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

1. L. Ranasinghe
2. ASC Perera

3rd and 4th Respondent
Petitioner-Petitioners

Vs

CA (PHC) APN 69/2009:
HC Colombo HCRA 149/2006
MC Mount Lavinia 754/S/3

The Commissioner of Labour

Complainant-Respondent-Respondent.

1. LDM Dharmaratne
2. AK de Silva
3. DT Dharmaratne

1st, 2nd and 5th Respondent-Respondent-Respondents

Before : Sisira de Abrew J &
Anil Gooneratne J

Counsel : Dhammika Jayaneththi for the petitioners
Maithri Amarasinghe SC for the Complainant-Respondent-Respondent
AHH Perera with MC Morawaka for the 1st, 2nd and 5th Respondent- Respondent-Respondents

Argued on : 12.11.2010

Decided on : 27.1.2011

Sisira de Abrew J.

The Assistant Commissioner of Labour on 13.2.2003 filed in the Magistrates' Court (MC) of Mount Lavinia a certificate in terms of (P1) Section 38(2) of the Employees Provident Fund Act No 8 of 1971 (EPF Act) to recover a sum of Rs. 2361074/64 as provident fund dues from Directory Printing and Publishing Co.(Pvt) Ltd for the period commencing from November 1994 to September 1999.

The directors of the said company appeared in the MC and the petitioners in this case (who are some of the directors of the company) took up the position that they were not the directors for the entire period set out in the certificate. The learned Magistrate thereupon directed the Assistant Commissioner of Labour to file a certificate setting out the proportionate liability of the directors for the period that they served as directors in the company. He complied with the said order. The learned magistrate, by her order dated 30.6.2006 (P7) decided that the petitioners and the respondents in this case are liable to pay the amounts stated by the Assistant Commissioner of labour (P8). Being aggrieved by the said order of the learned Magistrate petitioners invoked the revisionary jurisdiction of the High Court and the learned High Court Judge (HCJ) by her order dated 4.6.2009, dismissed the revision application. Being aggrieved by the said orders of learned High Court Judge and the Magistrate, the petitioners have invoked the revisionary jurisdiction of this court to set aside both orders.

Learned counsel for the petitioners contended that there was no provision in the EPF Act to apportion the liability among directors. He further contended that the past directors are not liable to pay EPF dues and the present directors must pay the dues. His contention is even if the past directors did not pay the EPF dues which were due during their period it is the duty of the present directors to pay the said amounts. I now advert to this contention. If this contention is accepted as correct, then the present directors who did not commit any wrongful act would be sentenced to pay a fine carrying a default sentence and if the fine is not paid default sentence would be implemented. Further if the amount mention in the certificate is not apportioned directors who know nothing about non payment EPF dues would be sentenced. This procedure by all means is unfair and no court would adopt this procedure. I therefore reject the above contention of learned counsel for the petitioners.

Learned counsel for the petitioners next cited the following passage of the judgment of the Supreme Court in KA Dayawathi Vs Ds Edirisinghe SC(FR) No.241/2008-decided on 1.6.2009. Justice Thilakawardene in the said case remarked thus: "It is important to note that there is no offence committed under Section 38(2) of the said EPF Act and the sum due from the employer is only deemed to be a fine imposed by the Magistrate."

Learned counsel for the petitioner relying on the above passage of the judgment contended that failure to comply with Section 38(2) of the EPF Act could not be considered as an offence. He further contended that if no offence had been committed, then directors could not be brought under section 40 of the EPF Act. He therefore contended that making petitioners who are directors of the company, liable is wrong. It has to be stated here

that the Supreme Court, in the said judgment recognizes the procedure set out in Section 38(2) of the EPF Act. It is clear from the following passage of the judgment.

"In terms of Section 40 of the said Employees Provident Fund Act, where an offence under the said Act is committed by a body of persons then if such body of persons is body corporate, every director and officer of such body corporate shall be deemed to be guilty of the offence. Therefore it is clear that apart from the recovery procedure set out in section 17, 38(1) and 38(2) of the said Act as amended the commissioner has to institute a separate action in the relevant Magistrate Court to punish the employer who has defaulted." I now advert to the contention of learned counsel. If the employer is a body corporate and if it does not comply with section 38(2) of the EPF Act, how is the Magistrate going to implement the default sentence. In short the question that must be considered is: if the employer is a body corporate and the amount ordered by way of a fine is not paid, who is going to be sent to jail. Obviously the Magistrate cannot send the body corporate to jail. If the contention that the directors of a body corporate cannot be sent to jail as they have not committed an offence is accepted then the amount set out in the certificate cannot be recovered. Was this the intention of the legislature when it enacted Section 38(2) of the EPF Act? Should Courts interpret Statute to frustrate the intention of the legislature and the purpose of the Statute? The answer is clearly no. At this stage it is pertinent to consider the preamble which reads as follows: "An act to establish provident fund for the benefit of certain classes of employees and to provide for matters connected therewith or incidental thereto." In interpreting Section 38(2) of the EPF Act if the court holds that directors of a body corporate do not fall within the ambit of employer in Section 38(2) of the EPF Act, then

the establishment of provident fund would almost be reduced to zero. Such an interpretation would certainly not bring any benefit to the employees in the corporate section. Further such an interpretation, in my view, would defeat the purpose of the Act and lead to absurdity. In this connection I would like to consider a passage from book titled Interpretation of Statutes by Brinda 7th edition page 235: It is a well known rule of construction that a statute should not be construed so as to impute absurdity to the legislature." "A Court must always avoid as far as possible giving an entirely absurd interpretation to a section drafted by the legislature unless a Court looking to the plain and grammatical language used has no other option except to give such a construction." Vide Interpretation of Statutes by Brinda 7th edition page 236.

In my view if the Courts interpret that directors of a body corporate do not fall within the meaning of 'employer' in Section 38(2) of the EPF Act, the Commissioner of Labour would not be able to recover contributions made by both the employees and employers in the Corporate section and thereby would cause severe injustice to the employees in the corporate section and the purpose of enacting Section 38(2) would be defeated.

For the above reasons, I h old that '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 a 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.

For the above reasons, I dismiss the petition of the petitioners with costs.

Petition dismissed.

Judge of the Court of Appeal.

Anil Gooneratne J

I agree

Judge of the Court o Appeal.