

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

In the matter of an application for the grant of a writ of certiorari and a writ of prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Writ Application
No. 342/2020

1. Kullappuarachchige Don Anuradha Perera
No. 69/01, Gregory's Road,
Colombo 07.
2. Kullappuarachchige Don Harindra Perera
"Samanthi", Angangoda,
Payaagala.

PETITIONERS

-Vs-

1. Nadun Guruge,
Commissioner General of Inland Revenue,
Department of Inland Revenue,
Inland Revenue Building,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.
2. Hon. Magistrate
The Magistrate Court No. 08,
Colombo Magistrate's Court,
Colombo 12.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J. (P/CA) and
Sobhitha Rajakaruna, J.

COUNSEL : Rienzie Arsecularatne, P.C., with Chamindri
Arsecularatne, Sasheen Kannangara, Udara
Muhandiram, Namal Karunaratne, Prem Kumar,
Dilinthi Rodrigo, Krishantha Elpitiya and
Angeline Morais for the Petitioners.

Supported and

Decided On : 18.09.2020

A.H.M.D. Nawaz, J. (P/CA)

These applications are made in respect of two Directors namely, Kulappuarachchige Don Anuradha Perera and Kulappuarachchige Don Harindra Perera of a company called Bally's Limited. Both these two Directors are being summoned to appear before the learned Chief Magistrate of Colombo on 21.09.2020, subsequent to the issuance of summons in Magistrate's Court Case bearing Nos. 40506/8/20 and 40508/8/20.

A cogent submission is made by the learned President's Counsel Mr. Rienzie Arsecularatne that wrong persons have been summoned before Court when in fact it is the company, Bally's Limited, which is liable to be summoned as a defaulter in terms of Section 8 (1) of the Finance Act No. 10 of 2015. The argument is made that in terms of this Finance Act No. 10 of 2015, it is the company called Bally's Limited that becomes liable and not the two Directors who have been summoned by way of these summons. In a series of judgments such as *M.E.D. Silva v. Commissioner of Inland Revenue* 53 NLR page 280, *Ranjith Wijemanne v. Commissioner of Income Tax* (1951) Vol. I Ceylon Tax Cases 496, *Rajan Phillip v. Commissioner of Inland Revenue* (1982) Vol. IV Reports of Sri Lanka Tax Cases 211, *Ramalin v. Commissioner Inland Revenue* (1988) 2 SLR 259, *Hamza v. Commissioner of Inland Revenue* (1991) Vol. IV Reports of Sri Lanka Tax Cases 301 and *Dias v. Commissioner General of Inland Revenue*

(2011) 2 SLR 15, it has been authoritatively held that the person summoned should be the defaulter.

In these two applications filed by the Directors (the Petitioners), Mr. Arsecularatne, learned President's Counsel argues that these two Petitioners do not become liable for the tax in dispute. Having listened to this argument we advert our attention to the case of *Commissioner General of Inland Revenue v. Koggala Garments Limited* (Court of Appeal minutes of 05.04.2017) - in Case bearing No. CA Application Tax/01/2008, where two Judges of this Court conclusively decided that any objection to jurisdiction must be taken before the tribunal which is seized of the matter in the first instance. This Court cited *Wade and Forsyth Administrative Law* 11th Edition 2014 where it is stated as follows:-

"Where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it. If it refuses to do so, it is wrongfully declining jurisdiction and the Court will order it to act properly."

In the circumstances, we direct that this jurisdictional bar must be first raised before the learned Magistrate before whom this matter is due to come up for a cause to be shown on 21.09.2020. It is appropriate that the learned Magistrate should address this question of jurisdiction in the first instance and make his order thereon. Therefore, until the Magistrate makes his order on the jurisdiction, we would decline jurisdiction and in view of this order, the Petitioners state that they would be withdrawing these applications, but with the reservation that they would have recourse to this Court on the jurisdictional question once the learned Magistrate has made its ruling.

This order will also apply to the submissions that have been made by Mr. Riad Ameen, learned Counsel for the Petitioners in Case Nos. CA-Writ-344-20 and CA-Writ-345-20 where the Petitioner is one Saman Pradeep Nishantha Kodituwakku, who is also summoned to answer a show cause in two cases bearing Nos.40507/8/20 and 40509/8/20. All these jurisdictional questions focus on the same issue that is sought to be argued before us namely, Directors of a company are not liable for the tax in dispute

for which only the company is made liable under Section 6 (1) of the Finance Act, No 10 of 2015.

Section 7 (1) of the said Act states that any person who fails to pay the levy as provided for in Section 6, shall be deemed to be a defaulter under this Act.

Section 8 (1) of the Act enables the Commissioner General to issue a certificate stating the amount in default to the Magistrate having jurisdiction, whereupon the Magistrate shall summon the defaulter to show cause.

I am of the view that any person summoned as a defaulter to show cause is entitled to raise before the Magistrate that the Court does not have jurisdiction over him as he is not the defaulter within the four corners of the Finance Act, No. 10 of 2015.

As we have pinpointed, the want of jurisdiction has to be raised before the learned Magistrate and any order made by the Magistrate is susceptible to challenge in proper proceedings.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE COURT OF APPEAL