

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

In the matter of an application for  
Mandates in the nature of Writs of  
Certiorari, Prohibition and  
Mandamus in terms of Article 140 of  
the Constitution of the Democratic  
Socialist Republic of Sri Lanka.

C.A. Writ No.WR.551/2006

Geoffrey Joseph Aloysius  
No.7, Queens Avenue,  
Colombo 03.

Petitioner

Vs.

01. Mahinda Madhiahewa,  
The Commissioner General of  
Labour.
02. K.A. Samarasinghe,  
Assistant Commissioner of Labour
03. S. Dharmasena,  
Asst. Commissioner of Labour,

All of Department of Labour,  
Labour Secretariat, Colombo 05.

And another.

Respondents

BEFORE : S. SRISKANDARAJAH, J P/CA  
COUNSEL : Sanjeewa Jayawardene with Rajiv Amarasinghe  
for the Petitioner,  
N.Wigneswaran SC  
for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents,  
4<sup>th</sup> Respondent absent and unrepresented

Argued on : 10.02.2011,22,02,2011 & 26.04.2011

Decided on : 13.09.2012

S.Sriskandarajah.J.

The Petitioner in this Application has sought a Writ of Certiorari to quash the notice and/or communication of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents issued in terms of Section 38 of the Employees' Provident Fund Act dated 5<sup>th</sup> December 2005 marked P5, and also has sought a Writ of Certiorari to quash the letter of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 18/01/2006 marked P7. Learned counsel for the Petitioner submitted that the two documents marked P5 and P7 contained the decision of the 1<sup>st</sup> Respondent that a sum of Rs.411,545.45 (Rupees four hundred and eleven thousand, five hundred and forty five & cents forty five) for the period 1/09/1981 to 30/11/2004 had to be paid by the Petitioner as Employees Provident Fund. By letter marked P7, the 1<sup>st</sup> Respondent has sought to recover a sum of Rs.2,022,004.48 (Rupees two million twenty two thousand four and Cents forty eight) the enhanced sum in P7 which was the addition of surcharge. These two documents marked P5 and P7 were addressed to the Petitioner as he was a Director of the 4<sup>th</sup> Respondent Company between 1/04/2002 and 31/03/2004. The learned counsel for the Petitioner submitted, it is settled law that the 1<sup>st</sup> Respondent, when taking steps for the recovery of the Employees' Provident Fund under the Provident Fund Act No.15 of 1958, as amended, has to first refer to Section 17 of the said law and

thereafter, if he is of the opinion, and it is not expedient to recover under Section 17, he should consider proceeding against the employer under Section 38(1) of the said law and, if it is impracticable or inexpedient to proceed against either Section 17 or under Section 38(1) of the said law, the 1<sup>st</sup> Respondent could proceed against the employer under Section 38(2) of the said law.

The submission of the learned counsel for the Petitioner is that, under the relevant sections, viz., Sections 17 and Sections 38, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot proceed against the Director of the Company to recover the said sum as the primary liability is on the Company to pay the said sum. Counsel for the Petitioner further submitted that Section 38 of the said law has to be read with Section 40, and the employer in this case is the Company, and once the determination is made that an offence is committed by the Company, and then only the 1<sup>st</sup> Respondent can proceed against the Director of the Company. It is the submission of the Petitioner that in case of recovery, the Commissioner has to first address his mind whether the sum could be recovered under Section 17 and/or under Section 38(1) of the said Act and, after addressing his mind, if he comes to the finding that it is impracticable or inexpedient to recover under those provisions, then he could proceed under Section 38(2) of the said Act.

It appears from the pleadings that the 1<sup>st</sup> Respondent has made a request to Samuel Sons & Company Limited, by letter dated 3<sup>rd</sup> October 2005, to pay a sum of Rs.411,545.96 (Rupees four hundred and eleven thousand, five hundred and forty five and cents ninety six) as the Employees' Provident Fund dues and, thereafter, the 1<sup>st</sup> Respondent, without proceeding against the said Company, has requested the Petitioner by letter dated 5<sup>th</sup> December 2005, to pay a sum of Rs.411,545.96 (Rupees four hundred and eleven, five hundred & forty five and cents ninety six). The 1<sup>st</sup> Respondent has called upon the Petitioner by his letter dated 18/01/2006 to pay Rs.2,022,004.48 (Rupees two million twenty two thousand four and Cents forty eight).

The employer, is defined in the Employees' Provident Fund Act, as amended by Employees' Provident Fund Amendment Act No.1 of 1985, it states as follows:-

“ ‘employer’ means 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), 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 the Secretary of such body, and in the case of a partnership, the Managing Partner or Manager.”

This definition includes a liquidator of a Company as an employer. The Petitioner in his petition has pleaded that in the District Court of Colombo, in case bearing No.161/CO, proceedings had been filed on the 31<sup>st</sup> of November 2004 by the creditors for winding up Samuel, Sons & Company Limited. The Respondents had not denied this position.

In these circumstances, Samuel, Sons & Company Limited ceased to be the employer and liquidator of the company, becomes the employer and, therefore, any notice for the recovery of the Employees' Provident Fund dues have to be given to the liquidator of that company therefore a notice issued to the company or to the Directors of the company after the appointment of a Liquidator will not have any force or effect and, therefore, this Court quash the documents marked P5 and P7 issued by the 1<sup>st</sup> Respondent.

The above order will not prevent the 1<sup>st</sup> Respondent to take appropriate steps under the law to recover the said sum by the procedure laid down by law. For these reasons I

issue a Writ of Certiorari, as prayed for in prayer 'C' and prayer 'D' of the petition.  
Application for Writ of Certiorari is allowed without cost.

President of the Court of Appeal