

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

In the matter of an Application For Revision in terms of Section 138 (1) of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka.

B.A.J.M. Balachandra,
Assistant Commissioner of Labour,
Labour Office of Gampaha District,
Gampaha.

COMPLAINANT

CA. No. CPA 0039/19

HC Gampaha Rev. No. 11/16 -Vs-

MC Attanagalla No. 90008/LB

E.M. Thilakaratna
Thilakaratne Contractors,
Kanda Uda, Masnoruwa,
Giriulla.

RESPONDENT

AND

E.M. Thilakaratne
Thilakaratne Contractors,
Kanda Uda, Masnoruwa,
Giriulla.

RESPONDENT - PETITIONER

-Vs-

B.A.J.M. Balachandra

Assistant Commissioner of Labour,
Labour Office of Gampaha District,
Gampaha.

COMPLAINANT - RESPONDENT

AND NOW BETWEEN

E.M. Thilakaratne

Thilakaratne Contractors,
Kanda Uda, Masnoruwa,
Giriulla.

RESPONDENT - PETITIONER -
PETITIONER

-Vs-

B.A.J.M. Balachandra

Assistant Commissioner of Labour,
Labour Office of Gampaha District,
Gampaha.

COMPLAINANT - RESPONDENT -
RESPONDENT

BEFORE : Shiran Gooneratne J. &

Dr. Ruwan Fernando J.

COUNSEL : P.K. Prince Perera with
S. Panchadsaran for the Respondent-

Petitioner-Petitioner

Madubashini Sri Meththa, State Counsel
for the Complainant-Respondent-
Respondent

ARGUED ON : 08.07.2020

WRITTEN SUBMISSIONS

: 22.05.2020 (by the Respondent-
Petitioner-Petitioner)

07.07.2020 (by the Complainant-
Respondent-Respondent)

DECIDED ON : 11.09.2020

Dr. Ruwan Fernando, J.

Introduction

[1] This is an application to set aside by way of revision, the judgment of the learned High Court Judge of Gampaha dated 02.04.2019, affirming the order dated 20.11.2015 of the learned Magistrate of Attanagalla who directed the recovery of a sum of Rs. 1,716,300/- as Employees' Provident Fund dues from the Respondent-Petitioner- Petitioner under section 38(2) of the Employees' Provident Act No. 15 of 1958 as amended.

Background

[2] The Complainant-Respondent-Respondent (hereinafter referred to as the Respondent) filed a Certificate in the Magistrate's Court of Attanagalla in terms of Section 38 (2) of the Employees' Provident Fund Act No. 15 of 1958 as amended for the recovery a sum of Rs. 1,716,300/- as EPF dues from the Respondent-Petitioner- Petitioner (hereinafter referred to as the

Petitioner) in respect of 32 workers employed by him for the period from April 2006 to September 2010.

[3] The learned Magistrate summoned the Respondent to show cause why further proceedings for the recovery of the sum due under the Act should not be taken against him. The Respondent appeared in court in response to the summons and the learned Magistrate by order dated 21.11.2014 directed the recovery of the said sum from the Respondent as a fine and in default, she imposed a 6 months imprisonment.

[4] Being aggrieved by the said order, the Petitioner preferred an appeal against the said order to the Provincial High Court of Gampaha stating that he had not been given an opportunity to show cause against the recovery of the sum mentioned in the certificate. The learned High Court Judge by order dated 10.07.2015 directed the learned Magistrate to afford an opportunity to the Respondent to show cause against the sum mentioned in the certificate (P4). Consequent to the said order, the learned Magistrate of Attanagalla afforded an opportunity to the Petitioner to show cause and the Petitioner filed objections in writing, stating the following matters by way of showing cause against the sum mentioned in the certificate:

1. The Respondent is not the employer of the said workmen whose names appear in the schedule to the certificate and the real employer was Kandy Plantations Ltd to which the Petitioner supplied labour services;
2. The certificate in question had been filed by the Respondent without holding a proper inquiry to identify the real employer of the workmen in violation of the rules of natural justice.

[5] After counter objections were filed by the complainant-Assistant Commissioner, the learned Magistrate having permitted the parties to file

written submissions, by her order dated 20.11.2015 held that the Petitioner was the employer of the said workmen and directed the recovery of the said sum of Rs. 1,716,300/- from the Respondent as a fine.

[6] The Petitioner moved by way of revision to the Provincial High Court of Gampaha and the learned High Court Judge by judgment dated 02.04.2019 while affirming the findings of the learned Magistrate held that the Petitioner had failed to establish the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction of the High Court. Being aggrieved by the said judgment of the learned High Court Judge of Gampaha, the Petitioner has filed this revision application seeking to revise and set aside the said judgment of the learned High Court Judge and the said order of the learned Magistrate of Attanagalla.

[7] While this application was pending in this Court, the learned State Counsel for the Respondent brought to our attention that the Petitioner had further filed an appeal against the said order of the learned Magistrate dated 20.11.2015 and the learned High Court Judge of Gampaha by judgment dated 05.06.2018 had dismissed the said appeal (Vide-motion dated 29.07.2019 and the judgment of the High Court dated 20.11.2015).

Main grounds urged by the Petitioner

[8] At the hearing, the learned Counsel for the Petitioner submitted that the judgment of the learned High Court Judge is erroneous for the following reasons:

1. The learned High Court has erred in holding that the Petitioner had not challenged the certificate of the Deputy Commissioner of Labour;

2. The learned High Court has failed to consider the judgment of the Supreme Court in *Ceylon Mercantile Union v. Ceylon Ferlitzer Corporation* 1985 (1) Sri LR 401;
3. The learned High Court has erred in law by not considering the fact that the Respondent had not observed the rules of natural justice by its failure to hold an inquiry for the determination of the real employer of the workmen in question;
4. The learned High Court has erred in law by holding that the Petitioner who sought revisionary jurisdiction of the High Court has failed to adduce exceptional circumstances.

Analysis

The scope of the proceedings under section 38 (2) of the Employees' Provident Fund Act

[9] It is necessary, at this stage to identify the scope of the proceedings for the recovery of arrears of payments due from an employer under section 38 of the Employees' Provident Fund Act No. 15 of 1958 as amended. Section 38(2) of the Act provides that where an employer makes default in the payment of any sum which he is liable to pay under the Act and the Commissioner is of the opinion that recovery of any sum due under section 17 is impractical or inexpedient, he may issue a certificate containing particulars of the sum so due and the name and place of residence of the defaulting employer to the Magistrate having jurisdiction in the division.

[10] Section 38(3) of the Act provides that the correctness of the certificate shall not be called in question or examined by the court in any proceedings under this section and accordingly, the Commissioner's certificate shall be

sufficient evidence that the amount due under this Act from the defaulting employer has been duly calculated and that the amount is in default. Section 38 (3) reads as follows:

(3) The correctness of any statement in a certification issued by the Commissioner for the purposes of this section shall not be called in question or examined by the court in any proceedings under this section, and accordingly, nothing in this section shall authorize the court to consider or decide the correctness of any statement in such certificate, and the Commissioner ‘s certificate shall be sufficient evidence that the amount due under this Act from the defaulting employer has been duly calculated and that such amount is in default”.

[11] Section 38 (3) of the Act was interpreted by the Court of Appeal in *Attorney-General v. City Carriers Ltd* (1991) 1 Sri LR 227) and the Court of Appeal held that the only permissible defences to challenge the certificate before the Magistrate are:

- (a) the respondent has paid the amount due;
- (b) the respondent is not the defaulter;
- (c) the certificate has been filed in a Court which has no jurisdiction to initiate recovery proceedings.

[12] In appeal, the Supreme Court in *City Carriers Ltd v. The Attorney-General* (1992) 2 Sri LR 257, held that the certificate shall contain the particulars of the sum claimed in the certificate and where the certificate contains no particulars of the sum claimed, it is not a certificate filed in terms of sub-section (2) of section 38 of the Employees’ Provident Fund Act. In *Mohamed Ameer and Another v. Assistant Commissioner of Labour* (1998)) 1 Sri LR 156, the Supreme Court further held that section 38(2) requires that the employees in respect of whom default is alleged

must be named or otherwise adequately identified and that (at least) where default is alleged in respect of a period during which there have been changes in remuneration and/or rates of contributions, the remuneration in relation to contributions and default has been computed must also be disclosed.

[13] In the circumstances, the following four permissible defences are available to a respondent in a recovery proceeding under section 38 (2) of the Act before a Magistrate's Court:

- (a) the respondent has paid the amount due;
- (b) the respondent is not the defaulter;
- (c) the certificate has been filed in a Court which has no jurisdiction to initiate recovery proceedings;
- (d) the certificate does not contain proper particulars of the sum due in the manner and to the extent required by section 38(2) of the Act.

Determination of the employer of the workers in question and the failure to consider the Judgment of the Supreme Court in Ceylon Mercantile Union v. Ceylon Fertilizer Corporation

[14] In the present case, the above-mentioned first, third and forth defences are not relevant as the Petitioner has challenged the certificate of the Commissioner of Labour *inter alia*, on the above-mentioned second ground, namely, that he is not the employer of 32 workmen who worked in the Mahawatta Estate owned by the Kandy Plantations Ltd and thus, he is not liable to pay the sum stated in the certificate issued under section 38(2) of the Act.

[15] At the hearing, the learned Counsel for the Petitioner submitted that the Petitioner challenged to the certificate of the Commissioner on the ground that he is not liable to pay any sum under the Employees'

Provident Fund Act as he only supplied labour services to Kandy Plantation Ltd but the learned High Court Judge failed to consider the Petitioner's said defence in the context of the test of 'control' and the test of 'integration' laid down by the Supreme Court in *Ceylon Mercantile Union v. Ceylon Fertilizer Corporation* (supra) and thus, his judgment is misconceived in law. He further submitted that the learned Magistrate too has failed to apply the said two tests in the correct legal perspective when the facts and the circumstances reveal that the Petitioner had only supplied labour services to Kandy Plantations Ltd and nothing more.

[16] In view of this defence taken by the Petitioner, the crucial question for the determination before the learned Magistrate was whether the Petitioner was the "employer" of the workers referred to in the schedule to the certificate on the basis of a contract of employment between the Petitioner and the said workers and if not, whether the Petitioner only supplied labour services to Kandy Plantations Ltd and thus, he was not an "employer" within the meaning of section 47 of the Employees' Provident Fund Act.

[17] The term "employee" is defined in section 47 of the Employees' Provident Fund Act as follows:

"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".

[18] The term "employer" is also defined in section 47 of the Employees' Provident Fund Act as follows:

"employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of

employees (whether such body is a firm, company, corporation or trade union), and any person who on behalf of any other person employs any workman and includes the legal heir, successor in law, executor or administrator and liquidator of a company; and in the case of an incorporated body, the President or Secretary of such body, and in the case of a partnership, the Managing Partner or Manager”.

[19] The essential condition of a person being an “employee” within the terms of this definition is that he has entered into or works under a contract with an employer in any capacity and there should be, in other words, a relationship between the employer and employee or master and servant. Unless a person is thus employed by an employer under any such contract in any such capacity, there can be no question of his being an “employee” within the definition of the term as contained in the Act.

[20] Thus, it is clear that there has to be an employer-employee relationship between the Petitioner and the employees stated in the schedule to the certificate on the basis of a contract of service to make the Petitioner liable under section 38 (2) of the Employees’ Provident Fund Act. In order to establish the existence of a contract of employment, it is necessary to distinguish between a contract of service and a contract for services. A contract of service will give rise to a master and servant relationship while the contract for services will contemplate a relationship of employer and independent contractor. The distinction depends on the rights conferred and duties imposed on the parties by the contract.

Control Test

[21] In the case of *J. and W. Henderson, Ltd* 62 TLR 427, Lord Thankerton at 429 found the following ingredients as being essential for the existence of a contract of service:-

1. the master’s power of selection of his servant;

2. the payment of wages or other remuneration;
3. the master's right to control the method of doing the work; and
4. the master's right of suspension or dismissal.

[22] The most crucial factor in determining whether a contract of service exists between the master and servant is the degree of control, the master has over the servant. This is what is called the 'control test' which determines whether a person is a servant or an independent contractor. This interpretation presupposes that a 'servant' is a person subject to the command of his master as to the manner in which he shall do his work whereas an 'independent contractor' may not exactly occupy the position of a servant but is a person who may have undertaken the duty of taking care for a specific work, but not necessarily because he is a servant. (*Yewews v. Noakes* (1880) 6 QBD 530, at 532).

[23] An independent contractor is a person who is assigned to do any specific work and thus, undertakes such work under a contract for services to produce any given result, but in the actual execution of the work, he is not under the direct control of the person for whom he does works, because he is not a servant under him on the basis of a contract of service. Thus, he is independent and free to use his own discretion in things not specified beforehand in the execution of his assigned work.

[24] Lord Thankerton in *Short v. J. & W. Henderson, Ltd.* (1946) 62T.L.R. 427,429, recapitulated the four indicia of a contract of service as follows:

- (a) the master's power of selection of his servant;
- (b) the payment of wages and other remuneration,
- (c) the master's right to control the method of doing the work, and
- (d) the master's right of suspension or dismissal.

Integration Test

[25] However, the control test which was the traditional test to determine the relationship of ‘master and servant’ or ‘employer-employee’ encountered certain difficulties in the modern complexities of the industry. This led to the formulation of another test known as the ‘integral’ or ‘integration’ or ‘organizational’ test. According to this test, under a contract of service, a man is employed as a ‘part of the business’, whereas under a contract for services too, he works for the business, but it is not integrated into it but is only accessory to it.

[26] In *Stevenson Jordan & Harrison v. Macdonald & Evans* (1952) 1 TLR 101, the Court established the “integration test” to decide whether or not the work of a person is an integral part of the business of an employer. Dening L.J. held that the test to determine whether the person is an employee or an independent contractor depends on whether a person is part and parcel of an organization and not on the control test alone. Dening L.J. stated at 142 that the 3rd Respondent being a Motor Claims Assessor played an important role in the Petitioner’s insurance business and thus, he became a part of that business. He stated that the Petitioner Company depended on reports of Motor Claims Assessors; and the 3rd Respondent had a very long period of employment with the Petitioner Company, which established a long standing regular relationship.

[27] The integral test was further refined in *United States v. Silk* (1946) 331 U. S. 704 where the US Supreme Court held that when determining whether certain employees were, in fact, employees within the meaning of a statute, the test to be applied is not whether or not a ‘power of control’ was exercised over the manner of performing service to the undertaking’ but whether the men were employees ‘as a matter of economic reality’. Cooke J. suggested that the fundamental test to be applied is this:

"Is a person who has engaged himself to perform these services performing them as a person in business on his own account? If the answer to the question is 'yes' then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service".

[28] In *Perera v. Marikar Bawa Ltd* 1989 (1) Sri LR 347, the question was whether the appellant was a workman within the meaning of the Industrial Disputes Act, The Court held that (i) the appellant did not carry on his business of Head Cutter as a business belonging to him and it was a business done by the appellant for the respondent; (ii) the appellant's work was an integral part of the respondent's business and thus, he was part and parcel of the organization; and (iii) thus, the appellant was a workman and an employee within the meaning of the Industrial Disputes Act.

[29] Thus, under this test, the main factor that has to be determined is whether the service is done by the worker for his own economic benefits or for the economic benefits of another person. So, if he is working for his own economic benefits, then he should be regarded as an independent contractor. In that event, there is a contract for service. However, if he is working for the economic benefits of another, there is a contract of service and the worker is an employee.

[30] Let me now turn to the decision heavily relied on by the learned Counsel for the Petitioner in support of the Petitioner's defence. In *Ceylon Mercantile Union v. Ceylon Fertilizer Corporation* (supra), the Supreme Court applied not only the test of 'control', but also the test of 'integration' to determine (i) the relationship of the workers with the Hunupitiya Co-operative Society (the 2nd respondent) and Ceylon Fertilizer Corporation (1st respondent) and (ii) the question whether the Hunupitiya Labour Co-operative Society (2nd respondent) had only acted as agent for the supply of labour services to the Fertilizer Corporation.

[31] In *Ceylon Mercantile Union v. Ceylon Fertilizer Corporation*, the Hunupitiya Co-operative Society entered into a written agreement (R6) with the Fertilizer Corporation for the supply of labour and be liable in damages if the Fertilizer Corporation was compelled on account of the Society's failure to supply labour and to engaging other labour at higher rates. The schedule to the agreement set out the rates of payments agreed upon payable to the Society. The agreement sets out terms with regard to the determination of wages, the advances of the workmen, assignment of the work, supervision and control of its execution and making payments by the Corporation to the workmen through the Society.

[32] His Lordship the Chief Justice Samarakoon held that the Co-operative Society (2nd respondent) was not merely an agent for the supply of labour services but it was actively engaged in working and putting into practice of the terms of the contract R6 with the Corporation (1st respondent) and therefore, the Fertilizer Corporation was not the employer of the workmen.

[33] Wanasundera, J. and Wimalaratne J. disagreed with His Lordship the Chief Justice. Wimalaratne J. held at page 411 that:

"The President of the Labour Tribunal, found as a fact that, notwithstanding the contract (R6), most of the workers had been working for the 1st respondent prior to the formation of the Labour Co-operative Society, the 2nd respondent and since, there have been even some instances of direct recruits of some workers by the 1st respondent. Such recruits have not even been members of the 2nd respondent at that time, but after recruitment, the 1st respondent would inform the 2nd respondent of such recruitment. The President also found that the 1st respondent had exercised the right of determination of wages, the assignment of work, the exercise of supervision and control in the execution of work, disciplinary control, and the payment of advances and compensation. Even the

final termination of their services, it is alleged, was the 1st respondent and the 2nd respondent had no hand in the matter.

Clearly, the manner in which the whereas the 1st respondent has dealt with the workmen is more in line, as the President says, with labour Co-operative Society being in the nature of a mere agent to supply labour, while the 1st respondent itself became the employer of such labour. Two other factors reinforce this view, namely that not a single workman concerned in this case is a member of this Labour Co-operative Society and the only nexus was the making of payments by the 1st respondent to the workmen through the Labour Co-operative Society, it would appear that these workmen had much greater contact and involvement with the 1st respondent than with the 2nd respondent".

"The workmen had the most tenuous contact with the 2nd respondent and in truth and in fact, it was the 1st respondent who calculated and determined the wages and advances to the workmen and not the 2nd respondent which acted as a mere conduit for the transmission of the payment. The 2nd respondent, as the President says, had merely undertaken to supply labour and not to perform any specific services. It is in this context that the President compared the work of the Labour Co-operative Society to the old Kangany system and held that the 2nd respondent functioned only as an agent for the supply of labour. . . ."

[34] Wimalaratne J. who agreed with the views expressed by Wanasundera J. observed at page 418 as follows:

"The instant case is similar to a situation where a contractor regularly brings labour to the employer's workplace to perform work in the regular course of the business of the employer, and the employer directs how the work is to be performed, and even calls upon the contractor not to employ particular persons from among the workforce. In that situation, my view is that there is no contract of employment between the contractor and the workmen".

[35] At page 419, Wimalaratne J. observed that:

"Wanasundera, J. takes the view that on the facts of this case, the relationship of employer and employee between the Corporation and the workmen has been established not only by an application of the test of 'control', but also by the test of 'integration', that is the workmen were intrinsic to the working of the Corporation. I am in agreement with the views of Wanasundera, J. The payment of wages by the Society was only a physical act of handing over the wages in the capacity of the agent of the Corporation. One had to remember that it was the Corporation and not the Society that determined the wages of each category of workers-check roll as well as piece-rate workers. As regards control of work, even the Chief Justice has no doubt that it was the Corporation that assigned the work, stipulated the proportions of mixing and indicated the mode of distribution.. What appears to have influenced the Chief Justice is that disciplinary control was in the hands of the Society. There is, however, a strong finding of fact by the President that "it is absolutely clear that the supervision and control of the workmen were exercised not by the 2nd respondent (the Society) but by the 1st respondent (the Corporation)".

[36] In *Sri Lanka Insurance Corporation Limited v. Commissioner of Labour and Others* S.C. Appeal no. 27A/2009 decided on 14.12.2016, the question *inter alia*, was whether the 3rd Respondent who was one of the Assessors of the Sri Lanka Insurance Corporation could be properly described as an employee or a servant of the Sri Lanka Insurance Corporation and if so, whether the Corporation was liable under the EPF Act having regard to the nature of work entrusted to him by the Corporation. Anil Gooneratne J. applied the 'integration' test and held that the 3rd Respondent was 'part and parcel of the business' of the Insurance Corporation and thus, was a 'workman' or an 'employee' within the meaning of the EPF Act.

[37] As Halsbury's Laws of England, Hailsham edition, Vol. 22, page 112, para. 191 clarifies the position of law:- "Whether or not, in any given case,

the relation of master and servant, exists is a question of fact; but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done". As Batt's "Law of Master and Servant", 4th edition, states at page 10:

"The line between an independent contractor and a servant is often a very fine one; it is a mixed question of fact and law, and the judge has to find and select the facts which govern the true relation between the parties as to the control of the work, and then he or the jury has to say whether the person employed is a servant or a contractor".

The other important factor for the judge to take into account whether the worker was part and parcel of the business of the person who employed him.

[38] In the background of the legal principles enumerated above, let me now turn to the true nature and character of the relationship of the workers with the Petitioner and/or Kandy Plantations Ltd. The learned Counsel for the Petitioner submitted that learned Magistrate had wrongly applied the principles laid down in *Ceylon Mercantile Union v. Ceylon Fertilizer Corporation* decision in the absence of any express terms of contract between the Petitioner and the workers in question. In my view, the absence of any express terms of the contract did not preclude the learned Magistrate from inquiring into the true nature of the contract and the relationship between the workers and the Petitioner. Such an argument, cannot, succeed in view of the definition contained in section 47, which refers to 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.....".

[39] The next submission of the learned Counsel for the Petitioner was that the Petitioner had only supplied labour services to Kandy Plantations Ltd as mentioned in the certificate and thus, the Petitioner could not be given the status of an “employer” within the meaning of the Act.

[40] At the hearing, the learned State Counsel brought to our attention to the statements made by the Petitioner, certain workers and the Representatives of Kandy Plantations Ltd before the Commissioner of Labour prior to the certificate was filed in Court marked P1. The learned State Counsel submitted that in the proceeding before the learned Magistrate, the Petitioner had not denied the statement made by him to the Commissioner or challenged the other statements recorded by the Commissioner at the Gampaha Labour Office prior to the issuance of the certificate.

[41] A perusal of the statement made by the Representative of Kandy Plantations Ltd at page 145 of the brief reveals that there was a written agreement between the Petitioner and Kandy Plantations Ltd for the supply of labour services to the said Company by the Petitioner and in terms of the said written agreement (i) the contractor (the Petitioner) was obliged to pay the wages to the workers and the EPF contributions; (ii) weekly payments were made by the Company to the contractor according to the number of coconuts husked by the workers; (iii) Kandy Plantations Ltd was not involved in the supervision of the works performed by the workers; (iv) the contractor was required to use his own equipment for the works performed by the workers.

[42] The Petitioner has not however, produced any such an agreement or provided any material and information to establish that he had contracted with Kandy Plantations Ltd only for the supply of labour and his part of the work ended after collecting the payments from the Company and

therefore, he was not obliged to pay the EPF contributions to the workers in question.

[43] The learned State Counsel further submitted that the Petitioner in his statement made to the Commissioner at the Labour Office marked P1 at page 119 of the brief has admitted that he exercised the control over the workmen supplied by him to the Company, paid wages and 8% percent of EPF contributions, given instructions to the workers. She submitted that under such circumstances, the learned Magistrate had correctly analysed the said statements and determined that the Petitioner had not only supplied the labour to Kandy Plantations Ltd but also had control over the workers and thus, the Petitioner falls within the definition of the “employer” in section 47 of the Employees’ Provident Fund Act.

[44] A perusal of the Petitioner’s statement made to the Labour Commission (P1) reveals that (i) he had registered himself at the Kuliyapitiya Labour Office as an EPF Contributing Member and obtained the EPF Contributing Membership Card No. 16244 from the Kuliyapitiya Labour Office; (ii) he obtained the services of the 40 employees on a contract basis by the end of 2010 and supplied their labour services at the Mahawatta Estate owned by Kandy Plantations Ltd; (iii) the employees were assigned various functions in the coconut Estate by him and their salaries were paid by him at the rate of Rs. 325/- to 350/- per day; (iv) he deducted 8% of the EPF contribution from their salaries till April 2008 and the Company agreed to pay the balance percentage; (v) he repaid the said 8% of the EPF contribution deducted from their salaries and after May 2008, he did not deduct EPF contributions from their salaries as the Company failed to pay the balance contribution as promised.

[45] A perusal of the Magistrate’s Court record and the order of the learned Magistrate reveals that the Petitioner has not denied the statement

made by him to the Labour Office marked P1 as correctly submitted by the learned State Counsel. The statement of the Petitioner before the Labour Commissioner clearly contradicts his own defence that he merely supplied labour services to Kandy Plantations Ltd and thus, he only played a passive role of supplying labour services to the Company. If the Petitioner merely supplied labour services, collected his commission and left all the other matters to be decided by Kandy Plantations Ltd and the workers, surely, there was no reason for him to actively engaged in deducting 8% of the EPF contributions from the salaries of workers supplied by him to the Company, decide the rates of wages made to the workers and pay their weekly wages.

[46] The statements made by the workers at pages 146-148 of the brief further reveal that they were recruited as labourers by the Petitioner and attached to the Mahawatta Estate for plucking coconuts, removing the husks of coconut and loading coconut nuts into lorries and their weekly wages were paid by the Petitioner. Having considered the facts and the circumstances including the statements marked P1, the learned Magistrate has decided that the part of the work performed by the Petitioner was not confined to the supply of labour but actively engage in the control of the workers, determination and payment of wages and deducting EPF contributions from their salaries and thus, the Commissioner has corrected decided that the Petitioner is the “employer” within the meaning of section 47 of the EPF Act. Her findings at page 9 of the order are as follows:

මෙම තත්ත්වය අනුව නුවර වැවලි සමාගමට සේවකයන් සැපයීමේ කොන්ත්‍රාන්කරුවෙකු ලෙස වූදින කටයුතු කර ඇති බව පමණක් නොව එම සේවකයන් සම්බන්ධයෙන් සියලුම පාලනය කිරීමේ කටයුතු සහ වැටුප් ප්‍රමාණ කර තීරණය කර ගෙවීමේ කටයුතු මෙන් ම සේවක අර්ථ සාධක අරමුදුල් ගෙවීමේ කටයුතු ද වූදින විසින් සිදු කර ඇති බව සහාය වන බැවින් සේවා යෝජකය

වගයෙන් තුදින නම් කිරීම පැමිණිලකරු විසින් නිවැරදිව කර ඇති බවට නිරීක්ෂණය කරමි.

[47] The manner in which the Petitioner had dealt with the workers clearly point to a contract of service between the Petitioner and the workers as the facts and the circumstances clearly establish the following matters:

1. All workers were directly recruited by the Petitioner for the purpose providing a labour service to Kandy Plantations Ltd and not a single worker was recruited by Kandy Plantations Ltd;
2. The Petitioner had exercised the supervision and overall control of the workers, including their disciplinary action and Kandy Plantations Ltd had nothing to do with the supervision or control and disciplinary control of the workers;
3. The Petitioner had exercised the right of assignment of work to each worker in the Mahawatta Estate of Kandy Plantations Ltd including plucking and removing the outer skins of coconuts and loading coconut nuts into Lorries;
4. The determination of rates of wages and payment of wages to the workers was determined by the Petitioner and no material or information was provided by the Petitioner to establish that the rates of payments were determined on the basis of the recommendations and directions made by Kandy Plantations Ltd;
5. Kandy Plantations Ltd only made payments to the Petitioner according to the works performed by the workers employed by the Petitioner and the workers had no contact with Kandy Plantations Ltd other than to work in the Estate according to the directions given by the Petitioner

6. The workers had all worked on behalf of the Petitioner and thus, they were part and parcel of the business of the Petitioner.

[48] I am of the view that in the light of the aforesaid facts and circumstances, the mere supply of labour services to Kandy Plantations Ltd and collection of payments to be paid to the workers are insufficient to hold that the Petitioner had acted as a passive service provider for the supply of labour and his part of work ended upon collecting the payment from Kandy Plantations Ltd to be transmitted to the workers.

[49] I hold that on the facts and circumstances of the case, a relationship of the employer-employee between the Petitioner and the workers has been clearly established not only by the application of the test of 'control', but also by the test of 'integration', that is, that the workers were part and parcel of the Petitioner's business.

[50] It seems that the learned High Court Judge has not specifically referred to the decision of the Supreme Court in *Ceylon Merchantile Union v Ceylon Fertilizer Corporation* (*supra*). I find, however, that the learned High Court Judge has held that the order of the learned Magistrate has dealt with all facts and circumstances of the case and applied the legal principles laid down in decided cases, that is an obvious reference to *Ceylon Merchantile Union v. Ceylon Fertilizer Corporation*. This seems to be the case referred to by the learned Magistrate in her order. In the light of very strong findings of the learned Magistrate, the learned High Court Judge found no reason to interfere with her order.

[51] It is to be noted that in *Ceylon Merchantile Union v. Ceylon Fertilizer Corporation*, the minority judgment held that the contractor had actively engaged in working and putting into practice the terms of its contract R6 and hence, he was not merely an agent for the supply of labour and

collection of agency commision. The majority of the judges held that the limited supervision enjoyed by the contractor for the transmission of the payment made by the Corporation to the workers without performing any specific services is insufficient to spell a contract of services.

[52] It was not the position of the Petitioner that he had entered into a written agreement with Kandy Plantations Ltd and acted as an agent of Kandy Plantations Ltd for the supply of labour and his contract ended after collecting the agency commission. His defence is that he merely supplied labourers to Kandy Plantations Ltd and thus, he cannot be regarded as an “employer” of the workers within the meaning of section 47 of the Act. The learned Magistrate, in my view, has correctly considered the legal principles laid down in *Ceylon Merchantile Union v. Ceylon Fertilizer Corporation* (supra) and distinguished the facts of the said case from the present case on the basis that the Petitioner is not a person who had merely provided labour services to Kandy Plantations Ltd and collected payments to be transmitting to the workers, but actively engaged in working and putting into practice his contractual relationship with the workers as shown in the statement marked P1.

[53] The Petitioner has failed, in my view, to convince this Court that in the light of the strong findings of the learned Magistrate that a contract of service between the workers and the Petitioner has been established, as to how the mere failure of the learned High Court Judge to specifically refer to the said decision could have vitiated the order of the learned Magistrate.

[54] For those reasons, I hold that the learned Magistrate has analysed the facts and circumstances of the case and correctly come to the conclusion that the Petitioner is an “employer” within the meaning of section 47 of the EPF Act and that he had defaulted in the payment EPF dues to the

workers in question. Under such circumstances, the learned High Court Judge cannot be faulted for affirming the said well-considered order.

Failure to observe the rules of natural justice

[55] It was the contention of the learned Counsel for the Petitioner that the learned High Court Judge had failed to consider in his order that the Respondent had failed to hold a formal inquiry for the identification of the real employer of the workers in violation of the rules of natural justice. He further submitted that the procedure adopted by the Commissioner to merely record statements without affording an opportunity to cross examine the persons who made statements to the Commissioner at a formal inquiry amounts to a nullity of the certificate issued by the Commissioner. He relied on two decisions of the Supreme Court in *Ceylon Printers Ltd and Another v. Weerakoon, Commissioner of Labour and Others* (1998 (2) Sri LR 29 and *Kusumawathie and Others v Aitken Spence and Co. Ltd* (1996 (2) Sri LR 18) and complained that in addition, the Commissioner has failed to give reasons for his decision

[56] *Ceylon Printers Ltd and Another v. Weerakoon, Commissioner of Labour and Others (supra)* concerned a writ application filed in the Court of Appeal under the Termination of Employment of Workmen (Special Provisions) Act. The issue that arose was whether the failure to consider the material produced at the inquiry and give an opportunity of challenging the new material and failure to give reasons amounts to non-compliance with the rules of natural justice. It was held that the such failures amounted to a breach of the principles of natural justice.

[57] *Kusumawathie and Others v. Aitken Spence and Co. Ltd* (supra) was also a writ application filed under section 2 of the Termination of Employment of Workmen (Special provisions) Act No. 45 of 1971. The

issue was whether in the absence of a specific statutory requirement to give reasons, the Commissioner has to communicate his reasons in compliance with the principles of natural justice. The Court of Appeal held that the finding that there is no statutory requirement in law to give reasons should not be construed as a gateway to arbitrary decisions and orders.

[58] This is not a writ application seeking to challenge the administrative decision of the Commissioner for wrongfully making the Petitioner liable for EPF dues in violation of the principle of natural justice. This is a revision application seeking to set aside the judgment of the High Court Judge affirming the order of the learned Magistrate made in proceedings instituted under section 38 (2) of the EPF Act.

[59] Section 38 of the Act prescribes two modes of recovery of EPF dues. Sub-section (1) of Section 38 states that “where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Commissioner is of opinion that recovery under section 17 of the Act is impracticable and inexpedient, he may issue a certificate to the District Court and the court shall thereupon direct a writ of execution to issue to the Fiscal authorizing and requiring him to seize and sell all the property, movable and immovable of the defaulting employer.

[60] Sub-section (2) of section 38 provides that where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Commissioner is of opinion that it is impracticable and inexpedient to recover that sum under section 17 or under sub-section (1) or where the full amount due has not been recovered by seizure and sale, then he may issue a certificate containing particulars of the sum so due from the defaulting employer to the Magistrate having jurisdiction.

[61] As noted, the correctness of any statement in a certificate issued by the Commissioner for the purposes of this section shall not be called in question or examined by the court in any proceedings under this section and such certificate shall be sufficient evidence that the amount due under this Act from the defaulting employer has been duly calculated and that such amount is in default.

[62] The Act is silent, however, as to the requirement of holding an inquiry before determining whether the employer has defaulted in the payment of EPF contributions and before filing a certificate in the Magistrate's Court. This may not preclude the Commissioner from exercising a discretion and affording the employer a hearing in any form before deciding the procedure set out in section 38 (1) or 38 (2) of the Act, to clarify his position before the Commissioner. In the present case, the Commissioner had afforded an opportunity to the Petitioner to present his case and recorded his statement as well as other statements to ascertain the nature of his relationship with the workers and decide whether the Petitioner is the employer of the workers (P1).

[63] On the material placed before the Commissioner, the Commissioner had formed his opinion that the Petitioner being the employer of the workers in question had defaulted in the payment of EPF dues to the said workers and correctly issued the certificate under section 38 (2) of the Act.

[64] Where it is alleged that a Commissioner had exercised his discretion wrongfully in violation of the rules of natural justice as it is claimed by the Petitioner in this revision application, such decision ought to be challenged in writ proceedings where the principles of administrative law principles are applicable. As noted, the scope of the defences that are available to an employer in proceedings instituted under section 38(2) are limited to 4

defences and hence, any question whether the Commissioner has exercised his discretion correctly or he has failed to follow every aspect of procedure are not matters that can be raised in proceedings instituted before a Magistrate under section 38(2) of the Act.

[65] On the other hand, the Petitioner had been afforded every opportunity by the learned Magistrate of Attanagalla to show cause against the recovery of the sum mentioned in the certificate and to challenge the certificate on the basis that he had no contractual relationship with the workers and thus, he is not the employer under section 47 of the Act.

[66] In my view, the Petitioner has failed to establish that he is not the employer of the workers in question and thus, he is liable to pay the EPF dues to the workers whose names appear in the schedule to the certificate issued under section 38 (1) of the Act as correctly decided by the learned Magistrate.

Failure to consider exceptional circumstances by the learned High Court Judge

[67] The final submission of the learned Counsel for the Petitioner was that the failure of the learned High Court Judge to consider the exceptional circumstances pleaded by the Petitioner in the Petition filed in the High Court amounts to a miscarriage of justice. The final question to be considered is whether there are exceptional circumstances amounting to a positive miscarriage of justice calling for the intervention of this Court by way of revision.

[68] In *Rasheed Ali v. Mohamed Ali* (1981) 1 Sri LR 262 (CA) Soza J. referring to the decisions in *Atukorale v. Samynathan* (1939) 41 N.L.R. 165, *Silva v. Silva* (1943) 44 N.L.R. 4, *Fernando v. Fernando* (1969) 72

N.L.R. 549 and *Rustom v. Hapangama* (1978-79) (2) Sri LR 225) stated at page 34 that “it is well established that the powers of revision conferred on this Court are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal where it lies has been taken or not. But this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the Court.”

[69] On appeal to the Supreme Court, Wanasundera J., while affirming the views expressed by Soza J. stated in *Rasheed Ali v. Mohamed Ali* (1981) 1 Sri LR 262 (SC) at page 265:

“The powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. Where the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances...”.

[70] In *Rustom v. Hapangama* 1978-79-80 1 Sri LR 352 (SC), Ismail J. at page 360 stated:

*“The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked, the practice has been that these powers will be exercised if there is an alternative remedy available only if the **existence of special circumstances are urged** necessitating the indulgence of this court to exercise its powers in revision”.*

[71] As noted, the Petitioner has failed to adduce sufficient material to establish that he had no contract of service with the workers in question as he had only supplied labour services to Kandy Plantation Ltd or there was a glaring defect in the procedure before the Magistrate or a manifest error in law in the order of the learned Magistrate or the High Court Judge

which has resulted in flagrant miscarriage of justice. Under such circumstances, the learned High Court Judge has correctly held that the Petitioner has failed to establish the existence of exceptional circumstances warranting the intervention of the High Court.

[72] I hold that the Petitioner has failed to establish the existence of exceptional circumstances amounting to a positive miscarriage of justice calling for the intervention of this Court by way of revision under Article 138 of the Constitution.

Conclusion

[73] For those reasons, I do not see merit in any of the grounds urged by the learned Counsel for the Petitioner. I accordingly, affirm the order of the learned Magistrate dated 20.11.2015 and the judgment of the learned High Court Judge dated 02.04.2019.

In the result, the Petitioner's revision application is dismissed with costs.

JUDGE OF THE COURT OF APPEAL

Shiran Gooneratne J.

I agree.

JUDGE OF THE COURT OF APPEAL