

**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

CA/WRIT/337/2014

1. Brumbys International Private Limited,
No. 17, Narahenpita Road,
Nawala.
2. D. Don Priyantha Nirmal Weerasinghe,
No. 17, Narahenpita Road,
Nawala.

PETITIONERS

Vs,

Employees Trust Board,
1st Floor, Labour Secretariat,
Narahenpita, Colombo 05.

RESPONDENT

Before: Vijith K. Malalgoda PC J (P/CA)

Counsel: S.N. Vijithsingh with Reshaal Seresinghe for the Petitioners
Hashini Opatha SC for the State

Argued on: **03.06.2016**

Written Submissions on: 02.09.2016

Judgment on: 31.03.2017

Order

Vijith K. Malalgoda PC J

Petitioners to the present application Brumbys International Private Limited and D. Don Priyantha Nirmal Weerasinghe have come before this court seeking inter alia,

- b) Issue a writ of *Certiorari* quashing the certificate dated 26th March 2014 issued by the Respondent in terms of section 28 (3) of the Employees Trust Fund Act No 46 of 1980, a copy which has been annexed here to marked as P24.
- c) Issue a writ of *Prohibition* prohibiting the Respondent from acting on and/or proceeding with and/or implementing the certificate dated 26th March 2014 issued by the Respondent in terms of section 28 (3) of the Employees Trust Fund Act No 46 of 1980, a copy of which has been annexed here to marked as P24.

The 1st Petitioner, company incorporate and registered under the Companies Act No 7 of 2007 was in the business of providing business process outsourcing (commonly known as BPO) to international customers through sub contracts received through a foreign principal.

The 2nd Petitioner is one of the two directors of the 1st Petitioner. As submitted by the Petitioners, the 1st Petitioner was providing the infrastructure facility and personnel to the foreign principal and all the expences including the payment to the Directors of the 1st Petitioner was paid by the foreign principal and therefore the 1st Petitioner was considered as tax free and zero rated VAT status by the Department of Inland Revenue.

The 1st Petitioner who had contracted with a foreign principal namely Tiway Tech SDN BHD of Malaysia, in the year 2004 initially for a period of 02 years and the said contract extended annually until it was terminated in April 2009.

As revealed before us all statutory payments with regard to the personnel supplied by the 1st Petitioner to the said foreign principal was paid by the principal through the 1st Petitioner who is the Sri Lankan service provider.

Since the case in hand referred to the contributions made to the Employees Trust Fund only, I will first deal with the requirements under the Employees Trust Fund Act No. 46 of 1980 with regard to the payments and surcharges payable under the said Act.

Section 16 (1) of the act sets out the liabilities of the Employers regarding payment of contribution as follows;

16 (1) The employer of every employee to whom this act applies shall, in respect of each month during which such employee is employed by such employer, be liable to pay in respect of such employee, to the fund, on or before the last day of the succeeding month, a contribution of an amount equal to three per centum of the total earnings of such employees from his employment under such employer during that month.

Section 27 of the said act deals with instances of default as follows;

27 Where any contribution payable under this act had not been paid to the fund on the due date and the employer is **unable to explain to satisfaction of the board 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 such contribution a surcharge of such amount calculated in the following manner:

- a) Where such contribution is in arrears for a period not exceeding ten days, surcharge of five per centum of the amount of such contribution

- b) Where such contribution is in arrears for a period exceeding ten days but not exceeding one month, a surcharge of fifteen per centum of the amount of such contribution
- c) Where such contribution is in arrears for a period one month but not exceeding three months, a surcharge of twenty per centum of the amount of such contribution
- d) Where such contribution is in arrears for a period three months but not exceeding six months, a surcharge of thirty per centum of the amount of such contribution
- e) Where such contribution is in arrears for a period six months but not exceeding twelve months, a surcharge of forty per centum of the amount of such contribution
- f) Where such contribution is in arrears for a period exceeding twelve months, a surcharge of fifty per centum of the amount of such contribution

(emphasis added)

As further revealed before this court the 1st Petitioner had paid all his Employees Trust Fund contributions to the Labour Department with regard to his employees who were working for the Malaysian Principal but the Petitioners have admitted that there were regular delays in making the payment since the 1st Petitioner had to submit all the payments and waited until the foreign principal remit the money with the Petitioners. In the said circumstance the 1st Petitioner in addition to making contributions to the Employees Trust Fund had paid surcharges for the delay.

In April 2009 the 1st Petitioner had to close down the operation, since the contract with the foreign principal was terminated. However the principal had agreed to pay compensation and any dues to the relevant authorities incurred during the operations with the 1st Petitioner up to 2009. Accordingly

compensation was paid to all the employees who were working with the 1st Petitioner for the foreign principal at the time of such closure and all the employees accepted the compensation paid to them.

The said closure was reported to the Commissioner of Labour with a copy to the Employees Trust Fund by letter dated 3rd August 2009 (P-3). In response to the above letter, the 2nd Petitioner had received a letter dated 17/10/2009 (P-4) which reads thus,

Closure of Business

This refers to your letter dated 03.08.2009 addressed to our finance manager (revenue) on the above matter

As you have requested to close your contribution file in Employees Trust Fund you have to settle all the contributions and surcharges due to the Employees Trust Fund.

Therefore we are sending herewith a report on outstanding surcharges due from your establishment amounting to Rs.....

Please make the payment at your earliest

In this regard, the Petitioner takes up the position that the Employees Trust Fund Board had neither informed the amount due as compensation in the said P-4 nor submitted a report indicating the outstanding surcharge to the said Board. However, much prior to the said letter, on 27.02.2007 the said Employees Trust Fund board had informed the Petitioner to make payment with regard to the surcharges for the period 2005 and 2006 and the Petitioner had paid the said surcharge to the Employees Trust Fund Board.

The 1st Petitioner was regularly informed by the said Employees Trust Fund Board to make the surcharge payments and the Petitioner too had made those payments promptly. (P6A and B, P7A and B, P8A and B, P7AB and ABC, P9A and B, P10A and B and P11A and B) whilst referring to the said documents the Petitioners took up the position that, by the said documents the 1st Petitioner was

surcharged up to April 2009 and the Petitioner had no reason to believe that he had to pay arrears for the period 2004-2005. As revealed before this court the Petitioner re-commenced a similar type of business after finding a new foreign principal in May 2011 and accordingly commenced contributing to its present employees under the same Employees Trust Fund number. While the 1st Petitioner was making the Employees Trust Fund contributions based on the new contract with a different principal, the Respondent wrote to the Petitioner by letter dated 05.02.2013 informing the Petitioners to make a surcharge payment of Rs. 13,900.50 for the period of 01/2004-06/2004 and 05/2011.

When the Petitioners' protested to the said surcharge payment on the ground that the Petitioners have settled all surcharges prior to the termination of their previous contract, another notice was served by the Respondent carrying the same date with a surcharge amounting to Rs.210,492.08 for the period 01/2004-12/2004,01/2005-04/2005 and 11/2012.

However the same authority has once again sent two final notices both dated 31.10.2013 to cover the due date 2004/01 to 2004/08 and 2004/09 to 2005/04 to the value of Rs. 92,455.98 and 95,842.45 respectively. (P-17 and P-18) according to the said final notice, the total surcharge the 1st Petitioner was asked to pay was Rs. 188,298.43.

Even though the Respondent has taken up the position that the surcharge for the period 2004 and 2005 was never paid by the Petitioners, the three sets of documents referred to above clearly reveals that the Respondents were not sure of the exact amount due from the Petitioners.

P-4 dated 17.10.2009 referred to an outstanding surcharge amount, but the said amount was neither indicated nor annexed as a report, for the Petitioners to settle the same by obtaining the same from the foreign principal.

The Petitioners position with regard to this payment is that, if he was noticed of the surcharge amount when they wrote P-3 to the Respondents, they could have obtained the money from the

foreign principal but due to the delay in notifying the surcharge for 4 years, the Petitioners was prevented from claiming it from the foreign principal.

However as observed by me earlier in this judgment, payment of contribution and surcharge is a statutory requirement under the Employees Trust Fund Act and therefore the Petitioners being the registered employer under the said act has a duty to pay the contribution as well as the surcharge. In the case in hand there is no allegation of Petitioner's failure to make contributions of Employees Trust Fund, but the final notices referred only to surcharges for the period 2004 and 2005. In this regard the Respondents have failed to place before this court that the said respondents had informed the Petitioner of his failure to pay the surcharge for the period of 2004 and 2005 at any time prior to 2013. Unlike in any other statutory payment due under a statute, section 27 of the Employees Trust Fund Act has provided the employer to offer an explanation with regard to the nonpayment of Employees Trust Fund contributions. In the said circumstances the Employees Trust Fund Board has a duty to consider the explanation offered by the Petitioners with regard to the nonpayment of Employees Trust Fund contributions (including surcharge) by the Petitioner to the Respondent Board.

In this regard this court is mindful of the following circumstances under which the Petitioners are claiming that they are not in a position to make the surcharge payment due for the period 2004 to 2005.

- a) All the expenses including the payment to the Directors of the 1st Petitioner was paid by the foreign principal and therefore the 1st Petitioner was considered as tax free and zero rated VAT status by the Department of Inland Revenue.
- b) The contract with the foreign principal was terminated in April 2009 and the principal had agreed to pay compensation and any other dues to the relevant authorities incurred during the operation of the BPO agreement.

- c) The said closure was reported to the Respondent by letter dated 03.08.2009.
- d) Respondent by letter dated 17.10.2009 informed the Petitioner to settle the outstanding amounts as indicated in the attached report to the value of an amount not indicated in the letter and no attachment was annexed to the said letter.
- e) Petitioner commenced operation with a different principal in May 2011 and continued to pay Employees Trust Fund to the new employees under the new agreement.
- f) After 5 years to the termination of the BPO agreement with the original foreign principal, in the year 2013 the Petitioner was asked to pay a surcharge of Rs. 13,900.50.
- g) When the Petitioner protested to the above request the Petitioner was served with two directives which were contradictory to each other.

and observe that the Employees Trust Fund Board failed to give a proper consideration under section 27 of the Employees Trust Fund Act No 46 of 1980 with regard to the position taken up by the Petitioners before the Employees Trust Fund Board, when reporting the Magistrate Colombo that the 1st Petitioner had failed to make payments with regard to Employees Trust Fund contributions and surcharges to the value of Rs. 188,298.43 or in other words the Employees Trust Fund Board had failed to act fairly when acting under section 27 of the Employees Trust Fund Act No 46 of 1980.

In this regard this court is mindful of the decision in *J.B. Textile Industries Ltd V. Minister of Finance and Planning (1981) 2 Sri LR 238* to the effect;

“Where a statute empowers a minister to make orders which interfere with the rights of property enjoy by citizen, the minister is in the absence of clear and express provisions to the contrary set out in the statute concerned, ordinarily under a duty to observe the Principles of Natural Justice and/or to act fairly before he exercise such powers, even though the said statute itself is silent in regard to the adoption of such a procedure.”

In the case of *Sahara India V. CIT (2008) 14SCC* Indian Supreme Court whilst discussing the rules of Natural Justice had observed, “Rules of Natural Justice are not embodied rules. The phrase Natural Justice is also not capable of precise definition. The underlying Principle of Natural Justice, evolves under common law, is to check arbitrary exercise of power by the state or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action.....

The duty to “Act fairly” by public functionaries was discussed by Wade and Forsyth as,

“Where an Act of Parliament confers upon an administrative body functions which involves its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is presumption that parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions.” (**Administrative Law HWR Wade & C.F. Forsyth 10th Edition page 415**)

In these circumstances the Petitioners are entitled to the relief claimed against the Respondent as prayed in paragraph (b) and (c) to their petition.

Application allowed and the relief is granted as prayed in paragraph (b) and (c) to the petition.

PRESIDENT OF THE COURT OF APPEAL