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

In the matter of an appeal in terms of Section 11 of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 read with Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Commissioner of Labour,
Department of Labour,
Kalutara.

COMPLAINANT

CA No. CA/PHC/0276/2019
PHC Case No. Re 23/2017
MC KALUTARA
Case No. 59678

v.

Rammuni Thilak Udayashantha,
Waellabada, Waskaduwa.

RESPONDENT

AND

Rammuni Thilak Udayashantha,
Waellabada, Waskaduwa.

RESPONDENT-PETITIONER

v.

Commissioner of Labour,
Department of Labour,
Kalutara.

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Rammuni Thilak Udayashantha.
Waellabada, Waskaduwa.

RESPONDENT-PETITIONER-APPELLANT

v.

Commissioner of Labour,
Department of Labour,
Kalutara.

COMPLAINANT – RESPONDENT – RESPONDENT

BEFORE	:	M. Sampath K. B. Wijeratne J. & M. Ahsan. R. Marikar J.
COUNSEL	:	Eranga Gunarathna for the Respondent – Petitioner - Appellants. Zuhri Zain, D.S.G. for the Complainant – Respondent - Respondent.
ARGUED ON	:	09.07.2024
DECIDED ON	:	13.09.2024

M. Sampath K. B. Wijeratne J.

Introduction

This appeal is filed by the Appellant challenging the judgment delivered by the learned High Court Judge of Kalutara on 21st November 2019, in Revision application No. WP/HC/KT/REV/23/2017. In that application the Appellant sought to overturn the Order of the learned Magistrate of Kalutara, dated 8th September 2017, in Case No. 59678.

Relevant facts

The Complainant-Respondent-Respondent (hereinafter referred to as the "Respondent"), the Assistant Commissioner of Labour, filed a certificate[1] in the Magistrate's Court of Kalutara under Section 38(2) of the Employees Provident Fund Act No. 15 of 1958, as amended (hereinafter referred to as the "EPF Act"), along with a schedule[2] outlining the details of the alleged default.

The Respondent-Petitioner-Appellant (hereinafter referred to as the "Appellant") was named as the defaulter in the said certificate. The learned Magistrate provided the Appellant an opportunity to show cause in terms of Section 38(2) of the EPF Act.

Subsequently, the Appellant, by way of motion supported by an affidavit[3], raised a preliminary objection based on the legal principle of double jeopardy (being prosecuted twice for substantially the same offence). The Appellant submitted to the Magistrate's Court that the Respondent had initiated proceedings against the Appellant in 2015 under Case No. 37759, during which a settlement was reached between the Petitioner and the Respondent. As a result, the payable amount was reduced to Rs. 163,350.00, which was fully paid by the Petitioner.

In response to the Appellant's contention, the Respondent argued that Case No. 37759 had been instituted to recover Rs. 163,350.00 for the period from August

[1] At page 123 of the Appeal brief.
[2] At page 124 of the Appeal brief.
[3] At pages 126 and 127 of the appeal brief.

2008 to January 2012. The certificate dated 4th August 2014[4], along with the attached schedule[5], confirmed this position. The period relevant to Case No. 59678 in the Magistrate's Court, however, covered February 2012 to May 2015[6].

Accordingly, the learned Magistrate, in an Order dated 8th September 2017, rejected the Appellant's show cause argument that he had already paid the amount stated in the certificate. The Magistrate ordered the Appellant to pay Rs. 344,205.00, the amount specified in the certificate filed in Case No. 59678.

Aggrieved by the decision, the Appellant filed Revision Application No. WP/HC/KT/REV/23/2017 in the High Court of Kalutara, seeking to revise and set aside the Order made by the learned Magistrate. In the Petition submitted to the High Court[7], aside from the claim of double jeopardy, the Appellant argued that the certificate filed in the Magistrate's Court under Section 38(2) of the EPF Act lacked the necessary information and, therefore, did not comply with applicable law.

The Respondent filed objections to the Appellant's application[8], and both parties subsequently submitted written submissions. After the inquiry, the learned High Court Judge delivered the Order on 21st November 2019.

The learned High Court Judge addressed the new ground raised by the Appellant and correctly held that the certificate was in compliance with applicable law. The Judge further analyzed the relevant facts and the order of the learned Magistrate, affirming the Magistrate's decision that the certificate filed in Magistrate's Court Case No. 37759 had no relevance to Magistrate's Court Case No. 59678, the latter being the subject of the revision application.

[4] At page 64 of the appeal brief.
[5] At page 65 of the appeal brief.
[6] *Vide* the certificate at pages 123 and 124 of the appeal brief.
[7] At page 4 of the appeal brief.
[8] At page 61 of the appeal brief.

Consequently, both the learned Magistrate and the learned High Court Judge concluded that the amount paid by the Appellant in Case No. 37759 was irrelevant to the amount due in the certificate filed in Case No. 59678.

Analysis

Preliminary objection

First and foremost, I will address the preliminary objection raised by the learned Deputy Solicitor General.

Objection raised on ground of an incorrect section referred to in the application to this court.

The learned Deputy Solicitor General for the Respondent raised the preliminary objection in her written submission that the provision referred to in the Petition of appeal filed by the Appellant is incorrect and therefore, the Petition of appeal should be dismissed *in limine*. Specifically, the Appellant referred to Article 154G (6), which is irrelevant to an appeal to this Court. The correct provision under which an appeal to this Court should be made is Article 154P (6). Despite this infirmity, the Appellant addressed the Petition to the Court of Appeal and has sought relief accordingly. It is evident that although the incorrect Article of the Constitution was mentioned, the appeal is properly directed to the Court of Appeal. Furthermore, specifying the section under which the appeal is made is not a statutory requirement. Above all, the omission does not cause any prejudice to the Respondent. There is always room for human errors even in making applications to a Court of law. Our judicial system serves as both a court of law and a court of equity. The Court should bear this in mind and grant relief as deemed appropriate. Therefore, referencing an incorrect Article in the Petition of Appeal should not be grounds for rejecting the appeal.

In the case of *Jayawardane v. Ranaweera*[9] (C.A.) this Court observed as follows; *'If a person making an application to a court, refers to a wrong section of a statute in the caption as the provision of law under which such application is*

[9] [2004]3 Sri L.R. 37, at p. 41.

made, such reference to the wrong provision of law itself will not deprive a court of its jurisdiction it otherwise has, if the Court has jurisdiction under another provision of law to deal with the substantive matter raised in the application, the court has jurisdiction to deal with such matter notwithstanding the reference to a wrong section in the caption.'

In the case of *Peiris v. The commissioner of Inland Revenue*[10], the Assistant Commissioner, acting under Section 64(2)(b), accepted the return but made an assessment in terms of Section 64(2)(a). However, the correct procedure should have been for him to act under Section 65 and make an additional assessment, as the original assessment was less than the proper amount. The Supreme Court held that *'it is well-settled that the exercise of a power will be referable to the jurisdiction that confers validity upon it, and not to a jurisdiction under which it would be nugatory. This principle has been applied even in cases where the Statute quoted as authority confers no power, while another Statute that does confer the power was in force.'*

In view of the preceding analysis, I overrule the Respondent's preliminary objection.

Substantial issues

New ground of appeal raised in the High Court

Regarding the new ground raised for the first time before the High Court, questioning the validity of the certificate filed under Section 38(2) of the EPF Act, the learned Deputy Solicitor General, on behalf of the Respondent, argued that such a challenge is not permissible under the existing laws.

She cited H.W.R. Wade & C.F. Forsyth in Administrative Law[11] '*The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisers know of*

[10] 65 N.L.R. 457 at p. 458.
[11] 9th Edn, p. 464.

the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged.'

She also submitted to Court that waiver of an objection by the Appellant before the Magistrate's Court estops him from raising it at a later stage.

She cited 'Law relating to estoppel' revised by Gopal S. Chathurvedi[12], wherein it is stated that '*In order to constitute abandonment or waiver, it must be a voluntary act on the part of the person possessing the rights. Acquiescence or standing by when there is a duty to speak or assert a right creates an estoppel. In such cases knowledge of the act must be brought by the acquiescing party. Acquiescence does not mean simply an intelligent consent, but may be implied if a person is content not to oppose irregular acts which he knows are being done.'*

It was also argued that under Section 114(f) of the Evidence Ordinance, it can be presumed that evidence which could have been produced but was not would, if produced, be unfavorable to the party withholding it. Furthermore, relying on Section 106 of the Evidence Ordinance she submitted that '*When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*'

However, I am not inclined to accept these two arguments, as the issue at hand is not about burden of proof or withholding evidence and presenting it later, but rather a legal question that was not raised before the Magistrate's Court and is being brought up for the first time in the revision application before the High Court, and subsequently in this Court.

The new ground the Appellant sought to raise was that the certificate filed by the Respondent in the Magistrate's Court under Section 38(2) does not include the particulars required by law.

In the case of *City Carriers Limited v. The Attorney General*[13] the Supreme Court observed that the certificate which does not contained the required particulars is

[12] 3rd Edn, p. 166.
[13] [1992] 2 Sri L.R. 257, at p.260.

as that no certificate filed under Section 38 (2) of the EPF Act. Further, it was held that although this question of law was not specifically raised in the lower court as an issue it could be raised in the higher court.

In this instance, the issue that was not raised before the Magistrate's Court, was raised in the High Court[14]. In my view, it is a fundamental question that needs to be addressed by the Court before proceeding further in view of the observation made by the Supreme Court in the case of *City Carriers Limited v. The Attorney General*[15] that the certificate which does not contain the required particulars is as that no certificate filed under Section 38(2) of the EPF Act. The learned High Court Judge considered and addressed this issue in the order that is now under appeal before this Court. I see no reason why this ground should not have been allowed to be raised in the High Court. The Respondent did not object to the aforementioned ground on the basis that it was a new ground but, replied to in the objections[16].

Given the reasons outlined, I am in agreement with the learned High Court judge regarding this issue.

Significant argument

Next, I will consider the main argument raised by the Appellant: that the certificate filed in the Magistrate's Court does not include the required particulars. According to Section 38(2), the certificate must contain details of the sum due and the name and place of residence of the defaulting employer. The details of the defaulted sum that must be included in a certificate have been subject to scrutiny by our Supreme Court.

[14] Paragraphs 14 and 15 of the Petition filed in the High Court by the Appellant, at pages 4 to 8 of the appeal brief.
[15] *Supra* note 13.
[16] Paragraphs 8 and 9 of the Objection filed in the High Court by the Respondent, at pages 160 to 165 of the appeal brief.

The particulars required in a certificate, as stated in the case of *City Carriers Limited v. The Attorney General*[17] (S.C.), include the computation of the sum, the period during which the sum became due, and details regarding the number of employees involved in the computation, or their names and emoluments. In *Mohemmed Ameer and Another v. Yapa, Assistant Commissioner of Labour*[18] (S.C.), the Supreme Court held that the certificate under Section 38(2) must contain the names of the employees for whom the default is alleged or be otherwise adequately identified, along with the period during which there have been changes in remuneration and/or the rate of contribution. Additionally, the remuneration related to which the contribution and default have been computed must also be disclosed.

As correctly observed by the learned High Court Judge, the impugned certificate contains the information required under Section 38(2) of the EPF Act and adheres to the judicial precedence. The certificate[19] includes the membership numbers and names of the employees in respect of whom the default is alleged, as well as the period during which the sum became due. It also contains the remuneration of the employees, the rates of contributions made by both the employee and the employer, and the total aggregated amount. Additionally, the surcharge on the total contribution due, and the aggregated amount is clearly stated in the certificate. The Appellant contended that the necessary information was submitted to the High Court through the document marked 'Y', but not to the Magistrate Court. Consequently, it was argued that the application under Section 38(2) is flawed. However, as I have mentioned earlier, the certificate includes the required information under the law, and the document marked 'Y' only provides additional information. Moreover, the document 'Y' has been certified as accurate by the Appellant himself cannot be claimed as information unknown to him.

[17] *Supra* note 13.
[18] [1998]1 Sri L.R. 156.
[19] At pages 123 and 124 of the appeal brief.

Therefore, I concur with the learned High Court Judge's conclusion that the certificate is in conformity with Section 38(2) of the EPF Act.

Revisionary power is an extraordinary authority exercised by a court only in exceptional circumstances[20]. As correctly observed by the learned High Court Judge, there were no exceptional circumstances warranting the exercise of revisionary jurisdiction in this case.

Conclusion

In light of the above analysis, I find no valid reason to interfere with the judgment of the learned High Court Judge of Kalutara dated 21st November 2019 and also the judgement of the learned Magistrate dated 8th September 2017. Therefore, I dismiss this appeal, subject to costs of Rs. 50,000/-.

JUDGE OF THE COURT OF APPEAL

M. Ahsan. R. Marikar J.

I Agree.

JUDGE OF THE COURT OF APPEAL

[20] *Colombo Apothecaries Ltd. and others v. Commissioner of Labour* (C.A.) [1998]3 Sr L.R. 320, *Kulathilake v. Attorney General* (C.A.) [2010]1 Sri L.R. 212.