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

In the matter of an Application for mandates in the nature of a Writ of Certiorari and / or Prohibition.

C.A. (Writ) Appl. No.387/2013

M.A. Lanka (Pte.) Ltd.,
No. 7, Galle face Terrace,
Colombo 3.
PETITIONER

-Vs-

1. **Commissioner General of Labour,**
   Labour Secretariat,
   P.O. Box 575,
   Colombo 5.
2. **Mallika Arachchilage Danawardena,**
   Labour Officer,
   Colombo East Division,
   Labour Secretariat,
   P.O. Box 575,
   Colombo 5.
3. **L.T.G.D. Dharshana,**
   Assistant Commissioner of Labour,
   Colombo East Division,
   Labour Secretariat,
   P.O. Box 575,
   Colombo 5.

4. **Chandi Premabandu,**
   Senior Legal Officer,
   Colombo East Division,
   Labour Secretariat,
   P.O. Box 575,
   Colombo 5.
5. **P.D. Janaka Samantha,**
   No. 179/1, Wedamawatha,
   Thumbowila,
   Piliyandala.

   RESPONDENTS

BEFORE	:	**A.H.M.D. Nawaz, J and** **P. Padman Surasena, J.**
COUNSEL	:	Nigel Hatch, PC with Ms. S. Ilangage for the Petitioner. Suranga Wimalasena, SSC with Chaya Sri Nammuni, SC for the Respondents.
Argued on	:	30.01.2017
Decided on	:	21.11.2017

A.H.M.D. Nawaz, J.

An important question of law that arises in the case can be stated in a nutshell - who is vested with the jurisdiction to determine the question whether the forfeiture of gratuity in terms of Section 13 of the Payment of Gratuity Act, No. 12 of 1983 (hereinafter sometimes referred to as "the Act") has been correctly made in accordance the Act? Which of the functionaries under the Act is the repository of that

jurisdiction? Is it the Commissioner of Labour or the Labour Tribunal that is the repository of that jurisdiction?

This is the question that this application for judicial review raises before this Court. The Petitioner-a freight forwarding company has sought, *inter alia*, a writ of certiorari to quash two decisions contained in documents marked **P5** and **P13** and a writ of prohibition on the 1st and / or 2nd and / or 3rd and / or 4th Respondents restraining them from inquiring into the application of the 5th Respondent with regard to gratuity.

The document **P5** dated 30.07.2012 orders the employer (the Petitioner in the case) to pay a sum of Rs. 191,865.30 as gratuity to one Samantha-the workman who had made a complaint to the Department of Labour against the Petitioner. The document **P13** dated 31.10.2013 reiterates the liability of the Petitioner to make this payment but what distinguishes **P13** from **P5** is that the latter document in point of time namely **P13** cites reasons as to how this liability is imposed. However, the contention of the learned President's Counsel for the Petitioner Mr. Nigel Hatch before this Court is twofold. Firstly, since the petitioner-company had employed less than 15 workmen in the months of August 2011 and May 2011 during the period of 12 months preceding the termination of the services of the workman Samantha, Section 5 of the Payment of Gratuity Act, No. 12 of 1983 would not clothe the Department of Labour with jurisdiction to inquire into the complaint of the workman in light of the fact that Section 5 of the Act mandates that there must have been 15 or more workmen employed on any day during the period of 12 months immediately preceding the termination of the services of the workmen. His second argument was that without prejudice to the 1st ground as aforesaid, and in any event, under Section 31B (1)(c) of the Industrial Disputes Act (as amended), only a Labour Tribunal is vested with jurisdiction to determine the question whether the forfeiture of gratuity as effected by the Petitioner in respect of the workman has been correctly made in terms of the Payment of Gratuity Act, No. 12 of 1983.

At this stage it is apposite to allude to the factual matrix surrounding the case in order to understand the legal arguments in its proper perspective. The 5th Respondent workman-P.D. Janaka Samantha had been in the employ of the Petitioner freight forwarding company for nearly 12 years until his services were terminated with effect from 14.11.2011 by a letter dated 08.02.2012 marked as **P2n**. He had risen to the position of Manager (Operations) but a deadlock seems to have developed in 2011 when the 5th Respondent sought to tender his resignation from the company with effect from 01.12.2011, by his letter dated 31.10.2011 **(P2a)**.

The Director/CEO of the petitioner-company responded to this letter of resignation by a letter dated 14.11.2011 **(P2b)** by refusing to accept the resignation of the workman and chronicled a number of serious lapses on the part of the 5th Respondent which, the CEO alleged, amounted to a clear violation of the terms and conditions governingthe workman's contract of services. Some of the acts of misdemeanor that the letter dated 14.11.2011 complains of are abuse of other employees, loss of revenue, sabotage of the business interests of the employer, engaging in business with rival companies, revelation of sensitive information to rival companies etc. The letter further alleged that the 5th Respondent workman was inducing fellow employees to cause a breach of their employment contracts by exhorting them to leave the company along with him.

By a document marked **P2(d)** of 18.11.2011, the workman was asked to show cause as to why disciplinary action should not been taken in respect of the allegations which were morefully described mirroring the same as in the letter that refused to accept his letter of resignation. The 5th Respondent responded to the show cause by denying the charges which he called baseless and false. Moreover, he requested in his response to the show cause that the charges be withdrawn and permission be granted to resign with no impediment to future prospects-vide **P2(f)**.

The course of correspondence between the employer and workman shows unmistakably that even as late as 25.11.2011 when the workman denied the charges

against him, the permission to resignation that he had sought in his letter dated 31.10.2011 was not granted. It is worthy of note that clause 9 of the contract of employment **(P2)** requires either party to serve three calendar months' notice in writing or the employee has to forfeit three months' salary in lieu of such notice. In this case, the letter of resignation dated 31.10.2011 **(P2a)** goes contrary to clause 9 of contract of employment **(P2)** as it gives only one month's notice of resignation.

Be that as it may, the petitioner-company took the view that the reasons given in the responses of the 5th Respondent were not acceptable and communicated to him with an accompanying charge sheet that the management had decided to hold a domestic inquiry and by a registered letter dated 06.01.2012 informed him of the appointment of an inquiry officer and the date and time of the inquiry. The letter elicited a response from the 5th Respondent dated 11.01.2012 **P2(l)** wherein he stated that as he had resigned on 31.10.2011 giving one month's notice, he should be treated as a "resigned employee" *(sic)* and the charges must be withdrawn. He also urged that his dues and gratuity be paid. Even in his response dated 11.01.2012, the 5th Respondent impliedly concedes that his resignation had not been accepted by the petitioner-company.

It is not in dispute that the domestic inquiry proceeded without the participation of the workman, albeit he was noticed to appear, and based on the findings of the said inquiry which found the 5th Respondent guilty of all charges, the petitioner-company proceeded to terminate the services of the 5th Respondent with effect from 14.11.2011 by a letter dated 08.02.2012-**(P2n).**

The charge sheet dated 9th December 2011 **(P2h)** contained 8 charges pertaining to loss of revenue, insubordination, deliberate dereliction of duty, misappropriation of funds of the Petitioner, divulging sensitive information relating to the business of the Petitioner to a competitor, making a secret profit whilst in employment etc. It is undeniable that the termination on the above grounds had not been challenged in any tribunal or court at the time this application for judicial review was preferred. It is

indubitable that up to now the termination of services remains unchallenged and unimpugned.

Thus we are faced with a situation where an employee was terminated on some of the grounds set out in Section 13 of the Actafter a domestic inquiry. 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.

As the letter of termination **P2n** bears it out, the termination of services of the 5th Respondent is premised on misconduct. It also notifies the 5th Respondent that the Petitioner reserves its right to institute legal action against him to recover any dues due from him to the company. It would appear that such a situation would attract Section 13 of the Payment of the Gratuity Act, No. 12 of 1983 which goes as follows:-

> *"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, wilful 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."*

In terms of Section 13, a workman to whom gratuity is payable under Part II will forfeit his gratuity if his services have been terminated on the disciplinary grounds specified in the said provision. In fact an employer's liability to pay gratuity to his workmen is cast upon him in terms of Section 5(1) of the Act which for purposes of clarity merits mention.

> *"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."

If Section 5(1) of the Actis truncated into its component parts, an employer's liability to pay gratuity will be contingent upon the following requisites:

1. *The workman must have completed five years or more under the employer;*
2. *Gratuity is payable upon termination of services brought about by the employer or employee, retirement, death of the workman or by operation of law or otherwise;*
3. *The employer has or has employed fifteen or more workmen on any day during the period of 12 months preceding the termination of services."*

The Commissioner of Labour is empowered under Part III of the Act to implement the payment of gratuity due under the Act and it is to him the workmen have recourse when any employer who is liable to pay any sum due as gratuity fails or defaults in the payment. But the liability imposed by Section 5 has an exception which is enacted in Section 13 of the Act which I have cited above. Notwithstanding the existence of the requisites as set out in Section 5(1) of the Act, if the services of the workman have been terminated on disciplinary grounds such as fraud, misappropriation of frauds, wilful damage of property, or loss of goods, articles or property of the employer, the right to receive gratuity is forfeited to the extent of the damage or loss as set out in Section 13 and consequently Section 5(1) liability is taken away. Section 13 forfeiture is linked to Section 31B (1)(c) of the Industrial Disputes Act in that the forum is in the Labour Tribunal to test the correctness of the forfeiture of gratuity. In other words the jurisdiction to assess the correctness of the forfeiture decision made by the employer in respect of his gratuity obligation is vested in the Labour Tribunal by virtue of Section 31B (1)(c) of the Industrial Disputes Act. So in a nutshell Section 13 of the Payment of Gratuity Act is intrinsically interwoven with Section 31B (1)(c) as

the former permits the employer to visit an errant workman with the sanction of forfeiture of gratuity, whilst Section 31B (1)(c) of the Industrial Disputes Act bestows the jurisdiction on a Labour Tribunal to assess the correctness of the decision of the employer.

By way of another addendum, I must refer to Section 31B(1)(b) of the Industrial Disputes Act which empowers a Labour Tribunal to award gratuity to a workman when he has worked in an industry which has employed less than 15 workmen. By way of contrast, Section 5 of the Payment of Gratuity Act empowers the Commissioner of Labour to oversee the payment of gratuity to a workman when he has been employed by an employer who has employed 15 or more workmen. Thus the underlying metwand is that there are two regimes for payment of gratuity. An employer who employs in terms of the Act is castupon the liability to pay only if he has employed 15 workmen or more, whereas the regime under the Industrial Disputes Act empowers the Labour Tribunal to award gratuity when there are less than 15 employees. An additional jurisdiction given to the Labour Tribunal is that if an employer who has or has had more than 15 workmen during the period of 1 year preceding the date of termination of services of a workman has terminated the services of the workman on grounds of misconduct as set out in Section 13, the Labour Tribunal is bound to assess the correctness of the decision.

Given that the services of the 5th Respondent were terminated on disciplinary grounds such as fraud and misappropriation, it would appear that Section 13 of the Act read with Section 31B (1)(c) of the Industrial Disputes Act would be engaged and consequently it would be the Labour Tribunal which has to go into the correctness of the decision to forfeit gratuity. But the gravamen of the contention before this Court is that by letter dated 19.01.2012 **(P3)** the 5th Respondent-workman complained to the Assistant Commissioner of Labour (East). It is before this forum namely the Assistant Commissioner of Labour that the employer took up the jurisdictional objection viz- the correctness of the forfeiture cannot be gone into by the Commissioner.

Turning to the legislative history I find that when the Payment of Gratuity Act, No.12 of 1983 was enacted in 1983, it was through Section 17 of this Act, No. 12 of 1983 that the legislature amended the Industrial Disputes Act giving the Labour Tribunals of this country jurisdiction to go into gratuity having regard to the number of employees. In 1983, the legislature added the presently worded subsections 31B (1)(b) and Section 31B (1)(c) to the Industrial Disputes Act. Those substituted provisions namely Sections 31B (1)(b) and 31B (1)(c) of the Industrial Disputes Act were added to the Industrial Disputes Act by Section 17 of the Payment of Gratuity Act, No. 12 of 1983. Both these subsections deal with payment of gratuity. The distinction between the two sections is that under 31B (1)(b) - the workman seeking entitlement to gratuity must have been employed in an industry which has employed **less than fifteen workmen,** whilst subsection 31B (1)(c) deals with the correctness of forfeiture of gratuity that has occurred for specific grounds but the industry in this instance must have employed **fifteen or more workmen.** This subsection entitles the Labour Tribunal to assess the correctness of forfeiture of gratuity effected in terms of Section 13 of the Payment of Gratuity Act, No. 12 of 1983. In other words since Section 13 of the Payment of Gratuity Act, No.12 of 1983 only applies to an industry where the employer has or has employed **fifteen or more workmen**, it goes without saying that under Section 31B (1)(c) of the Industrial Disputes Act, the Labour Tribunal would consider the correctness of forfeiture effected in an industry which has employed **fifteen or more workmen** within a period of 12 months preceding the date of termination of services of a workman. It all boils down that the Payment of Gratuity Act, No. 12 of 1983 applies to an industry that has employed 15 or more employees. But even in such a situation, if there is a forfeiture of gratuity on the grounds set out in Section 13 of the Act, the correctness of that decision goes before the Labour Tribunal for a legal appraisal. It is only when there is an industry having 15 or more workmen but there is no allegation of fraud or misappropriation as set out in Section 13, the Commissioner gets jurisdiction to go into the question of gratuity. Upon a close scrutiny of the aforesaid provisions of the Payment of Gratuity Act, No. 12 of 1983, one

is irresistibly drawn to the above legislative scheme and assignment of jurisdiction of the statutory functionaries namely, the Commissioner of Labour and Labour Tribunal.

Harking back to the jurisdictional objections of the petitioner-company before the Commissioner of Labour, this Court points out as stated before that the Petitioner raised the jurisdictional bar of Section 13 of the Act before this Court. The contention was that since termination of services of the 5th Respondent was for fraud and if he had a legitimate grievance, the legality of the forfeiture of gratuity should have been canvassed in the Labour Tribunal as Section 31B (1)(c) of the Act vests the jurisdiction with the Labour Tribunal. Here was an employer who consistently submitted before the inquiry officer of the Labour Secretariat that there was a Section 13 forfeiture of gratuity.

It would appear that this objection has gone a-begging. The jurisdictional question does not seem to have been dealt with in the initial order **(P5)** that the Petitioner seeks to quash in this application. In ***Commissioner General of Inland Revenue v. Koggala Garments (Pvt) Ltd.,*** (CA Application No. Tax/01/2008 decided on 05.04.2017), this Court cited H.W.R. Wade and C.F. Forsyth, *Administrative Law* (Oxford: Oxford University Press, 11th ed; 2014) as to the duty of a statutory tribunal to examine a jurisdictional issue that is raised before it. Both the celebrated authors state, at p.210, as follows:-

> *"Where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it. If it refuses to do so, it is wrongfully declining jurisdiction and the court will order it to act properly. Otherwise the tribunal or other authority 'would be able to wield an absolutely despotic power, which the legislature never intended that it should exercise. It follows that the question is within the tribunal's own jurisdiction, but with this difference, that the tribunal's decision about it cannot be conclusive."*

Thus William Wade and Christopher Forsyth articulate the proposition that a tribunal is under an obligation to examine the jurisdictional question that has been

raised before it. I had occasion to hold in ***Commissioner General of Inland Revenue v. Koggala Garments (Pvt) Ltd.,*** *(supra)* that if the tribunal had got its answer to the jurisdictional question wrong, it would be open to the aggrieved party to canvass the wrong answer as a jurisdictional error by way of judicial review but sadly enough, there is nothing to suggest nor is therea scintilla of evidence that the tribunal ever addressed itself on the jurisdictional question. No record of proceedings subsequent to the raising of the jurisdictional objection before the Commissioner has been placed before this Court. Instead, this Court finds **P5** dated 30.07.2017 where a standard form used by the Department of Labour has been sent to the Petitioner giving a breakdown of a sum of Rs.191,865.30 that must be paid to the workman Samantha (5th Respondent) by way of gratuity in terms of Section 5 of Payment of Gratuity Act, No.12 of 1983.

The aforesaid document marked **P5** orders the Petitioner to deposit the aforesaid sum within 14 days in the name of Assistant Commissioner of Labour at the Labour Office, Colombo South.

This decision, casting the Petitioner in liability under Section 5 of the Act does not answer the jurisdictional objection raised, nor does it explain the basis on which the process of decision making in terms of Section 5 has been carried out.

The culpable omission becomes more pronounced in light of the fact that Section 13 of the Act was urged as an exception to Section 5 of the Act but the document **P5** is devoid of any answer to the jurisdictional question. At this stage it would suffice to begin with the beginning of the watershed that brought about a paradigmatic shift towards giving reasons for administrative decisions in this country. The case of ***Karunadasa v. Unique Gemstones Limited*** (1997) 1 Sri.LR 250 is a landmark decision which bears repetition. This was a case under the Termination of Employment of Workmen (Special Provisions) Act, No.45 of 1971 where the Commissioner of Labour failed to convey to the Employer, the reasons for its decision to reinstate Karundasa. The Employer, Unique Gemstones Limited sought judicial

review of the said order under and in terms of Article 140 of the Constitution on the basis that reasons had not been given by the Commissioner of Labour. The Commissioner of Labour was absent and unrepresented in the Court of Appeal. In the judgment of the Court of Appeal, it was held that the Commissioner of Labour ought to have given reasons. Karunadasa appealed against the said judgment of the Court of Appeal to the Supreme Court where Justice Mark Fernando held as follows:

> *"The Court of Appeal did not attempt to lay down an inflexible general principle that Natural Justice always requires an administrative authority to give reasons, although he did perceive a trend in that direction. It seems to me that his observations that giving reasons for a decision is one of the fundamentals of good administration, and is implicit in the requirement of a fair hearing - were made, and must be understood, in the context of the position of the Commissioner of Labour under the Termination Act."*
>
> *And whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision 'may be condemned as arbitrary and unreasonable'; certainly, the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion.*
>
> *The parties do not seem to have realised the need to invite the Court of Appeal to call for and examine, the record and the recommendation. In the course of the hearing in this Court, Mr. Kamalasabayson tendered copies of the recommendation made by the 3rd respondent, and undertook to make the 2nd respondent's file available whenever required."*

In the course of the argument this Court drew the attention of both counsel that this Court was not furnished with copies of the proceedings or recommendations made by the inquiry officer before **P5** was made and in the absence of any tender of reasons for **P5** this Court is irresistibly drawn to the view that reasons for **P5** did not exist.

As would happen, by **P6** dated 14.08.2012 the Chairman, MA Lanka (Pvt) Ltd., (the petitioner-company) preferred an appeal to the Commissioner General of Labour and pinpointed that despite the production of the report of the inquiry officer who

conducted the domestic inquiry into the charge sheet and other relevant documents, no reasons had been given for imposing a Section 5 liability and that they would require reasons. **P5** does not afford any reasons to be given as to why their jurisdictional objection had been rejected. This document from the Petitioner does not seem to have provoked a response but by **P7** dated 17.10.2012 the Petitioner was notified to come for an inquiry on 21.11.2012. This invitation reinforces the view that no reasons existed for **P5.**

On 21.11.2012, the Petitionerby way of **P7(a)** reiterated its objection to liability to pay and though the Department of Labour acknowledged its receipt, there was no response to **P7(a)**.

Thereafter, the petitioner-company wrote to the Commissioner General of Labour by its letter dated 03.12.212 giving a concatenation of events surrounding the facts and circumstances of the case pertaining to workman Samantha and raised the selfsame two objections that had been put forward previously. This appeal **(P8)** is in effect a plea to the Commissioner that **P5** is wrong on two grounds namely;

1. *The company had less than 15 workmen in the months of August 2011 and May 2011.*
2. *Without prejudice to the 1st jurisdictional objection, under Section 31B (1)(c) of the Industrial Disputes Act (as amended) only a Labour Tribunal is with jurisdiction to test the correctness of forfeiture of gratuity.*

It bears repetition that **P8** too was not responded to. By a document dated 07.02.2012 **(P9),** the 2nd Respondent again summoned the Petitioner for a fresh inquiry. Upon a perusal of the documents and submissions made, this Court finds that the learned President's Counsel himself had attended this fresh inquiry. It would appear that by a document marked **P10,** another plea that **P5** must be withdrawn on legal grounds was sent to the Commissioner of Labour.

It has to be remembered that **P7, P8** and **P10** were in the forms of appeals to which there were no responses. **P10** also submitted along with it documents for the

consideration of the statutory functionary to support the argument that **P5** was erroneous and could never have been made.

It appears that the correspondence between the parties had eventually resulted in **P11** dated 21.10.2013 that summoned the Petitioner for a fourth inquiry on the jurisdiction matter. This Court wishes to highlight the need on the part of statutory functionaries to observe due process in order to dispose of legal objections as expeditiously as possible and a multiplicity of proceedings towards the resolution of legal issues must be avoided at all costs as they tend to show indecisiveness and inconclusiveness on the part of decision makers. What had seemingly gone on between the parties demonstrates a needless voyage to ceaselessly hold inquiries without reaching an answer to the jurisdictional questions that were raised for the umpteenth time.

Further by a letter dated 24.03.2013 (**P12**) addressed to the Commissioner General of Labour, the petitioner-company reiterated the jurisdictional objections they had raised in their prior letter dated 03.12.2012.

The Petitioner pointed out in that letter to the Commissioner that they are entitled in law to a determination on the objections that they had raised. After all this correspondence that had gone on between the Petitioner and the Commissioner General of Labour, a document dated 31.10.2013 (**P13**) has been addressed to the Petitioner reiterating the same payment obligation of the Petitioner as was adumbrated in **P5** dated 30.07.2012 but **P13** which the 3rd Respondent dispatched to the Petitioner virtually one year and three months later than **P5** is a reiteration of **P5** and seeks to give a semblance of an explanation as to why the petitioner-company is obligated to make a payment of gratuity. The document marked **P13** rejects both preliminary objections of the Petitioner and states further that by the previous determination dated 30.07.2012 (**P5**) it has been determined that the 5th Respondent is entitled to be paid gratuity. It is these two determinations (**P5** and **P13**) that are sought to be impugned by way of certiorari.

As I stated before, **P5** does not recite any reasons as to why **P5** imposes a gratuity liability when the jurisdiction of the Commissioner of Labour to embark upon an investigation in terms of Section 5 was called in question by the Petitioner on the ground that it is only forfeiture that the company has effected consequent to the findings of guilt by a domestic inquiry. The argument of the Petitioner that if a forfeiture of gratuity fell within Section 13 of the Payment of Gratuity Act , the matter must stand removed or it must be taken up in the relevant Labour Tribunal by virtue of subsection 31B (1)(c) of the Industrial Disputes Act was never answered or disposed of by the Commissioner.

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 accountof thefact 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*

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.

In fact as Sriskandaraja J. (as he then was) pointed out quite pertinently in ***A. Baur & Company Limited v. The Commissioner of Labour and Others*** (C.A. Writ Application No. 1033/2005 decided on 16.02.2009), whether the employer has invoked Section 13 correctly or erroneously, or whether he is entitled to invoke Section 13 or is disentitled to do so on the facts of the case, or whether the ingredients of Section 13 have been satisfied or not are all matters which go to determining "the question whether the forfeiture of gratuity has been correctly made" in terms of the Payment of Gratuity Act. This interpretation takes away the jurisdiction of the Commissioner to question the very decision that the employer has taken in terms of Section 13 on any ground whatsoever and the moment it is apparent to the Commissioner that there exists a forfeiture decision, the forum shifts to the Labour Tribunal to appraise its correctness. It is the right of the workman to invoke the jurisdiction under Section 31B (1)(c) of the Industrial Disputes Act.

If a forfeiture of gratuity is well evident, then Section 13 situation is patently apparent and the correctness of forfeiture has to be challenged and impugned in the labour tribunal. Here is an employer in this case who put before the Commissioner evidence of the existence of a prior domestic inquiry and a consequent finding of guilt to establish a Section 13 scenario but notwithstanding such a factual matrix, the Commissioner went ahead with an inquiry that resulted in **P5.** In my view despite the existence of a forfeiture *in situ*, the Commissioner could not have proceeded with an inquiry to determine gratuity liability as that jurisdiction lay by a legislative assignment of powers to the Labour Tribunal. Thus the inquiry officer of labour secretariat usurped a jurisdiction that he did not possess. Thus the want of jurisdiction on the part of the inquiry officer taints the making of **P5** and **P5** is consequently liable to be quashed for illegality.

As I pointed out, the document marked **P5** does not afford any reasons for the *vires* or competency of the inquiry that the labour office embarked upon. No doubt in ***R v. Secretary of State for the Home Department ex parte Doody*** **1994 1 AC 531** Lord Mustill expressed the view that there was no general duty to give reasons in English law. He did however strongly suggest that the giving of reasons was desirable. His Lordship observed that the law does not at present recognize a general duty to give reasons for an administrative decision. His Lordship pointed out though that it was equally beyond question that such a decision may in appropriate circumstances be implied. Indeed, according to *J. Auburn, J. Moffett and A. Sharland* "....there is a clear trend towards requiring public bodies to give reasons for their decisions" (*Judicial Review* (Oxford University Press, 2013), p.248). That would render procedural impropriety become applicable as a ground for impugning **P5** as **P5** is deafeningly silent on the reasons for the decision.

In the same way **P13** which is a reiteration of **P5** is susceptible to impugnation. **P13** rejects both the preliminary objections raised by the Petitioner. On the pivotal question of forfeiture and as to where the jurisdiction to test its correctness lies, **P13** assumes a jurisdiction that it does not have and on the above reasoning adopted, we reiterate our view that it is the Labour Tribunal that enjoys the jurisdiction to assess the correctness of the forfeiture of gratuity and in the circumstances we proceed to issue orders in the nature of writs of certiorari to quash **P5** and **P13**.

The Learned President's Counsel for the Petitioner invited this Court to review the correctness of the decision of ***A. Baur & Company Limited v. The Commissioner of Labour and Others*** [C.A. Writ Application No.1033/2005 decided by Sriskandaraja J. (as he then was) on16.02.2009] on the aspect of its holding thatif a resignation of a workman was accepted subject to the condition that he must face a domestic inquiry, there would be no termination. In such a situation the learned Judge proceeded to hold that the acceptance of resignation subject to an imminent inquiry would not amount to a termination.

We are not confronted in this case with a situation of a conditional acceptance of resignation as we find in *A. Baur & Company Limited v. The Commissioner of Labour and Others* (C.A. Writ Application No 1033/2005). In *A. Baur& Company Limited v. The Commissioner of Labour and Others,* there was a conditional acceptance of the resignation of the workman on the basis that she had to undergo the rigours of a domestic inquiry. The holding in that case that in such a situation there was no termination has to be tested in a case which throws up the same facts in the future namely a workman's resignation is accepted but subject to the condition that she faces an inquiry. Such is not the case before us. Here is a workman who sought to resign but his resignation was not accepted at all. Rather his services were terminated after a domestic inquiry and thereafter a Section 13 forfeiture was made.

In the circumstances this Court proceeds to quash documents namely **P5** dated 30.07.2012 and **P13** dated 31.10.2013 by way of writs of certiorari and since we have held that the correctness of forfeiture has to be tested in the Labour Tribunal we also proceed to issue a writ of prohibition restraining the 1st and / or 2nd and / or 3rd and / or 4th Respondents from inquiring into the application of the 5th Respondent with regard to gratuity.

JUDGE OF THE COURT OF APPEAL

P. Padman Surasena, J.
I agree

JUDGE OF THE COURT OF APPEAL