

**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 Writs of
Certiorari under and in terms of Article 140
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

Samagitha Ratnaike

Imperial Garden Apartments,
70, SukhumviSoi 21,
Apt 304,
Bankok,
Thailand.

Application No: **CA (Writ)
403/2018**

Amal Ratnaike

18730, Nau Avenue,
Porter Ranch,
CA 91326,
United State of America.

*Appearing by their lawful Power of
Attorney Holder,*

Malson Padmananda Alwis
No. 130/1, Subadrarama Road,
Nugegoda.

Petitioners

Vs.

1. **R.P.A. Wimalaweera**
The Commissioner General of Labour,
Labour Secretariat,
Narahenpita,
Colombo 05.
2. **L.T.G.B. Dharshana**
Then Deputy Commissioner of
Labour,
District Labour Office Colombo West,
Labour Secretariat,
Narahenpita,
Colombo 05.
3. **Iresha Udayngani**
Present Deputy Commissioner of
Labour,
District Labour Office Colombo West,
Labour Secretariat,
Narahenpita,
Colombo 05.
4. **Anura Hewawitharana**
Assistant Commissioner of Labour,
District Labour Office Kandy North,
No. 111, YatinuwaraVeediya,
Kandy.
5. **A.H.L.R. Padmini**
Labour Office,
District Labour Office Colombo West,
Labour Secretariat,
Narahenpita,
Colombo 05.

6. P.L.T. Bandula

No.14A, First Lane,
Wijaya Mawatha,
Thalahena,
Malabe.

Respondents

BEFORE

: D. N. Samarakoon J
Neil Iddawala J

COUNSEL

: Kushan de Alwis PC, with Ruwan Dias
and Ayendra Wickramasekara for the
Petitioners.

Amasara Gajadeera SC for the 1st – 5th
Respondents.

Argued on

: 06.10.2023

Written Submission on

: 24.11.2023

Decided on

: 14.12.2023

Iddawala – J

The petitioners through this application seek relief by way of Writ of Certiorari to quash the decision of the 1st and/or 2nd and/or 3rd and/or 4th and/or 5th respondents, manifested in documents marked P5, P7 and P9. The petitioners further pray for a grant of an interim order staying any one or more of the 1st – 5th respondents from initiating proceedings in the Magistrate Court to enforce the aforementioned decision and/or decisions.

The salient facts of the case are as follows. The petitioners are the children of the late Jayananda Rathnaike, who was the owner of the properties set out hereinafter which were managed by the 6th respondent. Both the 1st and 2nd petitioners are presently residing abroad and thereby have instituted this application through their lawful Power-of-Attorney holders.

The petitioners state that on or about 07.05.2015 the 6th respondent preferred a complaint to the 1st respondent (the Commissioner General of Labour) against the 1st petitioner alleging that;

- The 6th respondent was acting as a manager to the estate name Iriyagasthane at Wattegama and the premises bearing No.17, Fareed Place, Colombo 04 owned by late Jayananda Rathnaike,
- Upon the demise of the said Jayananda Rathnaike, the 6th respondent continued to perform the said function of the manager of the said properties under and upon the request of the 1st petitioner,
- The 6th respondent was purportedly receiving a salary of Rs. 85,000/- monthly,
- The 6th respondent's services were allegedly discontinued by the petitioners on or about 30.04.2015.

And thereby through his complaint alleged his entitlement to contributions to have been made to the Employee Provident Fund (EPF) and Employee Trust Fund (ETF) as well as other statutory dues.

The petitioner states that during the inquiry conducted by the 5th respondent (District Labour Office Colombo West) into the aforesaid complaint made by the 6th respondent, the 1st petitioner vehemently objected the said complaint as the 6th respondent never served under the 1st petitioner or the petitioners' late father, in the capacity of an employee and therefor is not entitled to have contributions to EPF and ETF.

Upon the completion of the said inquiry the matter was fixed for order on 10.05.2016, which was subsequently postponed due to further proceedings required by the 5th respondent. Nevertheless, after over a year the inquiry was finally taken up on 30.10.2017 and the 5th respondent pronounced her decision orally. The petitioner states that the 5th respondent wrongfully pronounced her decision by holding that the 6th respondent is a monthly paid employee of the 1st petitioner and therefore entitled to have contributions made to the EPF. One of the purported reasons for the decision of the 5th respondent was the fact that a case in the Labour Tribunal instituted by the 6th respondent against the petitioners was settled by the parties. Furthermore, the petitioners state that upon the decision of the 5th respondent, the 1st petitioner requested to be issued with a copy of the 5th respondent's findings. However, the same has been refused by the 5th respondent on the basis that permission had to be obtained by higher authorities.

On or about 06.11.2017 following the oral decision of the 5th respondent, the 2nd respondent issued a letter to the 1st respondent stating that it is decided that the 6th respondent is a monthly paid employee and that EPF payment will be payable and calculated from July 1991 to April 2015 along with the unpaid salary for the month of April 2015. Yet the reason for such decision nor the quantum of EPF had been specified in the said letter dated 06.11.2017. Aggrieved by the said decision the 1st petitioner on or about 10.11.2017 preferred an Appeal to the 1st respondent stating several grounds upon which the decision made by the 2nd and/or 4th and/or 5th and/or respondents is rendered erroneous. Yet, the petitioners claim that up to date no response has been received with this regard.

Furtherance to the aforementioned decision manifested by the letter marked P5 issued by the 2nd respondent, the 4th respondent issued a further letter marked P7 to the 1st and 2nd petitioners on or about 30.05.2018 directing the payment of a sum Rs. 1, 288,500/- in respect of EPF contribution of the 6th respondent. The petitioners further state that although the 1st petitioner is the party against whom the 6th respondent made the complaint, the letter dated 30.05.2018 issued by the 4th respondent wrongfully holds the 1st petitioners' brother, the 2nd petitioner of the instant application as being liable to make for the payment of EPF, together with the 1st petitioner.

In response to the above letter, the petitioner by a letter dated 10.07.2018, through her power of attorney drew the attention of the 4th respondent to the fact that no response has been received with regard to the appeal lodged by the petitioners. However, instead of responding to the appeal lodged by the petitioners and the aforementioned letter dated 10.07.2018, the 1st and/or 4th respondents issued a letter (P9) dated 20.07.2018 addressed to the petitioners re-iterating the decision manifest in P5 and P7 insisting that in an event the said sum of Rs. 1, 288,500/- is not paid on or before the 15.08.2018 actions will be taken against the petitioners at the Magistrate's Court. Aggrieved by the said decision/s of the 1st – 5th respondents manifest in the said documents marked P5, P7 and P9 the petitioner invokes the writ jurisdiction under Article 140 of the Constitution.

The contentions brought forward by the petitioners through their submissions are as follows: the petitioners firmly affirmed that the 1st -5th respondents have failed to consider the evidence placed on record during the inquiry held by the 5th respondent which clearly establishes the fact that there was no employer-employee relationship between the petitioners and the 6th respondent, and as a consequence of which the 6th respondent should not be entitled to payment of EPF.

The petitioner while bringing forward this argument draws the attention of the court to the document marked P3(b) which states that the late Jayananda Ratnaike had requested the 6th respondent to undertake the financial and

operational management of the two properties in question, which was then accepted by the 6th respondent. Furthermore, at the conclusion of the letter the late Jayananda Ratnaike referring to the 6th respondent states that he is 'most grateful for his generous help' which the petitioners claim *ex facie* clear that same cannot be a letter of appointment. Through document marked P3(c) the petitioner states that the 6th respondent confirms that the said late Jayananda Ratnaike was a relation of his and *inter alia* that the said Jayananda had 'assigned the management of his movable and immovable properties' to the 6th respondent and the 6th respondent in turn had appointed employees to look after the said properties. As such it is asserted that nowhere in the said statement does the 6th respondent state that he himself was an employee of the late Jayananda Ratnaike.

Moreover, the petitioners claim that the email marked P3(h) written by the 6th respondent to the 1st petitioner, *inter alia* states that 'I am not a monthly paid worker of your father' which clearly establishes the 6th respondent did not consider himself to be an employee of late Jayananda Ratnaike.

The petitioners also state that the Rs. 85,000/- claimed by the 6th petitioner as his salary was in fact a payment in respect of running and maintaining the said properties. The petitioners also draw the attention to the document marked R1, report submitted by the 5th respondents. Under the said R1 document heading 'නිරීක්ෂණ' the 5th respondent who conducted the inquiry specifically state that the 6th respondent has failed to submit evidence to establish that the Rs. 85,000/- set out in the bank statements were in fact paid as salary and thus the position of the 6th respondent that the said Rs. 85,000/- was his salary, cannot be accepted. The petitioners also emphasized on the fact that no reasonable employer would grant salary increase to an employee in the manner the 6th respondent claims to have increased.

Based on the findings of the 5th respondent contained in the report marked R1, the petitioners claim that it is clear that the only factor upon which the 5th respondent arrived at the purported conclusion that the 6th respondent is an employee and thereby entitled to EPF, is the settlement that was entered into

between the parties in the Labour Tribunal case No. 32/RM/31/2015. The documents clearly set out the fact that the said settlement was entered into solely for the purpose of fully and finally settling the claims made by the 6th respondent by his application to the Labour Tribunal for the purpose of recovering the original vehicle registration book pertaining to the vehicle No. 52-0344 which was in possession of the 6th respondent.

The learned state counsel appearing for the 1st – 5th respondents made submissions as follows. The learned counsel during the submissions emphasized on the facts that the 6th respondent was employed by late Jayananda Ratnaike since 01.03.1991 and upon his demise on 04.04.2014 the 6th respondent's employment was continued by the petitioners as the heirs of late Jayananda Ratnaike. The 6th respondent has also testified to the effect that salary was credited to his bank account by the employer on a monthly basis and subsequent to the demise of Jayananda Ratnaike, the petitioners paid the 6th respondent a sum of Rs. 85,000/- per month and in those circumstances the 6th respondent was deemed a monthly paid employee.

The respondents also highlighted on the fact that at the inquiry conducted by the 5th Respondent, it was revealed that the recruitment, payments and assignment of work have been done by the employer. And further, since the payment of salary was discontinued by the petitioners since April 2015, the 6th respondent filed an application before the Labour Tribunal holden in Ratmalana against the unlawful termination of the employment. The settlement was reached on 19.04.2016 by the 1st petitioner on behalf of all the heirs before the Labour Tribunal pursuant to the admission that the 6th respondent was an employee and there was a termination of employment in terms of Section 3(1) of the Industrial Disputes Act (hereinafter the 'IDA'). The learned counsel further states that during the tribunal inquiry there was no contention by the petitioners to whether the 6th respondent was considered as a monthly paid employee.

When a complaint is made by an applicant for statutory dues of EPF, the scope of the inquiry of the inquiring officer is to ascertain whether the applicant is an employee of the employer, and further if the employment is governed by the

provisions of Employee's Provident Fund Act (hereinafter the 'EPF Act') whether the employer has failed to pay statutory dues on behalf of the said employee to the Commissioner of Labour.

The learned state counsel firmly affirmed that the 6th respondent falls within the ambit of an employee under the EPF Act. According to interpretation of Section 47 of the EPF Act an employee is defined as:

“‘employee’ means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, or oral or in writing, and whether it is a contract of service or of apprenticeship or a contract personally to execute any work of labour, and includes any person ordinarily employed under any such contract, whether such person is or is not in employment at any particular time, and does not include a detached worker for a period of time specified in a social security agreement applicable to such detached worker.”

Through the document marked R1 (report dated 22.05.2017) submitted by the 5th respondent concludes to identify the 6th respondent as an employee of the late Jayananda Ratnaike, even though there are contentions and uncertainty with regard to the salary payments made to the 6th respondent. The 5th respondent further states that having considered the matter pertaining thereto, she sought the recommendation of the Chief Legal Officer by the report dated 22.05.2017. The Chief Legal Officer, by his letter dated 24.05.2017 directed the 5th respondent to proceed to charge the defaulted EPF from the petitioners.

However, the petitioner has contested the findings of R1 on multiple grounds:

- I. Failure to consider evidence presented during the inquiry conducted by the 5th respondent. This evidence includes references P3(b)/P3(c), P3(h).
- II. Disputes regarding the 5th respondent's conclusion in R1 that Rs. 85,000/- was not the correct salary.

- III. An assertion that the conclusion reached by R1 is inaccurately based on a settlement (No. 32/RM/31/2015) that was reached for a specific reason.

Despite this, it is noteworthy that the arguments put forth by the learned state counsel for the respondents are deemed acceptable. Considering the above-mentioned it is acceptable that the 6th respondent falls within the ambit of 'employee' as per the EPF Act and thus is entitled to all statutory benefits. Thereby, the calculation of EPF should be done in accordance with the EPF Act.

Having thus determined that the petitioner is obligated to pay the 6th Respondent's entitlements under the EPF Act vis-à-vis the employer-employee relationship that has been recognized, this Court will now turn to the computation of the EPF amount.

When determining the calculation of the EPF payment it is salient to pay attention to Section 10 of the EPF Act as it sets out the percentage of nominal contributions that needs to be made by both the employer and employee as a contribution to the fund. The section reads as follows:

“(1) Subject to the provisions of subsection (3) of this section and of section 27, an employee to whom this Act applies shall, in respect of each month during which he works in a covered employment be liable to pay to the Fund a contribution of an amount equal to eight per centum of his total earnings from the employment during that month.

(2) Subject to the provisions of subsection (3) of this section and of section 27, the employer of every employee to whom this Act applies and who is liable to pay contributions to the Fund shall, in respect of each month during which such employee is in a covered employment under such employer, be liable to pay to the Fund on or before the last day of the succeeding month, a contribution of an amount equal to twelve per centum of such employee's total earnings from that employment during that month

(3) The liability of an employee in a covered employment and his employer to pay contributions under this section shall commence on the day immediately after the date fixed in relation to such employment by the

Minister by Order published in the Gazette. Different dates may be fixed under this subsection for different classes of employees in the same covered employment”. (Emphasis added)

Thus, when the computation of EPF is done the statutory percentage of contributions by employee should be considered as 8% of his total earnings and 12% from the employer based on the total earnings of the employee.

In accordance with Section 15 of the EPF Act the employer of an employee is duty bound to payment of contributions dues from employees. The section reads as follows:

“The employer of an employee to whom this Act applies shall deduct and pay to the Fund the contribution for each month of such employee under this Act before the last day of the succeeding month from the earnings of the employee; and a contribution paid under this section to the Fund by such employer on behalf of such employee shall be deemed to have been paid to the fund by such employee.”

Section 28 of EPF Act states that the decision on the calculation of EPF is within the determination of the Commissioner. The section reads as follows:

“All claims to benefit shall be determined by the Commissioner or by way officer authorized in that behalf by him and the determination of the commissioner or such officer shall, subject to any decision on an appeal made against such determination in accordance with the provisions of this Act, be final.”

According to documents marked P5, P7 & P9 the time period for the calculation of EPF is identified as 1991/07 – 2015/03.

When considering the discussion and findings of R1 it is more evident to state that prior to 2006 there is no evidence to suggest that the 6th respondent was an employee of the said petitioners within the interpretation of the EPF Act, as the bank statements and other documentations provided are dated from 2006 onwards. Furthermore, even after 2006, according to R1, Rs. 85,000/- cannot be

accepted as his fixed salary payment. Nevertheless, according to R1 it is stated with rational reasons that for the purpose of EPF computation the acceptable amount to be considered would be Rs. 25,000/- as a payment since 2006/08.

Thereby, the consideration of service since 1991, as per documents marked P5, P7 & P9, is unacceptable. Yet according to the findings of R1 it could be said that the 6th respondent is entitled to claim for statutory dues for the period from 2006/08 to 2015/04.

Hence, it could be asserted that the 1st to 5th respondents need to reconsider the EPF calculation period and ensure that the statutory nominal contribution percentage for EPF payment is accurately determined in EPF calculations.

Considering all the above-mentioned this Court deems the 6th respondent can be considered as an employee of the petitioners and thereby is entitled to the payment of EPF. Yet however, it could also be stated that the calculation period and calculation amount of EPF in documents marked P5, P7 & P9 are erroneous.

Thereby, this Court deems to annul the orders in documents marked P5, P7 & P9. This Court further directs the 1st respondent- Commissioner General of Labour to recalculate the statutory dues as stated in this order.

JUDGE OF THE COURT OF APPEAL

D.N. Samarakoon - J

I agree.

JUDGE OF THE COURT OF APPEAL