IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

CA (PHC) APN -97/2010

High Court of Kandy. Rev- 141/2005

MC Kandy- 62865

In the matter of an application for Revision made in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the provisions of Section 11 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

W.R. Kulatunga Bandara, Assistant Commissioner of Labour, Kandy South District Labour Office, Kandy South.

Applicant.

Vs.

W. Balasuriya, Sports of Kings,

Cross Street, Kandy.

Respondent.

AND

W. Balasuriya, Sports of Kings,

Cross Street, Kandy.

Respondent-Petitioner

Vs.

W.R. Kulatunga Bandara, Assistant Commissioner of Labour, Kandy South District Labour Office, Kandy South.

Applicant-Respondent.

AND NOW BETWEEN

W.R. Kulatunga Bandara, (more correctly W.R. Kularatne Badara) Assistant Commissioner of Labour, Kandy South District Labour Office, Kandy South.

B.M. Karunadasa (present Asst. Commissioner of Labour Kandy South), District Labour Office, Kandy South.

Petitioner

Vs.

W. Balasuriya, Sports of Kings,

Cross Street, Kandy.

Respondent-Petitioner-Respondent.

Before : A.W.A. Salam, Sunil Rajapakshe, J, J.

Counsel : Anusha Samaranayake S.S.C. for the applicant-respondent-petitioner and Ranjan Suwandaratne with Anil Rajakaruna for the respondent-petitioner-respondent.

Argued on : 13.06.2013

Decided on : 17.07.2013

A.W.A. Salam, J.

This is an application to set aside, by way of revision, the judgment delivered on 01.04.2009 by the Provincial High Court Judge of Central Province, setting aside the order dated 11.11.2005 of the Kandy Magistrate who initially directed the recovery of the Employee's Provident Fund dues from the respondent under Section 38 (2) of the Employee's Provident Fund Act (hereinafter referred to as the "Act")

At the commencement of the proceedings before the learned Magistrate, the respondent was summoned and asked to show cause against the recovery of the sum mentioned in the certificate as a fine imposed by court. Stating his position as against the recovery process initiated, he took up the position that the business in respect of which the EPF contributions are said to be due is a horse racing business and the same has been made unlawful by Section 3 (3) (b) and punishable under Section 11 of the Betting on Horse Racing Ordinance. Elaborating on his objection, he submitted that the sum of money referred to in the certificate would ultimately accrue to the benefit of an employee who has entered into a contract of employment knowing it to be illegal. He stated that as the employee for whose benefit the EPF contributions are said to be due had entered into an illegal contract and therefore he is not liable to make contributions.

The learned Magistrate ruled out the objection raised by the respondent as it is devoid of any merits and directed the sum mentioned in the certificate be recovered.

Aggrieved by the said order, the respondent invoked the revisionary jurisdiction of the Provincial High Court. The High Court of the Province, exercising the revisionary powers vested in it, decided *inter alia* that the business concerned being unlawful, is not under any legal duty to contribute to the EPF. Hence, the order of the Magistrate was set aside.

The present revision application has been filed by the State, to have the said judgment of the Provincial High Court revised. There is no controversy that the employee in respect whom contributions to the EPF are due worked under the respondent. The solitary question that arises for determination in the revision application is whether the respondent can be absolved from liability on the ground urged by him.

Superficially, the authorities cited by the parties, appear to point to a wide divergence of opinion but a close scrutiny of the relevant authorities reveals just the contrary. The legal position prevails with regard to the issue at hand therefore is quite plain, and simple. The reason as to what influenced the learned Magistrate and High Court judge to hold conflicting views needs to be addressed now.

As regards the respondent's liability to contribute to the EPF Fund, the Magistrate followed the decision in Mudalige Group (Pvt) Ltd Vs Commissioner of Labour 2003 3 SLR 359. In that case Udalagama, J dealing with the identical issue held *inter alia* that the business of betting on horse racing falls within the definition of the expression "covered employment" as defined by regulations made under the Provisions of the Employee's Provident Fund Act.

The Provincial High Court Judge on the other hand elected to follow the *ratio* in Gratian Peiris Vs. Wilson Balasuriya & Sons Ltd decided by the same Court (by another judge previously) in appeal No 173/2003, probably on the mistaken assumption that the said judgement of the High Court in the case of Gratian peiris was affirmed by the Supreme Court in SC. Spl. LA No 34/2007.

Dealing with this aspect the learned High Court Judge states as follows..

ශ්‍රේෂ්ඨාධිකරණය විසින් 2007 ජුනි 11 වැනි දින තීරණය කොට ඇති වාර්තා ගත නොකරනලද නඩුවක් වන 34/07 ග්‍රේෂන් එදිරිව විල්සන් බාලසුරිය පුතු සමාගම නඩුවෙහි උගත් ත්‍රී පුද්ගල විනිශ්චමඩුල්ලක් තීරණය කොට ඇත්තේ නීතිවිරෝධී ව්‍යාපාරයක් සම්බන්ධ කටයුත්තක් කෙරෙහි කම්කරු විනිශ්චය සභාවට ඉල්ලීමක් ඉදිරිපත් කොට සහනයක් ලබා ගැනීමට හැකියාවක් නොමැති බවයි. මහනුවර මහාධිකරණයේදී ඇති තීන්දුවක් ශ්‍රේෂ්ඨාධිකරණය විසින් අනුමත කොට ඇති බව එකී ත්‍රී පුද්ගල ශ්‍රේෂ්ඨාධිකරණය නඩුවේ නියෝගයෙන් අනාවරණය වේ.

The learned High Court judge was greatly influenced by the misconception that the judgement of the Provincial High Court of Central Province in appeal No 173/2003 had been considered by the Supreme Court in SC. LA. No 34/2007 on 11 June 2007 and affirmed by the Supreme Court. However, on a perusal of the relevant it appears that the Supreme Court in the said leave to appeal application on the date specified above has dismissed the application for leave to appeal. In the circumstances, the learned High Court judge was clearly in error when he came to the conclusion that the Supreme Court had affirmed the judgement of the Learned and High Court Judge in Gratian Peiris's case.

By reason of the misconstruction of the outcome of case No SC. LA. No 34/2007, the learned High Court Judge was compelled to look at the judgement of Udalagama,J in Mudalige Group (Pvt) Ltd Vs Commissioner of Labour as being overturned. As the Supreme Court had not gone into the merits of the judgement in the case of Gratian Peiris but only examined the judgement with the wiew to ascertain the existence of exceptional circumstances to grant special leave, it can. neither constitute the affirmation of the judgement pronounced by the Provincial High Court in Gratian Peiris's Case nor can it be considered as a decision over ruling the judgement of Udalagama, J in the case of Mudalige Group (Pvt) Ltd Vs Commissioner of Labour. The gravity of the error committed by the learned High Court Judge, in this

respect is such which requires me to focus on the facts and the law that was applied in the case of Gratian Peiris and in Mudalige Group Private Limited case.

The case of Gratian Peiris originated in the Labour tribunal upon the workmen (Gratian Peiris who is incidentally the ultimate beneficiary of the Provident fund dues alleged to be due in this case) complaining of wrongful and unjustifiable termination of work by the respondent who is alleged to be the employer defaulter in this application. The Labour tribunal dismissed the application based on the ground that the contract of employment has been entered between the parties for an illegal purpose. Gratian Peiris, preferred an appeal to the Provincial High Court of Kandy in case No 173/2003, which too culminated in its dismissal. The Judge of the Provincial High Court setting out the reason for the dismissal of the appeal stated in his judgement that he opts to follow the *ratio decidendi*-through the doctrine of *stare decisis* in the case of Perera Vs Dharmadasa 1978/79 2 SLR 287 in preference to the judgement in Mudalige's case, for the reason that Perera Vs Dharmadasa is on all fours with Gratian's case. The Provincial High Court Judge who heard the appeal took the view that he was bound by the decision in Perera Vs Dharmadasa (Court of Appeal) in which it was held that a workman employed as a cashier to accept bets on horse racing with the full knowledge and acquiescence that he

was serving the employer in an unlawful business, is not entitled to seek the enforcement of the contract.

Distinguishing the facts of the case of Mudalige from that of Perera Vs Dharmadasa, the learned High Court Judge observed as follows..

> උදලාගම විනිසුරුතුමාගේ මුදලිගේ සමාගම එදිරිව කම්කරු කොමසාරිස් යන නඩුවේ බොහෝ දුරට පදනම්කරගෙන තිබුනේ සේවා අර්ථ සාධක අරමුදල් රෙගුලාසි සම්බන්ධයෙන් පමණි. එහෙත් එම තීන්දුවේ දක්වා තිබූ අර්ථ සාධක අරමුදල් පනත යටතේ සේවකයෙකුට හිමිවියයුතු ව්‍යවස්ථාපිත අයිතීන් ව්‍යාපාරය නීති විරෝධී ව්‍යාපාරයක් යන මුවාවෙන් ගෙවීම පැහැර හැරීමට ඉඩ දීම අසාධාරණය. එකී තත්වය සමඟ මමද එකඟවෙමි.
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> Page 4 of the judgment.

Elaborating on it the learned High Court judge in the Case of Gratin Peiris further observed thus..

> 1988 අංක 40 දරණ පනතෙන් බදු අයකර ගැනීමේ කාර්යය පටිපාටිය පමණක් වූ සීමිත කරුණක් සඳහා නීතිය වෙනස් වුවද මෙවන් ඔට්ටු ඇල්ලීමේ ව්‍යාපාරය යටතේ රැකියාව කරන්නෙකුට සිය අයිතීන් තහවුරු කර ගැනීම සඳහා වූ විධිවිධාන ඉදිරිපත් විය යුතු කාලය ඵලඹ ඇතැයි සිතන අතර ඒ සඳහා නීතිය තනන්නන්ගේ අවධානය යොමු විය යුතු කාලය එළඹ ඇත.
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> Page 8 of the judgment

From the passage cited above it is abundantly clear that in 173/2003, the Provincial High Court of Kandy referred to the judgment of Udalagama, J in Mudalige's case as being the correct approach to be adopted in the recovery

of unpaid EPF contributions by an employer who runs a business of betting on horse racing.

In the circumstances, even assuming that the Supreme Court has affirmed the judgement of the High Court in the case of Gratian Peiris yet it cannot have the effect of overruling the judgement in Mudalige's case because the latter case arises from a statutory liability as between the State and the defaulter. In the circumstances, it would be seen that the entire exercise of the learned High Court Judge classifying the order of the learned that Magistrate as being contrary to law is to be looked as of a grave misdirection of law.

It will be interesting to refer to the judgement of the High Court in Gratian Peiris's case where the Learned High Court Judge expressed by way of obiter his unreserved and candid opinion of the decision in Mudalige's case. In doing so the learned High Court Judge stated that the approach adopted to resolve the issue in Mudalige's case is the right attitude to deal with an unlawful business to recover the EPF dues. For reasons stated above, undisputedly the learned High Court Judge should have followed the judgment in Mudalige's case inter alia for the following reasons...

1. The judgment in Mudalige's case pronounced by the Court of Appeal was binding on the High Court whereas the judgment in Gratian's case had proceeded from the Provincial High Court,

although in the impugned judgment it is identified incorrectly as a judgment of the Supreme Court.

2. Assuming that the learned High Court Judge was right in treating the judgment of the Provincial High Court in Gratian's case on par with a judgment of the Supreme Court, his failure to apply the obiter expressed with regard to the recovery of EPF dues to the facts of this case is discriminatory.
3. The learned High Court Judge has failed to consider that the leave to appeal application against Mudalige's judgment also has been refused by the Supreme Court.
4. The learned High Court Judge has failed to appreciate that the factual position and the core issue in Mudalige's case on "all fours" with the case in hand.
5. The judgement in Gratian's case dealt with the right to maintain an application under Section 31(b)(1) of the Industrial Disputes Act by a workman who had entered into a contract to serve the master in an unlawful business and therefore not relevant to the present case.
6. The judgment of Udalagama, J in Mudalige's case had not been overruled or rendered invalid to date and remained good law and the learned High Court Judge has misdirected himself in

concluding that the judgment in Mudalige's case had been overturned by the Supreme Court.

The learned Senior State Counsel has contended that in terms of the rules promulgated under the Provisions of the Employees Provident Fund the business of the respondent should be considered as a "covered employment". Liability to contribute to EPF under the EPF Act arises only if the employment concerned falls under the category of "covered employment" as defined in the regulations made under Section 46 of the Employee's Provident Fund Act. The expression "covered employment" has been defined by regulations published in the Government Gazette as far back as in 1964 October under reference No 14,200. Quite unusually the expression has been defined not by inclusionary rule but by means of adopting the exclusionary rule. In terms of the said Government Gazette every employment is a "covered employment" except employment under the Government of Ceylon and under the Local Government Service Commission, established under the Local Government Service Ordinance Chapter 264.

A proper reading of the regulation which defines the expression "covered employment" sheds enough light as to the manner in which an employment has to be identified for the purpose of the application of the provisions of the Employee's Provident Fund Act. The regulation attracts every type of employment into the Employee's Provident Fund scheme, except what has

been specifically exempted. Probably the relevant act being a piece of social welfare legislation aimed at securing the superannuation benefit, the legislature had been benevolently magnanimous in extending a helping hand to the employees at an hour of need. The reason for excluding the employment under the Government and Local Government Service Commission is quite obvious. That is because the superannuation scheme enjoyed by the employees under the Central Government and the Local Government is quite secure and the Government and Local Government servants are adequately benefitted by W&OP, payment of gratuity and monthly pension schemes which features not available under the "covered employments".

Taking into consideration the above, the business of betting on horse racing, in my view should necessarily be considered as a "covered employment' particularly because the regulation which defines the said employment by means of exception has not excluded the business run by the respondent. Another important contention made by the Deputy Solicitor General revolves round the maxim known as *"allegans suam turpitudinem non est audiendus"* which means that a person alleging his own wrongdoing (turpitude) shall not be heard. In other words no person may base a legal claim upon an illegal act which has been asserted against oneself. As regards the maxim that a person alleging his own wrongdoing shall not be heard in order to avoid

unnecessary repetition, suffice it to reproduce certain portions of the decision in Mudalige's case...

> *In any event the petitioner-company is not entitled to evade payment relying on the Company's own illegal conduct which in my view would amount to controverting principles of public policy. In fact the petitioner-company by this application also appears to evade its fiscal liability to defraud the Government of revenue. The Betting and Gambling Levy Act, No.40/88 is valid law for the purpose of State revenue and betting and gambling are not considered illegal for revenue purposes. The right to recover Employee's Provident Fund flows from the statute and the fact of employment is sufficient for the initiation of action against the employer quite independently of the contract of employment which could be considered superfluous in an action of this nature. Further when the State sets the law in motion against a defaulter to recover unpaid Employee's Provident Fund dues, it cannot be assailed on the maxim of allegans suam turpitudinem non est audiendus as the State is not a party to the contract of employment.*

The right to recover unpaid Employee's Provident Fund dues remains with the State and the employee has no right of action to recover the same. The learned Deputy Solicitor General has contended that similar construction has also been taken under the Inland Revenue Act wherein under item 28 the 5th schedule to the Inland Revenue Act No 10 of 2006 as amended by Act No 10 of 2007 such part of the taxable income of any person or partnership as consist of profit and income from Betting And Gaming Act is liable to be taxed. Thus the legislature has by these Statutes recognized that although the conduct of a business may contravene the laws, yet it

should not be considered exempt from other statutory obligations.

The learned counsel for the respondent submitted that our law recognizes the principle that no employee can claim any statutory benefit or other benefits in relation to an illegal employment. He has cited several judgements both delivered by our courts and overseas. None of these judgements are directly relevant to the issue because the employee plays no role when section 38 is invoked. The employee has no status in an application filed under section 38 (2) of the EPF Act unlike in a case under Section 31(b) (1) of the Industrial Disputes Act where the employee complains of wrongful termination of his service. As far as the recovery of unpaid EPF is concerned, in my opinion, it is the inherent statutory right of the State to recover the same from any defaulter. Therefore it is not open to the respondent to object to section 38 (2) being invoked by the State as the State is not a party to the contract of employment. In the result, the maxim *allegans suam turpitudinem non est audiendus* cannot be applied against the State in proceedings initiated under Section 38 (2) of the EPF Act.

In the circumstances, it has been submitted on behalf of the State that the legality or otherwise of a business of betting on horse racing is not a matter that comes within the scope of the inquiry before the Magistrates having regard to the manner in which the liability arises under the EPF Act. In the circumstances, I am totally in

agreement with the above submissions made on behalf of the State and in my opinion to embark upon such an investigation by the Magistrates except as laid down in City Carrier case would defeat the real objectives of the EPF Act.

For reasons stated above, it is my considered opinion that the learned High Court judge has erred in the interpretation of the law when he came to the conclusion that the order of the learned Magistrate is contrary to law and liable to be set aside. As such, the said judgement of the learned High Court judge having ended up in a miscarriage of justice, the impugned judgement of the learned High Court judge is liable to be set-aside in the exercise of the revisionary powers of this court. Accordingly the impugned judgement of the learned High Court judge is set aside and the order of the learned Magistrate is restored subject to costs.

Judge of the Court of Appeal

Sunil Rajapakshe, J.

I agree.

Judge of the Court of Appeal

NR/-