

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

An Application under Article 138 of the Constitution to Act in Revision and High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 154P (6) of the Constitution

Roy K. Warnasuriya,
No. 07,
P. Ruban Pieris Mawatha,
Kalubowila.

Petitioner-Appellant

Court of Appeal Case No:
CA/PHC/307/2006
HC Badulla Case No:
21/2003
MC Mahiyangana Case No:
44755

-Vs-

Assistant Commissioner of Labour,
Labour Secretariat,
Mahiyangana,

Complainant-Respondent-
Respondent

Greenwood Growers (Pvt) Limited,
Giranduru Kotte Road,
52nd Mile Post, Mahiyangana.

Respondent-Respondent-
Respondent

1. Zung Yu Bin,
No. 9/2, Cooray Place,
Nugegoda.
2. Zung Yu Chun,
No. 1/40, Abdul Kapoor Mawatha,
Colombo 03.
3. M. Asoka Laksiri Fernando,
No. 27/5, Weeraman Road,
Panadura.
4. A.M. Dharshapriya Gihan Abeywardhena,
60/2, Brundiya Watte Road,
Wellampitiya.
5. Tharaka Ramanya Balasuriya,
188, Bandaranayake Mawatha,
Kegalle.
6. B.D. Demian Ranjan Mellawa,
54A, St. Mary's Road,
Mahabage, Ragama.
7. Cordelia Yolande G. De Silva,
610, Kotte Road,
Pitakotte.
8. Pramuka Merchant Corporation Ltd.,
30/3 J, Longden Place,
Colombo 07.

Respondents

Before : A.L. Shiran Gooneratne J.

&

Dr. Ruwan Fernando J.

Counsel : Wardhani Karunaratna with Priyantha Herath for the
Petitioner-Appellant.

Maithree Amarasinghe, SC for the Respondents.

Written Submissions: By the Complainant-Respondent-Respondent on
31/07/2019

By the Petitioner-Appellant on 25/07/2017

Argued on : 23/07/2020

Judgment on : 08/09/2020

A.L. Shiran Gooneratne J.

The Complainant-Respondent-Respondent filed certificate dated 11/11/2000, in the Magistrates Court of Mahiyanganaya, against the Respondent-Respondent-Respondent Company and its directors under Section 38(2) of the Employees' Provident Fund Act No. 15 of 1958 (as amended). The application was supported before the learned Magistrate, therein, the Counsel representing the company revealed to Court the names of the Directors of the company for the relevant period the default of contributions payable under the Act was due. Accordingly, the directors of the company for the relevant period including the Petitioner-Appellant was named and summoned before Court to show cause as to why further proceedings to recover the defaulting sum due should not be proceeded with. In the absence of sufficient cause, the learned Magistrate by order

dated 08/01/2003, directed that the amount due be recovered from the Appellant by way of a fine. The Appellant thereafter moved for a further date to pay the fine.

However, being aggrieved by the order of the learned Magistrate, the Appellant filed a revision application in the Provincial High Court of Badulla. The learned High Court Judge affirmed the said order made by the learned Magistrate. The Appellant is before this Court to challenge the said order.

The Appellant has raised the following grounds in appeal:

1. Respondent Commissioner's application should be dismissed *in limine* for its manifest illegality.
2. The Respondent Commissioner had not formed a proper opinion that the Appellant was liable/ no proper hearing afforded to the Petitioner.
3. The Respondent Commissioner has failed to follow procedure established by law.

The 1st and 2nd grounds of appeal are raised on the basis that the particulars in the certificate filed under Section 38(2) are not clearly set out and therefore it is contended to be a fatal omission which in turn has denied the Appellant of a fair hearing. The Appellant relies on *Mohamed Ameer and Another Vs. Yapa, Assistant Commissioner of Labour (1998) 1 SLR 156*, where it is held that the requirement that the employees in respect of whom default is alleged must be named or otherwise adequately identified.

The certificate dated 11/11/2000, filed before the learned Magistrate was issued under the name of the body corporate. *"Employer in Section 38(2) of the EPF Act includes directors of a body corporate and it is lawful for the Magistrate to order the directors of the body corporate to pay the amount set out in the certificate filed in terms of Section 38(2) of the EPF Act by way of a fine with a default sentence."* (CA (PHC) APN 69/2009, decided on 27/01/2011). *"In the circumstances, it could be seen that the directors of the company are liable to pay the amount in question; and the imposition of a fine on the company makes the directors of the company liable to pay such a fine, if it is not recovered from the respondent employer company"* (CA Application No. 1186/90).

On 28/11/2001, the Counsel for the Respondent Company informed Court that the due amount should be recovered from the past directors of the company who are liable to pay the dues which accrued during their period as directors and moved that they be summoned to Court. The Counsel appearing for the company on 28/11/2001, has clearly identified the Appellant as a defaulting employer. After the said disclosure, in terms of Section 38(2) of the EPF Act, the Appellant was summoned and was present before Court on 09/10/2002, represented by Counsel. Through Counsel, the Appellant submitted that it is not the past but the present directors should be held liable to pay the default payments and therefore, the present directors of the company should be brought before Court and held accountable and the Appellant be discharged from further proceedings, forthwith.

In proceedings before this Court, the Appellant further advanced this argument by stating that he was a mere working director of the company on a fixed salary and therefore, is not liable to pay the default sum.

The definition of "employer" in terms of Section 47 of the EPF Act states, *"any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union ----"*

In proceedings before the Magistrates Court, the Counsel for the Appellant made oral submissions on 06/11/2002, and sought and obtained a further date to tender written submissions. The position of the Appellant was that, he was a paid employee of the company and was never a director of the company during the default period in question and as such any dues owed by the company should be recovered from the company and its directors (present directors) within the meaning of the EPF Act.

I will now briefly set out the facts of this case.

The Appellant has been sued for the non-payment of EPF dues in his capacity as director of the company. The certificate filed under the EPF Act was to recover a sum of Rs. 1,058,566.50 from the employer for the period between 01/08/1997- 31/12/1998 in respect of 168 employees. The Appellant was appointed as a director of Greenwood Growers (Pvt) Ltd. with effect from

22/06/1998 (companies 48, filed in terms of the Companies Act No. 17 of 1982 marked "1R1", vide page 167 of the brief). By letter dated 04/04/2000, addressed to the Managing Director of the said company marked "X5", (Vide page 194 of the brief) the Appellant tendered his resignation with effect from 11th April 2000. Therefore, it is clearly established that the Appellant was a director at Greenwood Growers (Pvt) Ltd. during the relevant period in which the default occurred.

In the above context, the Appellant argues that he was a paid employee of the Respondent Company and had no control or knowledge of any such default in payments due in his capacity as working director in the Respondent Company and therefore, he cannot be considered as a director within the meaning of Section 38(2) and 40 of the said Act to be liable jointly and severally to pay the surcharge. Therefore, the Appellant submitted that any dues should be recovered from the said Company and its present directors within the meaning of Section 38(2) of the EPF Act.

As such, the sole question to be decided is whether the Appellant should be held responsible to pay contributions on behalf of the employees in his capacity as working director of the body corporate at the relevant period. Companies form 48 marked "1R1" stands unchallenged, which makes it clear that the Appellant held the position of director of the said company at the relevant period.

On the issue of liability, the Appellant's contention fully rests in the argument that he was only a "paid working director". The capacity in which a director functions and his services are utilized by a company is essentially an internal arrangement which could vary from one body corporate to another. Therefore, what is important is to find out whether such person is responsible as a defaulting employer in terms of Section 38(2) of the EPF Act. As observed earlier, the fact that the Appellant was a director of the company at the relevant period of default has been firmly established and at no stage of this case did the Appellant take up the position that he was only a paid working director and therefore did not come within the first limb of the definition of "employer" in terms of Section 47 of the EPF Act. Accordingly, the said argument has no merit and should be rejected.

In the written submissions filed prior to argument, it was contended that the Respondent Commissioner had failed to disclose all material facts and therefore, the certificate filed before the Magistrates Court was not in compliance with Section 38(2) of the EPF Act. The contents of the certificate as to whether the particulars disclosed regarding the amount of money to be recovered is correct or not or whether the names of the employees were set out clearly or not was never an issue before the Magistrates Court. Non-compliance arising upon the certificate too was never an issue to be considered before the Magistrates Court or in the Provincial High Court. This position is further evidenced in submissions made to

the Magistrates Court dated 06/11/2002, (Vide page 124 of the brief) where the Counsel submitted that the Appellant is in Court to absolve himself from liability and the present directors of the company made liable.

Therefore, the proceedings before the Magistrates Court makes it abundantly clear that the Appellant at no stage of the proceedings questioned the validity of the certificate on the basis of failure to provide the names of employees, the period during which default in paying the contributions took place, whether the amount due has been duly calculated or whether in fact the amount is in default. The Appellant has also not challenged the certificate on the basis that the name and place of residence of the employer (Appellant) is not included in the certificate nor the jurisdiction of Court.

The show cause before the learned Magistrate as to why further proceedings for the recovery of the sum due should not be taken was solely based on the fact that the Appellant was a working director and never a director of the company within the meaning of the Act. Therefore the factual position taken up by the Appellant can be clearly distinguished from the dicta laid down by Fernando, J. in *Mohamed Ameer and Another Vs. Yapa, Assistant Commissioner of Labour (supra)* and therefore the 2nd ground in appeal is also rejected.

The 3rd ground in appeal is moved on the basis that no steps had been initially resorted to by the Respondent Commissioner to ascertain the practicability

of recovering the alleged dues under Section 38(1) of the EPF Act prior to acting under Section 38(2).

In an identical issue raised in **C.A. 234/2013 (Writ) decided on 13/12/2013, Anil Gooneratne J.** held that;

“We find that on a perusal of the above provisions that there is no necessity at all for the Commissioner General of Labour to resort to Section 17 of the Act prior to filing a certificate under Section 38(2) of the Statute. The above provisions are very clear and it is for the Commissioner to form an opinion that it is impracticable or inexpedient to recover the sums due under Section 17 or under Section 38(1) of the Employees’ Provident Fund Act. We are unable to accept the views of the learned President’s Counsel. It is not for the defaulter to decide the required statutory provisions under which the Commissioner is expected to proceed and recover the amount in default. If the learned President’s Counsel’s argument is accepted such a course of action would defeat the intention of the Statute. This is a piece of social legislation enacted to grant superannuation benefits for employees, and not a statute enacted to delay the process and defeat the intention of the legislature.”

This Court has also endorsed a similar view in CA (PHC) 128/2014, decided on 30/10/2019, in a matter where it was alleged that the Respondent had failed to comply with the provisions of Section 89(1) of the Western Province

Finance Regulation No. 6 of 1990, by filing a certificate in the Magistrates Court to recover taxes instead of filing action against the defaulter in the District Court. Taking into consideration '*pari materia*' the rule of interpretation of similar statutes, the Court held that,

"In defining the discretion of the Commissioner of Labour on the procedure to be followed in dealing with the procedure related to the Employees' Provident Fund Act, the Court has held that there is no necessity for the Commissioner to have first resorted to the procedure in Sections 17 and 38(1) in order to file a certificate in the Magistrates Court under Section 38(2) of the said Act. (M/s Narthupana Tea and Rubber Company Ltd. Vs. The Commissioner of Labour SC Appeal 510/74 S.C.M. 13/03/1978. A Similar conclusion was arrived in Jewelarts Ltd. Vs. The Land Acquiring Officer and others (CA/Writ/App/No. 1126/2004)."

It further held that,

"When collecting defaulted taxes owing to the Provincial Council, a narrow interpretation of the available procedure would certainly confine and/or limit the procedure of collection of Taxes, which would be detrimental to the scope of Section 89(1) of the Regulation. Therefore, the intention of the legislature was to enable the Commissioner, in his opinion, to decide the required procedure to collect the taxes due to the Provincial Council and also to enable the defaulter of the taxes 'to show cause why further proceedings for the recovery of tax should not be taken against him'."

In the circumstances, I have no hesitation to follow the 'ratio' laid down by the said judgments and reject the 3rd ground of appeal.

For all the reasons stated above, the appeal is dismissed and the judgments of both lower courts are affirmed. If the Appellant fails to pay the dues, the learned Magistrate is directed to impose a default sentence according to law.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL