

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

**In the matter of an Application for a mandate in the  
nature of *Writ of Certiorari and Prohibition* under  
article 140 of the Constitution of the Democratic  
Socialist Republic of Sri Lanka**

JV Gokal (Ceylon) Private Limited,  
No. 70, Sedawatta Road,  
Wellampitiya.

**PETITIONERS**

**CA/WRIT/04/2013**

**Vs,**

1. J.V. De Soyza,  
Assistant Commissioner of Labour,  
The Labour Office- Central Colombo  
District,  
Colombo 05.
2. V.B.P.K. Weerasinghe,  
The Commissioner General of Labour,  
Department of Labour,  
Colombo 05.
3. D.L.L.M.C. Fernando,  
887/B/1, Pahalawela Road,  
Thalangama South,  
Battaramulla.
4. Attorney General,  
Attorney General's Department,  
Colombo 12.

**RESPONDENTS**

**Before: Vijith K. Malalgoda PC J (P/CA) &  
H.C.J. Madawala J**

**Counsel:** D.P Kumarasinghe PC with Mahendra Kumarasinghe and Jayarani Kumarasinghe  
for the Petitioner

Manohara Jayasinghe SC for Respondents

Argued on: 11.08.2015

Written Submissions on: 28.10.2015

**Order on: 03.02.2016**

## **Order**

**Vijith K. Malalgoda PC J**

Petitioner to the present application JV Goakal (Ceylon) Private Limited had come before this court seeking inter alia,

- a) A mandate in the nature of a *Writ of Certiorari* quashing the direction dated 19.09.2012 (P-30) of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the Petitioner to pay the amount of Rs. 627 200/-
- b) A mandate in the nature of a *Writ of Prohibition*, prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from seeking to recover any money as EPF contributions in respect of the 3<sup>rd</sup> Respondent.

Petitioner a limited liability company duly incorporated in Sri Lanka is a fully owned subsidiary of J.V. Overseas Trading Limited a Company based in Dubai. According to the Petitioner, the Petitioner Company was established in the year 2003 with an initial investment of US \$ 5 Million and was engaged in the business of processing, blending, packing and exporting value added Sri Lankan tea.

Petitioner has employed the 3<sup>rd</sup> respondent as its executive director at its inception since 23.06.2003 and the said post was one of the two highest and equal ranking positions in the Petitioner Company. The other equal ranking post of Director was held by one Vijith Perera.

As submitted by the Petitioner before this court the 3<sup>rd</sup> Respondent, prior to his appointment as the executive director of the Petitioner Company, was serving as a consultant to the J.V. Overseas Trading Company, the parent company of the Petitioner based in Hong Kong and therefore the parent company of the Petitioner reposed much trust on the 3<sup>rd</sup> Respondent.

The present application arises from a direction of the 2<sup>nd</sup> Respondent relating to the non-payment of dues under *Employees Provident Fund Act No.15 of 1958* to the 3<sup>rd</sup> Respondent by the Petitioner Company.

As submitted by the Petitioner before this court an inquiry into the non- payment of Employees Provident Fund contribution was initiated after the 3<sup>rd</sup> Respondent's services were terminated by the new management of the Petitioner Company. Prior to his termination the 3<sup>rd</sup> Respondent was placed as the Vice President, International Marketing and Business (Middle East Region) with effect from 16.06.2005 after removing him from his previous position pending an independent audit quarry by Messrs BDO Burah Hathy and Company.

As a result of the said Audit quarry several serious acts of misconduct was revealed and the services of the 3<sup>rd</sup> Respondent was subsequently terminated by giving reasons for his termination (P-8). A complaint was made at the Criminal Investigations Department with regard to misappropriation of funds belonging to the Petitioner Company and it was revealed during the argument that the 3<sup>rd</sup> Respondent was served with an indictment in the High Court of Colombo.

As observed by this court the 3<sup>rd</sup> Respondent had complained to the 2<sup>nd</sup> Respondent that the Petitioner Company has failed to make both, the employees and Employers contribution and thereby acted in violation of the provisions of the Employees Provident Fund.

In this regard, I wish to first consider the position taken up by the Petitioner before this court. According to the Petitioner, the 3<sup>rd</sup> Respondent held one of the senior most managerial and supervisory position in Petitioner Company and there was no other person within the country that oversaw the 3<sup>rd</sup> Respondent's discharge of his duties which included the remitting of the EPF contribution of the employees of the company including the EPF contributions of the 3<sup>rd</sup> Respondent.

It is the position of the Petitioner that the 3<sup>rd</sup> Respondent being the person who oversaw the remitting of EPF contributions of the employees had abused his managerial authority and taking advantage of the fact that there was no one in Sri Lanka to oversee his function, directed that no deduction shall be made from his salary as the employee contribution of EPF and has in fact collected that amount as part of his monthly salary.

In support of the above contention Petitioner has produced marked P-15 pay slips of the 3<sup>rd</sup> Respondent for the months of November and December 2004, February, June, July August, September, October, November and December 2005 which indicates that the 3<sup>rd</sup> Respondent had collected his salary without the 8% employee contribution of the EPF payment.

It is further observed by this court that the 3<sup>rd</sup> Respondent has not been registered with the Employees Provident Fund, to obtain an EPF number to make the contribution.

However the Petitioner has produced marked P-14 the Receipts issued by Employees Provident Fund, with regard to the payment made by the Petitioner to the EPF during this period.

In support of his contention the Petitioner has further submitted an affidavit marked P-16 from the Manager- Administration of the Petitioner Company and according to his affidavit, on the instructions of the 3<sup>rd</sup> Respondent and Mr. Perera who was the other Director, no contribution was made to the Employees Provident Fund on behalf of them, but, Employees Provident Fund contribution for all the other employees were made by the Petitioner Company, since both the 3<sup>rd</sup> Respondent and Mr. Perera

ranked on par with each other in the Petitioner Company during this period and there was no one competent to override their decisions at that time.

When the new management took over the management, of the Petitioner Company after appointing the 3<sup>rd</sup> Respondent as the vice president, the Petitioner Company has started contributing to the EPF on behalf of the 3<sup>rd</sup> Respondent. In support of the above position, the Petitioner has produced documents marked P-19 and P-20.

From the above evidence placed before this court, it is clear, that the non-payment of EPF contribution with regard to the 3<sup>rd</sup> Respondent was an act initiated by the 3<sup>rd</sup> Respondent himself, in order to collect his full salary without any deduction (employee contribution).

Therefore it is further observed by this court that the complaint made by the 3<sup>rd</sup> Respondent to the 2<sup>nd</sup> Respondent too was incorrect since the 3<sup>rd</sup> Respondent has collected the employee contribution of the 3<sup>rd</sup> Respondent by himself without allowing that to be deducted from his salary using his authority in the Petitioner Company.

However during the Argument the Learned State Counsel representing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents took up the position that the 2<sup>nd</sup> Respondent is the government officer statutorily charged with the responsibility of protecting the interest of the work force of Sri Lanka who suffers continued exploitation of unscrupulous employers. As such the Commissioner of Labour in keeping with his role as the sentinel of this nation's labour force, will be justifiably reluctant to make an adverse order against an employee unless there is cogent material whose credibility has been established under the same standards that would be applied in a court of law.

Even though the above argument of the counsel for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents is acceptable in general terms, the decisions of the 2<sup>nd</sup> Respondent in the present case cannot be justified by the said argument. As observed by this court, 'C' forms produced marked P-13 clearly indicates that the Petitioner has duly paid the EPF contributions for all his employees except the two Directors and

therefore one cannot argue that the 3<sup>rd</sup> Respondent and the other director of the Petitioner Company was subject to exploitation by the Petitioner Company.

Section 16 of the Employees Provident Fund Act No. 15 of 1958 reads as follows,

**Section 16;**

Where contributions payable under this Act in respect of any month have not been made to the Fund before the last day of the succeeding month and the employer is unable to explain to the satisfaction of the Commissioner that the failure to pay such contribution was due to circumstances beyond his control, he shall be liable to pay to the fund in addition to the amount of the contributions due, a surcharge on such amount calculated in the following manner,

- d. where the contributions are in arrears for a period exceeding six months, a surcharge of twenty five per centum of the amount of the contributions due.

When considering the material placed before this court, this court is in agreement with the Petitioner when he argued, that when imposing a surcharge of 193, 200/- the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents have failed to realize the above provision during the inquiry conducted by them.

In this regard the proceedings of the inquiry conducted by the Respondents are before us produced marked P-23 by the Petitioner and the Respondents have not denied the said document in their objections before this court. When going through the said report, it is observed by us that the inquiring officer has failed to realize the importance of Section 16 of the Employees Provident Fund Act No 15 of 1958 and to consider whether the Employer has explained before him that the failure to pay such contribution was due to circumstances beyond his control.

In this regard we are mindful of the decision by the Supreme Court in *Hapuarachchi and Others V, Commissioner of Elections and Others 2009 (1) Sri LR 01*, where the Supreme Court ordered the

Respondent to re consider the application submitted by the Petitioners and to give reasons for his decision following such re consideration.

It is further observed by this court that the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents have misdirected themselves when they conclude that the Petitioner has to pay the employer contribution of Rs. 173 600/- as part of EPF arrears to the 3<sup>rd</sup> Respondent when it was clear that the 3<sup>rd</sup> Respondent had collected the same fraudulently from the Petitioner during his employment with the Petitioner, but the inquiry officer has failed to give his mind to this aspect during the inquiry.

However this court is of the view that the Petitioner is liable under the Employees Provident Fund Act No.15 of 1958 to make a payment of Rs.266, 400/- as the Employer contribution to the 3<sup>rd</sup> Respondent.

For the reason set out above, this court decides to issue a Mandate in the nature of *Writ of Certiorari* as prayed in paragraph (ii) of the Petition quashing the impugned decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 19.09.2012 (P-30) by which the Petitioner was ordered to pay Rs. 627, 200/-.

This court is not inclined to issue a mandate in the nature of *Writ of Prohibition* as prayed in paragraph (iii) to the Petition for the reasons discussed above. 1<sup>st</sup> and 2<sup>nd</sup> Respondents are free to hold a fresh inquiry having in minded the observations made by this court in the present case.

**PRESIDENT OF THE COURT OF APPEAL**

**H.C.J. Madawala J**

I agree,

**JUDGE OF THE COURT OF APPEAL**