

# An analysis of the jurisdiction, duties and powers of an industrial arbitrator in Sri Lanka

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**Abstract**— *The Industrial Disputes Act has been enacted to achieve industrial peace through maintenance of harmonious industrial relations. Industrial peace becomes increasingly important inter alia to attract investors and to provide the services essential to the life of the community. The Act provides mechanisms for settlement of industrial disputes which consist of collective agreement, conciliation, arbitration, industrial court and labour tribunal. Settlement of industrial disputes by conciliation is not always possible. In such circumstances, settlement of industrial disputes by arbitration becomes an appropriate method. The provisions of the Act confer jurisdiction, duties and powers on an industrial arbitrator to achieve its objective. However, the provisions of the Act provide a basic legal framework for arbitration. The question lies here is whether an industrial arbitrator is adequately empowered by the Act to settle industrial disputes in order to achieve the objective of the Act. Hence, the objective of this research was to explore the scope of the jurisdiction, duties and powers of an industrial arbitrator to settle industrial disputes. The research methodology adopted for this research was analysis of the provisions of the Industrial Disputes Act, decided cases, journal articles and text books. It is found that although the Act provides skeleton framework, creative role played by the Appellate Courts have provided flesh and blood to the skeleton. The wordings of the provisions of the Act, underlying just and equitable concept, judicial activism of the Appellate Courts and the combined effect of all expands the jurisdiction and confer very wide powers to an industrial arbitrator, subject to necessary safeguards, to perform his functions to achieve the objective of the Act. The powers of an industrial arbitrator are wider and flexible than the powers of a civil arbitrator or commercial arbitrator. It makes industrial arbitration an effective mechanism to settle industrial disputes which is essential to make Sri Lanka as a hub for investment in Asia.*

**Keywords**— Industrial arbitration, Just and equitable concept, Industrial peace

## I. INTRODUCTION

The Industrial Disputes Act has been enacted to achieve industrial peace through maintenance of harmonious industrial relations. Industrial peace becomes increasingly

important *inter alia* to attract investors, and to provide the services essential to the life of the community. The Act<sup>1</sup> provides mechanisms for settlement of industrial disputes, which consist of collective agreement, conciliation, arbitration, industrial court and labour tribunal. Settlement of industrial disputes by conciliation is not always feasible. In such circumstances, settlement of industrial disputes by arbitration becomes an appropriate method. The provisions of the Act confer jurisdiction, duties and powers on an industrial arbitrator to achieve its objective.

The question lies here is whether an industrial arbitrator is adequately empowered to settle industrial disputes in order to achieve the objective of the Act. Hence, the objective of this research is to analyze the scope of the jurisdiction, duties and powers of an Arbitrator to settle industrial disputes. It is analyzed in light of the legal regime developed by judicial decisions based on the provisions of the Industrial Disputes Act. The research methodology adopted for this research is analysis of the provisions of the Industrial Disputes Act, decided cases, text books and journal articles.

## II. REFERENCE BY THE COMMISSIONER AND MINISTER TO AN ARBITRATOR

An arbitrator does not have any inherent power to receive complaints from the parties to an industrial dispute, but he obtains his jurisdiction when an industrial dispute is referred by the Commissioner of Labour or Minister of Labour. The Commissioner has the power to refer an industrial dispute for arbitration, if the parties to the dispute consent for such reference.<sup>2</sup> It is called 'voluntary arbitration'. The Minister has power to refer a minor dispute for arbitration notwithstanding that the parties to such dispute do not consent to such reference.<sup>3</sup> Therefore, it is called 'compulsory arbitration'. The power of the Minister to refer an industrial dispute for arbitration is an administrative function.<sup>4</sup> The Minister could exercise the statutory power and refer an industrial dispute arising from

<sup>1</sup> Hereinafter the word "Act" refers the Industrial Disputes Act, No. 43 of 1950 as amended.

<sup>2</sup> Section 3(1)(d).

<sup>3</sup> Section 4(1). See also Senanayake, J. in Chas P. Hayley and Co Ltd v. Commercial and Industrial Workers, (1995) 2 Sri LR 42 at 48.

<sup>4</sup> Inter Orient Logistics (Pvt) Ltd v. Ceylon Mercantile Industrial and General Workers Union, C/A No. 867/2007.

a live collective agreement as well.<sup>5</sup> When commenting on the wide powers of the Minister, Senanayake, J. stated in *Chas P. Hayley and Co. Ltd v. Commercial and Industrial Workers*<sup>6</sup> that “the legislature has prudently and advisedly entrusted an amplitude of power in the Minister in the larger interest of industrial peace.”

The Commissioner or Minister could refer the disputes that fall within the ambit of ‘industrial dispute’ only. The interpretation clause of the Act provides that “ ‘industrial dispute’ means any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, of any person, ...”<sup>7</sup> Hence, if a dispute does not fall within the scope of an industrial dispute, they will not have power to refer such dispute for settlement by arbitration.<sup>8</sup>

Section 31B (2) (b) of the Act provides that when an application is made to a labour tribunal, the tribunal shall “where it is so satisfied that such matter constitutes, or forms part of, of an industrial dispute referred by the Minister under section 4 for settlement by arbitration to an arbitrator...make order dismissing the application without prejudice to the rights of the parties in the industrial dispute.” The ambiguity as to whether the Minister has power to refer an industrial dispute which has been pending before a labour tribunal has been a subject matter for judicial interpretation by the appellate courts.

In *Wimalsema v. Navaratne*<sup>9</sup> the Court of Appeal held that the Minister had power to refer a dispute for settlement by arbitrator even though an inquiry was pending before a labour tribunal relating to the same dispute. In *Upali Newspapers Ltd v. Eksath Kamkaru Samithiya*<sup>10</sup> the Court of Appeal analyzed the effect of section 31B(2)(b) of the Act in light of combined effect of the provisions in the 1978 Constitution relating to interpretation of the terms ‘judicial officer’<sup>11</sup>, appointment of President of a Labour Tribunal by the Judicial Services Commission<sup>12</sup> and independence of the judiciary<sup>13</sup> and held that *Wimalsema* Case “can no longer be considered as valid authority for the proposition

<sup>5</sup> *Volanka Ltd v. Seneviratne, Minister of Labour*, (2000) 2 Sri LR 19. See also *Chas P. Hayley and Co Ltd v. Commercial and Industrial Workers*, *Op. cit.*, at 48.

<sup>6</sup> *Ibid.*

<sup>7</sup> Section 48.

<sup>8</sup> See *Skrisandarajah, J. in Inter Orient Logistics (Pvt) Ltd v. Ceylon Mercantile Industrial and General Workers Union*, *op.cit.*

See A. Sarveswaran, *Would Industrial arbitration be an Effective Mechanism to Resolve the Dispute arising from the Demands made by FUTA?* (unpublished)

<sup>9</sup> (1978-79) 2 Sri LR 10.

<sup>10</sup> (1999) 3 Sri LR 205.

See also De Silva, J. in *Volanka Ltd v. Seneviratne, Minister of Labour*, *op.cit.*, at 24-25.

<sup>11</sup> Article 170.

<sup>12</sup> Article 114.

<sup>13</sup> Article 116(1).

that the Minister has unlimited powers under section 4(1)<sup>14</sup> and section 31B(2) (b) “would apply only to an application made to a Labour Tribunal subsequent to a reference made by the Minister to an arbitrator”. The decision of the Court of Appeal was upheld by the Supreme Court.<sup>14</sup> Hence, the Minister does not have power to refer an industrial dispute to an arbitrator which has been pending before a labour tribunal.

The question arises whether the Minister has powers to refer or not to refer an industrial dispute to an arbitrator. In *Aislaby Estates Ltd v. Weerasekera*,<sup>15</sup> Pathirana, J. stated as to the powers of the Minister that the decision of the Minister “not to refer the dispute for settlement by arbitration... under section 4(1) of the Act, is an administrative act ..., and such decision not having been invested with statutory finality by any provisions of the act, the minister can re-examine the question and make a reference under section 4(1) of the act if he is later of the opinion that the dispute should be referred for settlement by arbitration...” The courts have developed the concept of Public Trust Doctrine in light of the provisions of the Constitution<sup>16</sup> to state that the authorities have powers in trust, and the fundamental rights jurisprudence under the equality clause of the Constitution<sup>17</sup> to include abuse of powers by authorities. Hence, abuse of powers by the Minister in making decisions as to refer or not to refer an industrial dispute for arbitration may become a violation of the Public Trust Doctrine and fundamental rights guaranteed by the Constitution.

The next question arises whether the Minister has power to revoke a reference he makes under section 4(1) of the Act. Section 4(1) empowers the Minister to refer a dispute to an arbitrator. But the section does not provide anything in relation to revocation of a reference. In *Nadarajah Ltd v. Krishnadasan*<sup>18</sup> the Supreme Court held that the Minister does not have power to revoke or rescind the reference made in terms of section 4 (1) of the Act. In this case,<sup>19</sup> Sharvanandha, J. stated: “Situations may however arise necessitating a second reference if the Arbitrator declines, resigns, dies or becomes incapable of performing his functions, or leaves Sri Lanka under circumstances showing that he will probably not return at an early date...” . The Supreme Court differentiated revocation of a reference from the situations that frustrate the reference and held that the Minister could make second reference in situations that frustrate the earlier reference.<sup>20</sup>

<sup>14</sup> *Upali Newspapers Ltd v. Eksath Kamkaru Samithiya*, (2001) 1 Sri LR 105.

<sup>15</sup> (1973) 77 NLR 241 at 250.

<sup>16</sup> Articles 3 and 4.

See also A.Sarveswaran (2012), “Judicial Approach for Promotion of Good Governance of Natural Resources in Sri Lanka, *Occasional Research Paper Series*, Postgraduate Unit, Faculty of Law, University of Colombo, No.01

<sup>17</sup> Article 12(1).

<sup>18</sup> (1975) 78 NLR 255.

<sup>19</sup> *Ibid.*, 259.

<sup>20</sup> See also *Equipment and Construction Co Ltd v. Ranasinghe*, (1985) 1 Sri LR 82 for the same view.

As discussed above an arbitrator obtains his jurisdiction only from the reference made by the Commissioner or Minister. The provisions of the Act is widely worded in the manner that they could be abused by the Minister to grant jurisdiction to an arbitrator or interfere with the jurisdiction of an arbitrator. However, the Appellate Courts have intervened to provide a legal framework as to the powers of the Minister to refer an industrial dispute to an arbitrator or revoke an industrial dispute from an arbitrator. The intervention by the courts provides certainty as to the jurisdiction of an industrial arbitrator and makes him to exercise his powers without fear of outside interference that may disentitle his jurisdiction.

### III. SCOPE OF THE JURISDICTION OF AN ARBITRATOR

As the phrase 'industrial dispute' in the Industrial Disputes Act is very wide to embrace different types of disputes arising from employer-workman relationship, the scope of the jurisdiction of an arbitrator is also very wide.<sup>21</sup> It is much wider than the jurisdiction of a Labour Tribunal. However, a dispute which does not fall within the interpretation of 'industrial dispute' and the ambit of section 16 of the Industrial Disputes Act will not grant jurisdiction to an arbitrator.<sup>22</sup>

Section 16 provides that every order under section 3(1) (d) or 4(1) referring an industrial dispute to an arbitrator for settlement by arbitration shall be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute between the parties. However, the proviso to section 16 expands the scope of power of an arbitrator by providing: "Nothing in the preceding provisions of this section shall be deemed to be in derogation of the power of the arbitrator to whom the dispute is referred to admit, consider and decide any other matter which is shown to his satisfaction to have been a matter in dispute between the parties prior to the date of the aforesaid order, provided such matter arises out of or is connected with a matter specified in the statement prepared by the Commissioner."<sup>23</sup>

In *Shell Company of Ceylon Ltd v. Perera*<sup>24</sup> when explaining the ambit of the proviso, the Supreme Court stated: "It may be noted in passing that the proviso to section 16 recognises a power even in an arbitrator to admit and decide other matters in dispute between the parties prior to an order of reference, but, unlike the power of

an industrial court indicated in section 23, this power is limited to deciding matters arising out of or connected with the referred dispute."

Section 36(5) provides *inter alia* that an arbitrator may, at any time after the commencement of any proceedings in respect of an industrial dispute, permit any party to raise any fresh matter relating to the dispute for the decision of such arbitrator, if such arbitrator is satisfied that such matter could not have been raised at the commencement of the proceedings. In *Volanka Ltd v. Seneviratne, Minister of Labour*<sup>25</sup> De Silva, J. observed that section 36(5) of the Act supplements the power given to an arbitrator by section 16 of the Act.

Although an Arbitrator is empowered to settle an industrial dispute by arbitration, he could explore the possibility of settling the dispute by conciliation as the objective and the scheme of the Act is settlement of industrial disputes and maintenance of industrial peace. In *Shell Gas Lanka Ltd v. All Ceylon Commercial and Industrial Workers' Union*<sup>26</sup> Hector Yapa, J. stated: "It should be remembered that when a dispute is referred to an arbitrator for settlement by arbitration, it is the recognized practice to explore the possibility of conciliation in the first instance." If the settlement is not possible, the Arbitrator has to proceed with conducting inquiries to make his award.

### IV. MAKING INQUIRIES

Section 17(1) of the act provides: "when an industrial dispute has been referred under section 3 (1) (d) or section 4 (1) to an arbitrator for settlement by arbitration, he shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable..."<sup>27</sup>

The duty cast upon an arbitrator by the words "shall make all such inquiries" in section 17(1), empowers him to determine the course of inquiry. In *Brown & Co Ltd v. Ratnayake*<sup>28</sup> Rodrigo, J. stated: "It is important to note that the Section enacts that the arbitrator shall make all such inquiries. The Section does not say that the arbitrator shall hold an inquiry. In my view, the word 'make' is a pointer

to how the inquiry commences. The word 'make' in my view throws the ball in to his Court requiring the arbitrator to initiate what inquiries he considers are necessary..."<sup>29</sup>

<sup>21</sup> See P. Jayawardhane (July-Sept 2003), "Reference of Industrial Disputes for Settlement by Arbitration", *Sri Lanka Labour Gazette*, Vol 54, No 3 at pp 10-11 for the nature of the disputes that are referred for arbitration.

<sup>22</sup> See Colombo Commercial Co Ltd v. Shanmugalingam, (1964) 66 NLR 26. See also Jayasuriya, J. in Kalamazoo Industries Ltd v. Minister of Labour and Vocational Training, (1998) 1 Sri LR 235 at 240-241. Anandacoomaraswamy, J. in Eksath Kamkaru Samithiya v. Ceylon Printers Ltd, (1996) 2 Sri LR 317 at 319.

<sup>23</sup> See Standard Chartered Grindlays Bank Ltd v. Minister of Labour, (2002) B.L.R 14.

<sup>24</sup> (1967) 70 NLR 108 at 116.

<sup>25</sup> *Op.cit.*

<sup>26</sup> (2000) 3 Sri LR 170 at 180.

<sup>27</sup> Section 14 of the Industrial Disputes (Hearing and Determination of Proceeding) (Special Provisions) Act, No. 13 of 2003 provides that it shall be the duty of an arbitrator to make his award under section 17 of the Act, within three months of the date of the making of such reference.

<sup>28</sup> (1986) B.L.R 229 at 231.

<sup>29</sup> See also Saleem Marsoof, J. in Brown and Company v. Minister of Labour, (2011)(2) B.L.R 485 at 489.

Although an arbitrator can devise the procedure for conducting inquiries, such procedure should be consistent with the principles of natural justice.<sup>30</sup>

#### V. HEARING EVIDENCE

According to section 17(1), an arbitrator has to hear such evidence as may be tendered by the parties to the dispute. But, according to the provisions of section 36(1), an arbitrator who makes inquiries can require any person, to furnish such particulars that he may consider necessary;<sup>31</sup> to give evidence;<sup>32</sup> and to produce such documents as the arbitrator may consider necessary.<sup>33</sup>

With regard to the effect of the words “tendered by the parties” in section 17(1), S.R.De Silva (1973) states that: “This provision, however, does not, in respect of evidence, restrict the arbitrator to evidence that is “tendered by the parties” since under s. 36(1) an arbitrator is entitled, as we have seen, to require persons to furnish particulars, documents and give evidence.”<sup>34</sup>

In *Piyadasa v. Bata Shoe Co*<sup>35</sup>, Tambiah, J. stated: “...it seems to me that since the arbitrator is empowered by s. 36 (1) of the Act to require any person to furnish particulars, produce documents and give evidence, it would have been a very desirable thing if the arbitrator had asked the petitioner and the other workmen whether they wished to give evidence, and / or call evidence on their behalf, for, he must act judicially.”

In *Volanka Ltd v. Seneviratne, Minister of Labour*<sup>36</sup> De Silva, J. opined: “...since the arbitrator is empowered by section 36(1) of the Act to require any person to furnish particulars, produce documents and give evidence it would have been a very desirable thing to call the petitioner to give evidence at the conclusion of the respondents evidence even though he declined to do so at the commencement on the basis that there was no case to meet.” The parties

to the dispute also have a duty to assist the arbitrator by providing relevant evidence to settle the dispute.<sup>37</sup>

An arbitrator must act judicially in assessing evidence.<sup>38</sup> When making a just and equitable award, an arbitrator should consider all relevant evidence adduced at the inquiry.<sup>39</sup>

<sup>30</sup> *Brown & Co Ltd v. Ratnayake, op.cit.*, at 232. See also *Asian Hotels and Properties PLC v. Frederick S. Benjamin, S.C. Appeal No. 143/2010*.

<sup>31</sup> Section 36(1)(a).

<sup>32</sup> Section 36(1)(b).

<sup>33</sup> Section 36(1)(c).

<sup>34</sup> S.R.De Silva, (1973). *Legal Framework of Industrial Relations in Ceylon*, H.W.Cave & Company, Colombo, at 279.

<sup>35</sup> (1982)1 Sri LR 91 at 95.

<sup>36</sup> *Op.cit.*, at 27.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Srimane, J. in Heath and Co (Ceylon) Ltd v. Kariyawasam, (1968) 71 NLR 382 at 384.* See also *Tambiah, J. in State Bank of India v. Edirisinghe, (1991) 1 Sri LR 397 at 419.*

<sup>39</sup> See *Tambiah, J. in State Bank of India v. Edirisinghe, ibid.*

Section 36(4) of the Act provides that in the conduct of proceedings under this Act, an arbitrator shall not be bound by any of the provisions of the Evidence Ordinance. This makes the machinery for the settlement of industrial disputes more flexible. In *Brown and Company v. Minister of Labour*,<sup>40</sup> Saleem Marsoof, J. compared the nature of industrial arbitration with the nature of equity in English Law and stated that the Industrial disputes Act substitutes more flexible procedure “in the fashion in which equity in English law gave relief to the litigants from the common law.” It is suggested that the equitable maxim that equity will not permit a wrong to be without remedy is also becomes relevant in light of the jurisdiction of an arbitrator and the nature of awards that he could grant when he exercises just and equitable powers under the Act.

#### VI. DUTY TO ACT JUDICIALLY

Section 17(1) and other provisions of the Act empowers an arbitrator with very wide powers to make inquiries and hear evidence and thereafter make just and equitable award which legally binds the parties. When exercising this power an arbitrator exercises arbitral power and not judicial power. The question arises with regard to the nature of the arbitral power he exercises.

In *Nadaraja Ltd v. Krishnadasan*<sup>41</sup> Sharvanandha, J. pointed out when commenting on the function of an Industrial Arbitrator: “The Arbitrator has to act judicially in making the ultimate award which is binding on the parties. His function is judicial in the sense that he has to hear the parties, decide facts and apply rules with judicial impartiality.” Justice Sharvanandha emphasizes with reasons that an arbitrator has a duty to act judicially.

In *All Ceylon Commercial and Industrial Workers' Union v. Nestle Lanka Ltd*<sup>42</sup> Jayasuriya, J. observed: “...He is required in arriving at his determinations to decide legal questions affecting the rights of the subject and hence he is under a duty to act judicially...” The nature of the duties and powers conferred upon an arbitrator also leads to the conclusion that an arbitrator has a duty to act judicially.

#### VII. ARBITRATOR IS FETTERED BY CONTRACT OF EMPLOYMENT?

Section 19 of the Act provides: “Every award of an arbitrator ..., be binding on the parties, trade unions, employers and workmen referred to in the award in accordance with the provisions of section 17(2) ; and the terms of the award shall be implied terms in the contract of employment

between the employers and workmen bound by the award.” Section 19 and other provisions imply that an arbitrator has power to create new rights and obligations. The new rights and obligations become implied terms of

<sup>40</sup> *Op.cit.*, at 489.

<sup>41</sup> *Op.cit.*, at 261.

<sup>42</sup> (1999) 1 Sri LR 343 at 348.

the contract of employment between an employer and a workman.

In *Brown & Co Ltd v. Ratnayake*<sup>43</sup> Rodrigo, J. stated: "The function of the arbitral power in relation to industrial disputes is to ascertain and declare what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other, as distinct from the rights and liabilities of the parties as they exist at the moment the proceedings are instituted."

If the terms of the contract of employment are silent, an arbitrator could create new rights and obligations of the parties. But, the question arises whether an Arbitrator has power to create rights and obligations contrary to the contractual rights and obligations of the parties.

In *State Bank of India v. Edirisinghe*<sup>44</sup> it was submitted that: "... The Arbitrator is bound by the terms of the contract employment. A Labour Tribunal can vary the terms of contract of employment as s. 31B(4) of the Industrial Disputes Act gives the power to a Labour Tribunal to grant any relief or redress notwithstanding anything to the contrary in any contract of service between a workman and his employer. There was no such provision as regards Industrial Arbitrators. If the terms of the contract of employment are silent on the question of retirement and pension,<sup>45</sup> the Arbitrator can create new terms which would then become implied terms in the contract of employment between an employer and a workman in terms of s.19 of the Industrial Disputes Act."

However, Tambiah, J. when delivering the majority judgment countered this submission by stating: "...one must not lose sight of s.19 of the Act which states that an award of an Arbitrator in force shall be binding on the parties and the terms of the award shall be implied terms in the contract of employment between the employer and the workman. As was pointed out by Wanasundera, J. in *Thirunavukarasu's* case what the award seeks to do is to create new terms and conditions which are statutorily made implied terms of the contract of employment. The effect of the award is to introduce terms which become implied terms of the contract. I also see that s. 33 (i)(e) enables an Arbitrator in his award to make an order as to the payment by an employer of a pension, the amount of such pension and its duration. The submission ... that the Arbitrator is bound and fettered by the terms of contract of employment is untenable."<sup>46</sup>

In this case, after citing observations from decided cases, Tambiah, J. stated: "...it is clear that an Industrial Arbitrator is not tied down and fettered by the terms of contract of employment between the employer and the workman.

He can create new rights and introduce new obligations between the parties."<sup>47</sup>

The question arises whether an arbitrator has inherent limitations to his freedom. The jurisdiction of a labour tribunal is not identical to that of an arbitrator. An application to a labour tribunal could be made with regard to relief or redress for termination of services, or payment of gratuity.<sup>48</sup> An industrial arbitrator derives his jurisdiction when an industrial dispute is referred to him for settlement by arbitration. The interpretation of the word 'industrial dispute' is wide and it means disputes connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, of any person.<sup>49</sup>

Section 31B(4) is applicable only to a labour tribunal but not to an industrial arbitrator. An industrial arbitrator is not empowered with a similar provision comparable to the provision in section 31B(4). It implies that the intention of the Legislature is not to empower an arbitrator with the power similar to that of a labour tribunal. Therefore, in evaluating the power of an arbitrator, absence of a provision similar to section 31B(4) is significant.

In terms of section 31B(1), an application could be made to a labour tribunal for relief or redress. According to the wording of section 31B(4) too, a labour tribunal is empowered to go beyond the domain of any contract of service in granting any relief or redress. However, the jurisdiction and the powers of an industrial arbitrator are not limited only to award relief or redress like a labour tribunal. An arbitrator has jurisdiction to decide diverse aspects of employment.

It is also notable in the Act, that although there are many provisions commonly applicable without any distinction whatsoever to an arbitrator, industrial court and a labour tribunal, section 31B(4) is not commonly applicable to all labour courts, but, applicable only to a labour tribunal in granting relief upon an application made under section 31B(1) of the Act.

Therefore, in light of the above arguments, it is submitted that when an arbitrator makes a just and equitable award he should give due consideration to a contract of employment. However, it is also submitted that the statutory requirement to make a just and equitable award negate the argument that an arbitrator should strictly remain within the domain of contract of employment in making an award.

<sup>43</sup> *Op.cit.*, at 231.

<sup>44</sup> *Op.cit.*, at 411.

<sup>45</sup> The dispute was relating to these issues.

<sup>46</sup> At 415.

<sup>47</sup> At 415.

<sup>48</sup> Section 31B(1).

<sup>49</sup> See P.Jayawardhane, "Reference of Industrial Disputes for Settlement by Arbitration", *Op.cit.* for the nature of the disputes mostly referred for arbitration.

Section 31B(4) of the Act which empowers a labour tribunal to grant relief notwithstanding to anything in a contract of employment recognizes the existence of unequal bargaining power between an employer and a workman. For the same reason, viz., because of the existence of unequal bargaining power, an arbitrator also should not be fettered by a contract of employment in making a just and equitable award.

An arbitrator has to make award with regard to industrial disputes which arise from various matters including the terms of employment or with the conditions of labour. Therefore, an arbitrator should have power to make an award notwithstanding anything to the contrary in a contract of employment. If not, he will not be able to make a just and equitable award as required by the Act, and it will defeat the objective of the Act.

However, the circumstances which necessitate disregarding the contract of employment in making a just and equitable award depends *inter alia* on the nature of industrial dispute, bargaining power of the parties, reasonableness of the contract of employment and facts and circumstances of each individual case.

The two propositions viz., an arbitrator should give due consideration to a contract of employment and, an arbitrator is not fettered by a contract of employment are not two conflicting or contrasting propositions. These propositions are made in light of the underlying just and equitable concept which balances the interests of both the employer and employee. In *Municipal Council of Colombo v. Munasinghe*,<sup>50</sup> H.N.G.Fernando, C.J. pointed out: "The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily an award which favours an employee."

Therefore, it is emphasised that an arbitrator should decide in the light of the facts and circumstances of each case whether he should give due consideration to a contract of employment or deviate from a contract of employment in making a just and equitable award. This discretion also expands the scope of the powers of an arbitrator to a great extent.

#### VIII. MAKING AWARDS

Section 17(1) of the Act requires an arbitrator to make a "just and equitable" award to the dispute referred to him. But, the phrase "just and equitable" has not been defined in the Act. The nature of the phrase empowers an arbitrator with an equitable discretion in making an award to an

industrial dispute. As discussed earlier, the interpretation to the phrase "industrial dispute" includes disputes arising from various matters relating to employment. Therefore,

<sup>50</sup> (1968) 71 NLR 223 at 225.

the territory in which an arbitrator could exercise his just and equitable power also becomes wider. Section 33 of the Act provides both equitable relief and discretion to make decisions with regard to such equitable relief. Hence, this provision also expands the scope of the powers of an arbitrator.

Although, an arbitrator has very wide discretion to make a just and equitable award, misconstruction of the phrase 'just and equitable' is an error of law.<sup>51</sup> In *Stratheden Tea Co Ltd v. Selvadurai*,<sup>52</sup> Weerasooriya, J. stated on the power given by section 17 (1): "Although the power conferred by that section is a wide one, there are limitations to the exercise of it which are implicit in the wording of the section. That is to say, the power is to be exercised in accordance with justice and equity, and not arbitrarily."

When commenting on the discretion of an arbitrator, H.N.G.Fernando, C.J. in *Municipal Council of Colombo v. Munasinghe*<sup>53</sup> pointed out: "I hold that when the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is 'just and equitable', the Legislature did not intend to confer on an Arbitrator the freedom of a wild horse..." In *Fernando v. United Workers Union*<sup>54</sup> G.P.S.de Silva, J. stated: "...the making of a 'just and equitable' award involves the exercise of a judicial discretion, a discretion that must be exercised reasonably and fairly, having regard to the findings reached upon the material placed before the arbitrator." In *Standard Chartered Grindlays Bank Ltd v. Minister of Labour*<sup>55</sup> Andrew Somawansa, J. stated: "...in making an award there must be judicial and objective approach and most importantly the perspectives of both the employee as well as the employer must be balanced and principles of justice and equity must apply to both parties."<sup>56</sup>

Even though, the phrase "just and equitable" which escapes from any precise definition has not been defined in the Act, the principles evolved from decided cases provide what an arbitrator should do or should not do in making a just and equitable award.<sup>57</sup>

#### IX. REPUDIATION OF AN AWARD MADE BY AN ARBITRATOR

Section 20(1) of the Industrial Disputes Act provides that a party bound by an award made by an arbitrator

<sup>51</sup> See Weerasooriya, S.P.J. in *Stratheden Tea Co Ltd v. Selvadurai*, (1963) 66 NLR 06 at 09.

<sup>52</sup> *Ibid.*, at 09.

<sup>53</sup> *Op.cit.*, at 225.

<sup>54</sup> (1989) 2 Sri LR 199 at 202.

<sup>55</sup> S.C Appeal 22/2003.

<sup>56</sup> See also Chandra Ekanayake, J. in *Singer Industries (Ceylon) Ltd v. Ceylon Mercantile Industrial and General Workers Union*, (2010) 1 Sri LR 66 at p. 84; 2011(B.L.R) 161 at 167.

<sup>57</sup> See S.R.De Silva (1973). *Legal Framework of Industrial Relations in Ceylon*, op.cit, at 311 S.R. De Silva (1977). *Some Concepts of Labour Law*, Lake House Investments Ltd, Colombo, at 25 – 26. Nigel Hatch (1989). *Commentary on the Industrial Disputes Act of Sri Lanka*, Friedrich – Ebert – Stiftung, Colombo, at 273 – 291.

may repudiate the award by a written notice to the Commissioner and to the other party.<sup>58</sup> There is no requirement to give any reason for repudiation. However, such repudiation will not have any effect for a minimum period of twelve months from the date of the award. The question arises whether repudiation is an adequate and effectual alternative remedy to disentitle the remedy by way of writ of certiorari. In *Obeysekera v. Albert*<sup>59</sup> the Court of Appeal held that section 20(1) confers a right on the aggrieved party to repudiate an award and he cannot seek a discretionary remedy by way of writ certiorari.

In *Thirunavukarasu v. Siriwardena*<sup>60</sup> Wanasundera, J. stated that repudiation of an award “can have only prospective application and cannot affect any rights and obligations that have already accrued to the parties and have become terms and conditions of service...” But, writ of certiorari will quash the award and render the award null and void ab initio. Hence, there is a difference in the effect of repudiation of an award and writ of certiorari to quash the award. In *E.S.Fernando v. United Workers Union*<sup>61</sup> the Supreme Court relied on the authoritative statement made by Wanasundera, J. in *Thirunavukarasu* case and held that repudiation of an award in terms of section 20 of the Act is not an adequate and effectual remedy and it will not disentitle the remedy by way of writ certiorari. The decision made by the Supreme Court has been followed by the appellate courts.<sup>62</sup>

#### X. CONCLUSION

As discussed above, the provisions of the Act confer very wide powers to an arbitrator to perform his functions in achieving the objective of the Act. The powers given to an industrial arbitrator is wider than the powers of a civil arbitrator or commercial arbitrator. Wanasundera, J. stated in *Thirunavukarasu v. Siriwardena*<sup>63</sup> : “An industrial arbitrator has much wider powers both as regards the scope of the inquiry and the kind of orders he can make than an arbitrator in the civil law...” Marssoof, J. also stated in *Sukumaran v. Maharaja Organization*<sup>64</sup> that industrial arbitration “is intended to be even more liberal, informal and flexible than commercial arbitration.”<sup>65</sup> However,

it is emphasized that the provisions of the Industrial Disputes Act relating to jurisdiction, duties and powers of an arbitrator cannot be considered in isolation, but they

should be considered in light of other relevant provisions in the Act. Such combined approach expands the scope of jurisdiction, duties and powers of an arbitrator and enables to achieve the objective of the Industrial Disputes Act which is settlement of industrial disputes and maintenance of industrial peace in the country.

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<sup>58</sup> Form ‘A’ under Regulation 3 of the Industrial Disputes Act, Gazette No. 11688 of 02-03-1959.

<sup>59</sup> (1978-79) 2 Sri LR 220.

<sup>60</sup> (1981) 1 Sri LR 185.

<sup>61</sup> (1989) 2 Sri LR 119 at 204 ; (1990) B.L.R, Vol III Part I p. 25 at 26-27.

<sup>62</sup> See also Brown and Company Ltd v. Ratnayake, *op.cit.* Somasundaram Vanniasingham v. Forbes, (1993) 2 Sri LR 362.Intabex (Lanka) Ltd v. Perera, CA No.408/97. Ceylon Electricity Board v. Alavi Moulana, (2006) 3 Sri LR 01 at 07. Bank of Ceylon v. Commissioner General of Labour, C/A No. 481/2005.

<sup>63</sup> *Op.cit.*, at 191.

<sup>64</sup> (2008) B.L.R 398 at 400.

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