would be deducted from his gratuity is 16.06.2021 (P30).

Coming back to the complaint to the Labour Commissioner, at the time of the receipt of the 4th Respondent's complaint by the Commissioner, the disciplinary inquiry against the 4th Respondent had not commenced and therefore, there had been no adverse findings made against the 4th Respondent. In the absence of such, there cannot be a forfeiture. At this stage, the Counsel for the Petitioner conceded that what the Petitioner had done was to withhold the payment of gratuity with the contemplation of forfeiting the same if the employee was found guilty. The Petitioner had failed to tender to this Court the entire set of proceedings before the Labour Commissioner. However, the 1st and 4th Respondents had tendered the application and the proceedings of 2 days before the Labour Commissioner. The said proceedings dated 24.08.2020 are marked as 4R6 and the proceedings of 23.12.2020 as 4R7. The 1st Respondent too had tendered the said proceedings. It appears as per 4R6, the inquiry before the Commissioner had commenced on 24.08.2020 and it is also clear that at the time the 4th Respondent made the application before the Commissioner of Labour, his disciplinary inquiry had not been concluded nor were there any findings quantifying the exact loss or damage caused to the Petitioner. As per the chronology of events I have mentioned above, the 4th Respondent had retired on 23.12.2018. That was long before the commencement of the proper disciplinary inquiry or a finding made against him. Hence, if I am to summarise his work status at the time he applied to the Commissioner of Labour, he had been interdicted but had been allowed to retire and it is not disputed by the date of his retirement that there had been no disciplinary proceedings against him. I also find that even the charge sheet marked P13 is dated 30.10.2019. Hence, it appears on the date of the 4th Respondent's retirement he had not even been served with a charge sheet.

In a nutshell, when the 4th Respondent had retired, he had been interdicted but not served with a charge sheet and no findings against him had been made pursuant to a disciplinary inquiry. In these circumstances, will the exception provided under section 13 of the Payment of Gratuity Act apply? and can the Petitioner withhold the payment of gratuity to the Petitioner? As clearly defined in the ***M.A. Lanka*** case and the Payment of Gratuity Act, for section 13 to be triggered, a workman's services have to be terminated for reasons of fraud, misappropriation of funds of the employer, wilful damage of the property of the employer or causing the loss of goods, articles or property of the employer. No findings to this effect had been made on the date of his retirement as there had been no termination by that time. As discussed in the ***M.A. Lanka*** case, the most important thing to consider in triggering section 13 is whether there were sufficient grounds established as contemplated in section 13, at the time the Commissioner commenced the inquiry into unpaid gratuity. In the ***M.A. Lanka*** case, the Court stressed on the importance of this by stating as follows;

> *"It has to be remembered that the employer-workman relationship had not been severed in terms of the contact of employment prior to the termination on disciplinary grounds. What ensued after the termination of services of the 5th Respondent is germane to the jurisdictional issue that arises in the case."*

Further, section 13 clearly states that the amount to be forfeited from the gratuity should be the amount from the damage or loss caused by the employee. However, by that time no damage or loss had been quantified as no disciplinary inquiry had commenced. Therefore, in my view the Labour Commissioner was correct in accepting the application of the 4th Respondent to inquire into the gratuity. As elaborated in the ***M.A Lanka*** case, the jurisdiction on gratuity is given to the Labour Tribunal only upon the fulfilment of the requirements stipulated under section 13. Hence, in the absence of those requirements, the Petitioner could not have invoked the jurisdiction of the Labour Tribunal. It is clearly expressed in the ***M.A. Lanka*** case in the following terms.

> "*In fact what is necessary for purposes of the Commissioner of Labour to ascertain whether he has jurisdiction or not is some kind of evidence whether the services of the workman have been terminated in terms of Section 13 for reasons of fraud, misappropriation of funds of the employer, wilful damage to property of the employer, or causing the loss of goods, articles or property of the employer. If that evidence is manifest or evident to the Commissioner of Labour upon a facial examination of available documents, it is at this stage that the Commissioner of Labour would lose seisin of the matter. Merely because an employer states before the Commissioner that he has effected a Section 13 forfeiture when an employee has complained against non-payment of gratuity, it doesn't automatically follow that the Commissioner should stay his hand. It is open to the Commissioner to ascertain the genuineness of the claim of the employer that he has in fact effected a forfeiture for the reasons set out in Section 13 of the Payment of Gratuity Act. To the limited extent of ascertaining whether there is in effect a forfeiture on account of the grounds set out in Section 13, the Commissioner can take into account of the fact of a domestic inquiry that had taken place, before the employer proceeded to impose a forfeiture. The existence of findings of guilt would also establish that there is foundation for the claim of the employer that he has imposed a forfeiture on account of Section 13 of the Act. In other words the Commissioner goes so far as to investigate whether the claim of the 15 employer that he has made a Section 13 forfeiture is true or not. The Commissioner of Labour would venture no far afield if the claim of the Petitioner factually exists*."

Hence, in my view the Labour Commissioner had acted within his powers when he accepted the 4th Respondent's complaint and commences the inquiry. The only inquiry proceedings that had been tendered are reflected in 4R6 and 4R7. On 24.08.2020 the Petitioner's representative had acknowledged that a charge sheet had not been given and had conceded that as they cannot extend the retirement age of the 4th Respondent, they had allowed the 4th Respondent to retire and specifically given a date where the next date for inquiry was fixed. As per the proceedings of 4R6, it is clear that the Commissioner who had conducted the inquiry had considered the sections 5 and 13 of the Payment of Gratuity Act. However, surprisingly the said day's proceedings do not contemplate any objection raised by the Petitioner of this case to the jurisdiction of the Commissioner of Labour to accept and inquire into the application of gratuity. The inquiring officer has clearly explained on the day's proceedings that in the absence of a charge sheet, a disciplinary inquiry, the Petitioner in this case is not allowed to deduct or withhold the gratuity payments pursuant to the 4th Respondents retirement.

As the Petitioner had sought a further postponement, the inquiry had been adjourned to 02.09.2020. On 02.09.2020, both parties had been present and the Petitioner had informed that they are not in a position to pay gratuity as the 4th Respondent had committed a financial fraud and that there is an inquiry going on. Hence, it is clear that even on the second day of inquiry, the necessary ingredients needed for the Petitioner to invoke section 13 of the Payment of Gratuity Act had not been present. It is also pertinent to note that even on this date the Petitioner had not raised any objection to the jurisdiction of the Labour Commissioner to inquire in to this matter. Thereafter, on 19.10.2020 by 4R8, the Commissioner of Labour had informed the Petitioner the amount of money that is due to be paid.

This Court has considered the cases cited by the Petitioner to establish his contention that the Labour Commissioner has no jurisdiction to inquire in to the non-payment of gratuity in view of section 13 of the Payment of Gratuity Act; namely ***Lanka Milk Foods (CWE) PLC v. Commissioner General of Labour and others*** **(CA WRT 312/2023, CA Minutes 18.12.2024),** ***M.A. Lanka (Pte.) Ltd v. Commissioner General of Labour and others*** **(CA WRT 387/2013, CA Minutes 21.11.2017),** ***Ceylinco General Insurance Limited v. Commissioner General of labour,*** **(CA WRT 95/2020, CA Minutes 12.12.2023).** In all these cases, when the employees' applications were referred to the Commissioner General, it was subsequent to the employer forfeiting the gratuity. In the instant case before this Court, the facts and circumstances are different namely; at the time the application was made to the Commissioner and even at the time of the Labour Commissioner's decision, there was no forfeiture of gratuity by the employer. What was present was only the withholding of the gratuity in violation of the Payment of Gratuity Act. It is also important to bear in mind that for a forfeiture to be claimed, there should be a disciplinary inquiry where the employee is found guilty of grounds contemplated under section 13 of the Payment of Gratuity Act and that also upon an amount being calculated as the loss caused and a decision taken to forfeit an equivalent to the amount that has been calculated. In the instant case before me, none of these requirements are fulfilled.

I am in agreement with the conclusions in the said cases and specially the ***M.A. Lanka*** case. However, for the reasons stated above, the said cases cannot be applied to the instant case before us as the facts and circumstances are different. In all the cited cases, the grounds to invoke section 13 of the Payment of Gratuity Act had been existing at the time the Commissioner had commenced the inquiry. However, in this instance, it was not there. Hence, the said cases cannot help the Petitioner.

Thereafter, on 16.11.2021 the Commissioner of Labour had filed the certificate in the Magistrate's Court to recover the gratuity. It appears to me that by this time the disciplinary inquiry had concluded and the amount or the loss caused by the Petitioner had been calculated and informed to him with a letter of termination (P13). However, there is no material tendered to this Court by the Petitioner to establish that this document had been tendered to the Commissioner of Labour before he filed the certificate in the Magistrate's Court. Hence, the peculiar nature of this case is at the time the Commissioner gave the decision to pay the gratuity, the conditions that would have triggered the section 13 of the Payment of Gratuity Act were not there. However, when the certificate was filed in the Magistrate's Court the said factors were there. In my view the exception to section 5 of the Payment of Gratuity Act under section 13 of the Act, will operate only if the conditions stipulated under section 13 were prevalent at the time of the employee making the application to the Commissioner. In this case when the necessary ingredients stipulated under section 13 became prevalent the Commissioner had already made the order pursuant to the inquiry. The Petitioner has failed to demonstrate that before the filing of the certificate in the Magistrate's Court, the said finding of facts which triggered section 13 was brought to the attention of the Commissioner of Labour. This fact was not addressed by the Petitioner or the Respondents. Hence, this Court cannot make any comment on the said issue.

The Petitioner at the argument stage confined his arguments to the jurisdiction issue and in my view, for the reasons which I have stated above, the contention has to fail. It is also trite law that the burden of proof lies with the Petitioner. Hence, it is incumbent on the Petitioner to demonstrate what actually transpired before the Commissioner of Labour before he made the order. However, in this instance I find that the proceedings had been tendered to this Court only by the Respondents.

It is also pertinent to note that in the instant case the parties were not at variance on the applicability of the Payment of Gratuity Act as there was no dispute about the number of workers employed by the bank.

I will now consider the Petitioners contention that there was no fair hearing offered and thereby the rules of natural justice were violated.

Fair hearing

Upon the application been made by the 4th Respondent, the 1st Respondent had taken steps to send notice to the Petitioner of this case (1R2) and all the proceedings before the Commissioner had been tendered by the 1st Respondent, I find that both parties had been present throughout the inquiry and both parties had been heard. I also find that there is no objection raised by the Petitioner pertaining to the jurisdiction of the Commissioner to hold the inquiry. However, the inquiring officer had given his mind to sections 5 and 13 of the Payment of Gratuity Act and he had considered whether the Petitioner was entitled to withhold gratuity.

I also observe that as per clause 40.3 of the disciplinary code, an employee can be retired subject to a disciplinary proceeding and his gratuity may be deducted. As per the proceedings before the Commissioner, I cannot find any proceeding to demonstrate the Petitioner bringing this clause to the attention of the Commissioner of Labour. Further, I find the Petitioner has failed to tender to this Court any material to demonstrate that the Respondent had been informed in accepting his retirement request that his services had been terminated subject to this clause or permitted to retire subject to clause 40.3 of the disciplinary code. In the absence of such, in my view, this clause cannot come to the assistance of the Petitioner. Accordingly, upon receipt of the complaint, the Commissioner has issued notice to the Petitioner, he had been present at the inquiry and after hearing both parties, the Commissioner had come to his conclusion. Hence, in my view, I cannot agree with the contention of not having a fair hearing or violation of natural justice.

Prayers of the Petitioner

The Petitioner seeks a Writ of Certiorari quashing the document marked P33, being the communication issued by the Commissioner of Labour subsequent to the inquiry. Thereafter, by the document marked P35, the Commissioner of Labour issued a further communication to the Petitioner revising the amount stated as due. By the said communication marked P35, the Commissioner of Labour cancelled the previous communication marked P33. Hence, issuing a Writ of Certiorari to quash P33 becomes futile. In any event I cannot find any illegality in the document P35 and in my view, the Petitioner has failed to establish any illegality for the Petitioner to succeed. I have considered the documents P37, which is a reply to the Petitioner's letter dated 07.12.2020, whereby the Commissioner had given an explanation as to why the gratuity cannot be withheld and the document P39 which is again a reply to the Petitioner's letter dated 21.09.2021, whereby the Commissioner had explained as to why section 13 of the Payment of Gratuity Act cannot be applied to the instant complaint and specifically stressed that the employer-employee relationship between the parties had come to an end not upon termination, but upon retirement of the 4th Respondent.

In my view, the Petitioner had failed to demonstrate any illegality in the said letters too. In view of the above-stated findings, the Petitioner's prayer to quash P42 which arises out of the inquiry and the certificate, has to fail. Hence, Petitioner's said prayers have to fail. Since I have refused to grant the Writ of Certiorari to quash the above documents and since Petitioner's prayer (b) fails, in the absence of any illegality, the Petitioner's prayer (c) has to fail.

Another ground as to why this Petition should fail was taken as an objection by the Respondents. Let me now consider the said objection.

Undue delay

The Respondents' Counsel contended that the Petitioner has filed this Writ application with an undue and unexplained delay thereby, alleging laches on the part of the Petitioner. The Petitioner by his prayers is challenging several decisions conveyed by the documents marked as P33, P35, P37, P39 and P42

P33 is the decision of the Commissioner subsequent to the inquiry whereby the Petitioner was informed to pay the amount stipulated thereon. The said letter is dated 14.9.2020. P35 is the amended notice of gratuity to be paid. By this notice, the previous notice P33 is cancelled. Hence, quashing P33 becomes futile. However, this Court observes that the document P35 containing the final amount that has to be paid as gratuity is dated 19.10.2020. The Petitioner has filed this application on 08.03.2022 which is nearly one and half years from the impugned notice of gratuity payment. This is the most crucial document from which the Commissioner had come to the conclusion that the Petitioner should pay gratuity to the 4th Respondent which is the decision on the application of the 4th Respondent to the Commissioner. All the other documents containing the decisions arise from this document marked as P35.

The Petitioner has failed to explain the delay to file this application to quash the decision in P35 for one and half years. P37 is actually an explanation given to a query raised by the Petitioner. This explanation is a re-iteration of the Commissioner's observations and conclusions after concluding the inquiry in to gratuity payment. The said explanation too is dated 19.02.2021. Even this explanation has not been challenged by the Petitioner for more than a year. P39 is once again a further re-iteration of the Commissioner's conclusions at the inquiry and does not contain a new decision. However, the said letter too is dated 22.10.2021. The document P42 contains the Magistrate Courts's proceedings. The Petitioner is seeking to quash the proceedings in the Magistrate's Court which is a culmination of the inquiry that resulted in the decision contained in P35. As I have observed earlier, the Petitioner has failed to challenge the decision of the Commissioner for more than one and a half years. He had waited without paying or challenging the decision of the Commissioner to pay gratuity contained in P37. It appears as submitted, the Petitioner decided to challenge the decision of the inquiry (P37) only upon the Commissioner filing a certificate in the Magistrate's Court to recover the sum stated in the certificate. It is trite law that delay defeats the purpose of a Writ application. This Court has constantly held that the delay disentitles a Petitioner from obtaining the relief sort as held in ***Dissanayake v. Fernando (1968)*** **71 NLR 356** the Court held that *"where there has been a delay in seeking relief by way of certiorari, it is essential that the reasons for the delay should be set out in the papers filed in the Supreme Court".* In the case of ***Gunasekera v. Weerakoon*** **73 NLR 262,** the Court held that "*the application should be refused because the Petitioner was guilty of undue delay in making the application. In the said matter, a delay of 7 months was considered to be "too long"*."

In this instance the Petitioner has failed to explain his delay to challenge impugned decision in P37 for more than one and a half years. Hence, the Respondents objection on delay has to succeed.

<u>Conclusion</u>

I have considered the submissions made and the documents tendered. However, in my view, the Petitioner has failed to establish any ground to obtain the relief sought. Further the Petitioner has failed to demonstrate any ground for the intervention of this court. Accordingly, for the above-stated reasons, I refused to grant the relief sought by the Petitioner and proceed to dismiss this Writ application. The costs are to be borne by the respective parties.

Judge of the Court of Appeal

Mahen Gopallawa, J

I agree

Judge of the Court of Appeal