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 Writ of Certiorari and Prohibition under and in terms of Article 140 of the Constitution.

Maharagama Urban Council,

Maharagama.

C.A. Case No. WRT- 0289/19 **PETITIONER**

Vs.

1. Assistant Labour Commissioner.
   District Labour Office,
   Maharagama.

2. Labour Commissioner.
   Labour Department,
   Colombo 05.

3. A. A. D. Chandana.
   No. 98,
   Yahampath Mawatha,
   Maharagama.

4. C. D. Somasiri.
   117/2, Abreyratne Mawatha,
   Makuludoowa,
   Piliyandala.

5. G. H. G. Samantha Rohana.
   21/6, Samagi Mawatha,
   Depanama,
   Pannipitiya.

6. H. D. A. Malkanthie.
   179/5, Temple Road,
   Thalpathpitiya,
   Nugegoda.

7. S. L. Ranaweera.
   No. 60, Gamunu Mawatha,
   Bangalawatte,
   Kottawa,
   Pannipitiya.

8. Hon. Attorney General.
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

BEFORE : M. T. MOHAMMED LAFFAR, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Ms.Chandrika Morawaka with Ms.Hemakumari Hettige for the Petitioner.

Ms. Shemanthi Dunuwille, SC, for the Respondents.

ARGUED ON : 26.09.2023

WRITTEN SUBMISSIONS

TENDERED ON : 02.11.2023 (On behalf of the Petitioners)

07.11.2023 (On behalf of the 1st, 2nd and 8th Respondents)

DECIDED ON : 05.12.2023

WICKUM A. KALUARACHCHI, J.

The 3rd to 7th respondents in this matter had made an application to the 1st respondent claiming that they work for the petitioner local authority as its employees and claimed Employees' Provident Fund (hereinafter mentioned as EPF). After an inquiry, the 1st respondent decided that the petitioner had defaulted in making the contribution to EPF for the period

from June 1994 to September 2011. In consequence, a certificate in terms of Section 38(2) of the Employees Provident Fund Act No. 15 of 1958 (marked P-1) was filed in the Magistrate Court of Nugegoda to recover a sum of Rs.2,254,630.71 from the petitioner.

This application has been filed by the petitioner seeking a writ of certiorari quashing the 1st respondent's decision/certificate issued against the petitioner. In addition, the petitioner seeks a writ of prohibition preventing the 1st respondent from continuing proceedings against the petitioner as a defaulter.

At the hearing, the learned Counsel for the petitioner and the learned State Counsel for the 1st, 2nd, and 8th respondents made oral submissions. Subsequently, the synopses of the arguments were submitted by way of written submissions on behalf of both parties.

The learned Counsel for the petitioner contended that the 3rd to 7th respondents were independent contractors appointed to collect default rates and taxes and they drew a commission based on the sums collected by each individual. Warrants issued by the petitioner to the 5th and 4th respondents to collect default rates and taxes have been marked with the petition as P-2, P-3 and P-4. As there was no employer-employee relationship between the petitioner and the respondents, and as the 3rd to 7th respondents were not the employees of the petitioner, the learned Counsel contended that the petitioner is not liable to pay EPF contribution.

The position of the 1st, 2nd and 8th respondents was that the power of recovering taxes and payments due to the petitioner is a power given to the Secretary of the Petitioner Urban Council in terms of Section 170 and 170A of the Urban Councils Ordinance and the 3rd to 7th respondent were employed by the petitioner for discharging such duties and functions in terms of Section 36 of the Urban Councils Ordinance.

The learned State Counsel appearing for the 1st, 2nd and 8th respondents contended that 1R-12(a) is the letter of appointment dated 06.01.1994 issued to the 3rd respondent and 1R-13, 1R-14, 1R-15 and 1R-18 are the other letters of appointment issued to 4th, 5th, 6th and 7th respondents. The learned State Counsel contended further that based on the evidence and material produced before the inquiry, the 1st respondent has decided that the 3rd to 7th respondents worked under a letter of appointment and/or contract of service for the petitioner and they were workmen covered under the EPF Act.

However, the main contention of the learned State Counsel was that the petitioner could not maintain this application because the petitioner had acquiesced to the legality of the certificate filed by the 1st respondent by submitting themselves to the proceedings before the Magistrate's Court and the revision application filed therein and thus, the petitioner cannot thereafter challenge that the certificate filed is illegal. The learned State Counsel pointed out that the learned Magistrate issued the order on 25.05.2016 imposing the sum mentioned in the certificate as a fine. The said order has been canvassed by way of a revision application bearing No. HCRA 84/2016 in the Provincial High Court of Colombo, the revision application was dismissed, and the judgment of the said High Court revision application was not challenged. In view of these circumstances, the learned State Counsel contended that the petitioner is going on what is called a 'Forum Shopping' and making a belated application by abusing the process of law.

First, I proceed to consider the issue of the maintainability of this application because if this application could be maintained only, the issue of whether the 3rd to 7th respondents were independent contractors or not must be considered. On 09.04.2014, the certificate (P-1) was filed in the Magistrate's Court of Nugegoda in order to recover the Employees' Provident Fund of Rs. 2,254,630.71. Thereafter, summons were issued to the petitioner on 29.05.2014. The petitioner appeared before the

Magistrate's Court on 14.10.2014 and moved for a date to discuss. In a case of this nature, after appearing in the Magistrate's Court, the petitioner had two options. Either to show cause in the Magistrate's Court why the sum mentioned in the certificate should not be recovered or to challenge the certificate in a proper forum, if it was wrongly issued. On 24.03.2015, the petitioner submitted an affidavit showing cause as to why the sum mentioned in the certificate should not be recovered. It appears that five months after appearing in the Magistrate's Court, the petitioner decided not to challenge the certificate but to show cause in terms of Section 38 (2) of the EPF Act why the sum mentioned in the certificate should not be recovered.

According to Section 38 (3) of the EPF Act, the correctness of any statement in a certificate issued by the Commissioner for the purpose of this section shall not be called in question or examined by the Court in any proceedings under that section. Therefore, it is apparent that the correctness of the certificate could not be challenged in the Magistrate's Court. When showing a cause in terms of Section 38 (2) of the Act, limited causes such as (i) that the petitioner was not the person named as the defaulter in the certificate, (ii) that he has paid the amount specified in the certificate, (iii) that the defaulter was not a resident within the jurisdiction of the Magistrate's Court, could be shown. If the 3rd to 7th respondents were independent contractors, the petitioner knew very well that issuing a certificate to pay EPF to them was wrong. Hence, soon after the certificate was filed, the petitioner could have challenged the certificate by way of a Writ Application. But the petitioner did not take any step to challenge the certificate instead he opted to show cause in the Magistrate's Court.

The learned Magistrate delivered his order on 25.05.2016 imposing the sum mentioned in the certificate as a fine. From 14th October 2014, the date that the petitioner appeared in the Magistrate's Court, up to the date of delivering the order, for one year and seven months, the petitioner did not challenge the certificate.

What did the petitioner do after the Magistrate's Court order? The petitioner filed a revision application bearing No. HCRA 84/2016 challenging the order of the learned Magistrate. In addition, the petitioner filed an appeal bearing No. HCMCA 62/2016 against the same order. However, the appeal has been withdrawn by the petitioner on 12.02.2017. The revision application was dismissed by the High Court on 12.07.2019.

It is important to take into consideration that by filing the revision application, the petitioner sought to revise the order of the learned Magistrate on the basis that the cause or causes that had been shown by the petitioner had not been properly considered by the learned Magistrate. Therefore, it is apparent that even after the order of the learned Magistrate, the petitioner had gone to the Provincial High Court of Colombo not to challenge the certificate filed by the 1st respondent but to challenge the order of the learned Magistrate. In fact, the said certificate cannot be challenged in a Provincial High Court. What is important to note is that the petitioner has never challenged the certificate in any forum before filing this Writ Application. Three days prior to the judgment being delivered by the High Court, the petitioner invoked the jurisdiction of this Court and filed this Writ Application seeking to quash the certificate issued by the 1st Respondent.

Throughout the aforesaid legal process, the petitioner did not challenge the correctness of the certificate, instead, the petitioner opted to show cause why the sum mentioned in the certificate should not be recovered. After failing in all other attempts, the petitioner eventually attempted to challenge the certificate, which should have been done immediately after the certificate was filed.

The learned State Counsel urged to dismiss this application on the ground that the petitioner cannot challenge the certificate because the petitioner is guilty of laches. No doubt, the petitioner is guilty of laches because the petitioner waited four years and nine months to challenge the certificate.

Hence, this application should be dismissed for the reason of the petitioner being guilty of laches. There is another fundamental legal bar to maintain this application. Once the learned Magistrate has made an order considering the cause shown by the petitioner as to why the sum mentioned in the certificate should not be recovered, the petitioner cannot challenge the certificate. There after he can only challenge the order of the learned Magistrate. If the petitioner wanted to challenge the certificate, it should have been done without recourse to the option of showing a cause before the Magistrate. In other words, the petitioner waives off his right to challenge the certificate by recourse to the option of showing cause.

It must be noted precisely, when the petitioner opted to show cause in the Magistrate's Court as to why the sum mentioned in the certificate should not be recovered, and when the learned Magistrate delivered the order to recover the sum mentioned in the certificate as a fine, the time to challenge the certificate lapses. Thereafter, only the order of the learned Magistrate could be challenged. In fact, the petitioner has realized that and correctly filed a revision application against the order of the learned Magistrate. As stated previously, the said revision application was dismissed. If an appeal is not filed against the judgment of the revision application in which the learned Magistrate's order was affirmed, what remains is to recover the EPF contribution due from the petitioner as directed by the learned Magistrate in his order dated 25.05.2016. I hold that the petitioner cannot challenge the certificate after the learned Magistrate made an order imposing the sum mentioned in the certificate to be paid as a fine in order to recover the EPF dues.

For the reasons stated above, I hold that the petitioner cannot maintain this application for the reliefs prayed for in the petition. Also, I perceive validity in the learned State counsel's contention, which is stated in her written submission that the petitioner is abusing the process of law.

Accordingly, the instant Writ Application is dismissed with costs fixed at Rs. 75,000/-.

JUDGE OF THE COURT OF APPEAL

M. T. Mohammed Laffar, J

I agree.

JUDGE OF THE COURT OF APPEAL