

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
under Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

C A (Writ) Application

No. 71 /2015

1. Sisilamba Prajamula Sanvidanaya,

Thammitagama,

(GS Division 168)

Daladagama,

Maho,

2. Imihami Mudiyansele Tikiri

Bandara,

President,

Sisilamba Prajamula Sanvidanaya,

Thammitagama (GS Division 168)

Daladagama,

Maho.

PETITIONERS

-Vs-

1. Commissioner of Labour

Labour secretariat,

Department of Labour,

Colombo 05.

2. Assistant Commissioner of Labour

District Labour Office,

Maho.

3. Illangarathna Bandara,

Madagama,

Maho.

4. Hon. Magistrate

Magistrate's Court

Maho.

Before: Vijith K Malalgoda PC J (P/CA)

P. Padman Surasena J

Counsel: R Chula Bandara for the petitioner

Wickum De Abrew DSG for 1st and 2nd Respondents

Argued on: 2016-09-07,

2017-02-08

Decided on: 2017-05-09

JUDGMENT

P Padman Surasena J

The 1st Petitioner, as borne out by the document produced marked **P 1**, is a welfare organization registered with the Rural Water Supply and Sanitation Unit of the Western Provincial Council. Its primary purpose is

distribution of pipe borne water to the houses of Tammitagama village in the Maho Divisional Secretariat area. The 2nd Petitioner is the President of the said organization.

The said organization has obtained the service of the 3rd Respondent for its work relating to the maintenance of the said project. It is significant to note that the 3rd Respondent being a member of this organization is also a recipient of benefits generated from this project.

It is the position of the 1st and 2nd Respondents that the 3rd Respondent is an employee of the 1st Petitioner organization and hence the 1st Petitioner organization is liable to pay Employees' Provident Fund (hereinafter sometimes be referred to as EPF) to the 3rd Respondent. This is on the basis of the declaration produced marked **R 1**.

Further the 1st and 2nd Respondents state that since the 1st Petitioner organization has failed to pay the said EPF contributions in terms of section 10 of the EPF Act, the application bearing No. 87550/LB dated 2014-07-16, has been filed in terms of section 38(2) of the EPF Act in the Magistrate's Court of Maho.

It is prudent to commence analyzing the issue raised in this case by listing out the salient features of the law pertaining to the liability of an employer to pay EPF.

They are as follows;

- i. An employer becomes liable to contribute to the Employees' Provident Fund in respect of any employee, only when his or her employment is prescribed as a covered employment¹.
- ii. In terms of the Provisions of the Employees' Provident Fund Act regulations could be made to declare any employment referred to in section 8 (1) of the EPF Act to be a covered employment².
- iii. The Minister may make regulations in respect of all matters for which regulations are required or authorized to be made under this Act³.

It would also be useful to note that both the learned counsel for the Petitioners as well as the 1st and 2nd Respondents, have concurred that the Honourable Minister of Labour and Vocational Training, has by the Gazette bearing No 653/16 dated 13th March 1991 declared that an 'employment in the service of any Charitable institution or any institution

¹ Section 10 (1) of the Employee's Provident Fund Act.

² Section 8 (2) of the Employee's Provident Fund Act.

³ Section 46 of the Employee's Provident Fund Act.

maintained solely for the purpose of religious worship or social service being an institution or organization employing ten (10) or more persons' to be a covered employment. The Hon. Minister has specified the date therein as the date from which the liability of such an employee and his employer should commence, to pay their respective EPF contributions. A Copy of the said Gazette bearing No 653/16 dated 13th March 1991 has been produced marked **P 11**⁴.

It is the submission of the learned counsel for the Petitioners that an employer becomes liable to contribute to the Employees' Provident Fund in respect of any of his employees only when such employment has been declared as a covered employment in terms of Section 10 (3) read with section 8 of the Employees' Provident Fund Act.

Learned Deputy Solicitor General who appeared for the 1st and the 2nd Respondents did not controvert any of the legal positions set out above⁵. However it is his position that the 1st Petitioner cannot claim an exemption under the above Gazette as it is not conclusive whether it is a charitable institution or any institution maintained solely for the purpose of religious worship or social service, in terms of its Constitution produced marked **P 4**. Learned Deputy Solicitor General further

⁴ Same Gazette has been produced annexed to the written submissions filed on behalf of the 1st & 2nd Respondents.

⁵ Pages 4 & 5 of the written submissions filed on behalf of the 1st & 2nd Respondents.

submitted that there is no clear definition in the Act as to what is meant by the term 'a charitable institution or any institution maintained solely for the purpose of religious worship or social service'.

It is to be noted that the fact that the 1st Petitioner is not 'an institution which has employed 10 or more persons' has not been contested by the 1st and 2nd Respondents⁶. Thus, the sole question left to be adjudicated by this Court would be the question whether the 1st Petitioner is 'a charitable institution or any institution maintained solely for the purpose of religious worship or social service'.

The Constitution of the 1st Petitioner, produced marked **P 4**, shows clearly that the primary purpose of the 1st Petitioner is to co-ordinate, implement, manage and maintain a sustainable project for distribution of pipe borne water and meeting the needs of sanitation facilities of houses of Tammitagama village in the Maho Divisional Secretariat area.

Article 5-2-4 of the said Constitution also becomes noteworthy because it has categorically restricted the membership of this organization to the recipients of its water supply benefits.

The above facts, when taken along with the contents of the other provisions of the said Constitution clearly indicate that the 1st Petitioner

⁶ Such institution which has employed less than 10 persons is not liable to contribute to EPF.

is not an institution which has been designed to function as a commercial organization, a kind of organization upon which the Gazette bearing No 653/16 dated 13th March 1991 (marked **P 11**) had sought to impose a liability to contribute to EPF.

Further this institution has been registered with the Rural Water Supply and Sanitation Unit of the Western Provincial Council as a welfare organization (**P 1**). The 3rd Respondent (Illangarathna Bandara) is clearly a beneficiary of this scheme. He is also a member of the 1st Petitioner. Thus, the 3rd Respondent for all purposes is an active member of the Organization and also a recipient of its benefits. The mere fact that the 3rd Respondent is paid Rs. 10,000/= per month in recognition of his voluntary services to the Organization does not necessarily mean that he must be categorized as an employee of this organization.

It must further be noted that no letter of appointment has ever been issued to him by this organization. Indeed the perusal of the minutes of the Annual General Meeting of this organization held on 2010-03-31, produced marked **P 6**, clearly reveals that it was at that meeting, with the concurrence of all the members present there, that the 3rd Respondent had been proposed and seconded to function as the controller of the distribution of water, of this project. Further the said

minutes reveal that name of one Anura (another member and also the treasurer of the organization) was previously proposed and seconded. It also reveals that the necessity to propose 3rd Respondent's name had arisen as said Anura had declined to accept the said responsibility⁷. This being the procedure adopted to appoint the 3rd Respondent, would in the mind of this Court, negate the proposition that the 3rd Respondent is an employee of the 1st Petitioner.

It is to be noted that the 2nd Petitioner has submitted an appeal to the 2nd Respondent urging him to reconsider the decision with regard to the liability to contribute to the EPF. This appeal has been produced marked **P 8**. It transpires from the said appeal that the 3rd Respondent appear to have stated at the Annual General Meeting of the organization held on 2014-09-14, that he does not intend claiming any money arising from the instant dispute. However no step has been taken by the 1st and the 2nd Respondents, to verify this position.

This would be an appropriate juncture to turn to the legal submission made on behalf of the 1st and 2nd Respondents. The position taken up by the learned Deputy Solicitor General on behalf of them is that a writ

⁷ Page 4 of the minutes (**P 6**).

cannot lie since the issue whether this organization is a welfare organization or not, is a disputed fact.

It must be stressed by this Court that mere denial of a fact by a party or a mere statement that a fact is a disputed fact would not be sufficient to push such a fact under the umbrella of 'disputed facts'. If this Court is to consider such mere denial to be sufficient, this Court would be compelled to refuse the issuance of writs whenever any such statement in the form of 'I deny', 'I am unaware', 'I place the burden on the other party to prove' etc. has been averred by the opposite party as has been the case more often than not.

It is the view of this Court in the light of the above material that the 1st and the 2nd Respondents do not appear to have or are in a position to controvert any of the above facts leading to the negation of the proposition that the 3rd Respondent is an employee of the 1st Petitioner. All what the 1st and 2nd Respondents have done is to have made a bare statement that a writ cannot lie since the issue whether the 1st Petitioner is a welfare organization or not is a disputed fact.

Another significant observation that this Court could make with regard to the liability of the 1st Petitioner to contribute to EPF is that the 1st and the 2nd Respondents at no time had even attempted to state that the 1st

Petitioner is a commercial organization. The material available in this case points strongly to the opposite of it. Thus the irresistible conclusion that this Court could arrive at from the above material is that the Petitioners are not liable to contribute to EPF in respect of services of the 3rd Respondent as the 3rd Respondent has not been engaged in a covered employment within the meaning of the EPF Act.

It is to be borne in mind that the 1st and the 2nd Respondents can exercise the power vested in them by section 38(2) of the EPF Act, only 'where an employer makes default in the payment of any sum which he is liable to pay under this Act'. Thus, the issuance of any certificate against a person who is not liable would not be in accordance with law. Hence such an action would be ultra vires the authority imposed on the 1st and 2nd Respondents by the Employees Provident Fund Act.

In these circumstances and for the foregoing reasons this Court decides to issue a mandate in the nature of a Writ of Certiorari quashing;

- i. the decision of the 1st and 2nd Respondents to recover a sum of Rupees 100,400.00 from the Petitioners as arrears payable by them as contributions to the Employee's Provident Fund, and

- ii. the subsequent decision to file the application bearing No 87550/LB in the Magistrate's Court of Maho against the 2nd Petitioner.

Learned Magistrate of Maho is hereby directed to discontinue further proceedings of the said case namely M C Maho case No 87550/LB forthwith.

We make no order for costs.

Writ of Certiorari issued.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL