

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

In the matter of an Application for a writ of Certiorari made under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**C.A. (Writ) Application**

**No. 279/2015**

Sussex Educational Services Limited  
153/1, Dharmapala Mawatha,  
Colombo 7.

**Petitioner.**

Vs.

1. Commissioner of Labour,  
Department of Labour,  
Labour Secretariat,  
Colombo 5.
2. Assistant Commissioner of Labour,  
No. 4A, Rahula Cross Road,  
Matara.
3. K.M. Jayawardene,  
'Hill House'  
Mahapoda,  
Karandeniya.

4. Honourable Magistrate,  
Magistrates Court,  
Maho.

**Respondents.**

**C.A. Writ Application No. 279/2015**

Before : Vijith K. Malalgoda, P.C., J (P/CA) &  
S. Thurairaja, P.C., J.

Counsel : H. Hisbullah with M. Jegatheswaran for the  
Petitioner.  
Vicum de Abrew, D.S.G., for 1st, 2nd and  
4th Respondents.

Argued on : 15.03.2017.

Written Submissions

Filed on : 21.03.2017.

Judgment on : 24.03.2017.

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**ORDER**

**S. Thurairaja, P.C., J.**

Petitioner Sussex Educational Services Limited previously known as Ceylinco Sussex Educational Services Limited had employed the 3rd Respondent as a Teacher from 16<sup>th</sup> October 2006 to 15<sup>th</sup> October 2007. (P2B) According to the letter of appointment he will be working at

Ambalangoda, among other conditions, both parties namely the Petitioner and the 3rd Respondent will be contributing for EPF and ETF. Para 9 of the said letter of appointment states as follows.

9. *It will be necessary for you to join the Employees Provident Fund and contributions to the fund will be in terms of Employees Provident Fund Act and regulations framed there under.*
10. *You will be entitled to the contributions to the Employees Trust Fund in terms of the provisions of the Employees Trust Fund Act and regulations framed there under.*

The Petitioner submits that the 3<sup>rd</sup> Respondent had reached 57 years when he was employed and submits a copy of the National Identity Card as P2A. As per the said National Identity Card the 3<sup>rd</sup> Respondent was born as 23<sup>rd</sup> April 1949. At the time of joining the Petitioner Company 3<sup>rd</sup> Respondent was 57 years and 5 months. 3<sup>rd</sup> Respondent continued working with the Petitioner with periodical extensions of the contract. As per P2D the 3<sup>rd</sup> Respondent was appointed as a Principal and placed at Matara branch. In the letter of appointment, it was stated that the 3<sup>rd</sup> Respondent will not be entitled for EPF because he is over 55 years. For easy reference I reproduce paragraph 2 of the said letter of appointment P9 as below.

*"You will be paid an all inclusive allowance of Rs. 35,000/- per month. As you are over fifty five (55) years of age, you will not be entitled for EPF and ETF."*

The same condition continues, in 2012 when the contract was extended.

It is admitted by petitioner in para 23 of the petition that EPF was paid from 2006 to October 2010. Thereafter on the basis of express terms set out in the said letter of appointment as extensions payment of EPF was discontinued.

The 2<sup>nd</sup> Respondent issued a determination on the petitioner for the payment and recovery of EPF from October 2009 to November 2012 and the amount stated as Rs. 223693 with a penalty of Rs. 111846 total of Rs. 335539.80. This final notice is marked as P3 and filed with the petition. Thereafter an action was instituted at the Magistrate Court of Matara under case No. 20138 for non payment of EPF. The summons is marked as P4 and produced with the petition.

The Petitioner seeking to quash the certificate filed by the 2<sup>nd</sup> Respondent which is marked as P6.

The Respondents raised an objection for unexplained delay in filing this application hence moves to reject this application *inlimine*.

On perusing the available materials it was found that final notice of action was given by the 2<sup>nd</sup> Respondent by letter dated 9<sup>th</sup> May 2014 (P3) since there was no response, an application was filed at the Magistrate Court dated 22.08.2014. (P7 impugned document). This application was filed on the 3<sup>rd</sup> July 2015 in this Court. There is a

delay of 11 months in filing this application. The Petitioner had not explained the delay in his petition.

For the sake of completeness I proceed further to see the legal argument taken by the Petitioner in this case.

The Petitioner submits that any person who is employed after 55 years is not entitled to join the EPF program in Sri Lanka. Because the Act provides the withdrawal after 55 years for Male and 50 years for Female.

The Petitioner submits that the 3<sup>rd</sup> Respondent was a retired public officer and when he joins a private sector which is covered by EPF Act, is not entitled for EPF. When the Counsel made submission in Court he crystallized his argument by saying that no one can join the EPF program after 55 years, if it is Male and 50 if Female. Counsel for the Respondent refute the claim and submitted there is no age limit for any one to join (subject to other laws) and if the employment is a "Covered Employment", under EPF Act it will be mandatory to contribute the EPF.

I refer Section 8 of the EPF act. It states as follows:

*(1) Any employment, including any employment in the service of a corporation whose capital or a part of whose capital is provided by the Government, may by regulation be declared to be a covered employment.*

*(2) Regulations may be made-*

- (a) to treat as a covered employment any employment outside Sri Lanka which is for the purposes of a trade or business carried on in Sri Lanka and which would be a covered employment if it were in Sri Lanka; and*
- (b) to treat as not being a covered employment or to disregard.*
  - (i) employment under a person who employs less than a prescribed minimum number of employees;*
  - (ii) employment of a person in the service or for the purposes of the trade or business, or as a partner, of that person's spouse.*

*(3) Subject to the other provisions of this Act, every person over a prescribed age who is employed by any other person in any covered employment shall be an employee to whom this Act applies. For the purposes of this subsection different ages may be prescribed for different covered employments-*

*(4) Any regulation declaring any employment to be a covered employment may provide that such persons only as earn less than a prescribed amount in that employment or as are of a prescribed class or description, and not other persons in that employment, shall be employees to whom this Act applies.*

According to the above Section it is cleared who can join the EPF.

It was in the minds of the representatives of the people, to legislate such an act for the benefit of the Employees. That is why they made these contribution as mandatory and not optional. In fact they made failure to contribute an offence.

When we read Section 8 of the said act it is clear that, *“every person over a prescribed age who is employed by any other person in any covered employment. Shall be an employee to whom this act applies.”*

It is prudent to consider Section 10 and 15 of the said act. It reads as follows;

Section 10:

*(1) Subject to the provisions of subsection (3) of this section and of section 27, an employee to whom this Act applies shall, in respect of each month during which he works in a covered employment, be liable to pay to the Fund a contribution of an amount equal to eight per centum of his total earnings from that employment during that month.*

*(2) Subject to the provisions of subsection (3) of this section and of section 27, the employer of every employee to whom this Act applies and who is liable to pay contributions to the Fund shall, in respect of each month*

during which such employee is in a covered employment under such employer, be liable to pay to the Fund on or before the last day of the succeeding month, a contribution of an amount equal to twelve per centum of such employee's total earning from that employment during that month.

Section 15:

***Payment of contributions due from employees.***

*The employer of an employee to whom this Act applies shall deduct and pay to the Fund the contribution for each month of such employee under this Act before the last day of the succeeding month from the earnings of such employee; and a contribution paid under this section to the Fund by such employer on behalf of such employee shall be deemed to have been paid to the Fund by such employee.*

The Petitioner submits that the Employee on reaching 55 years (If it is a male and 50 years to female) can collect his benefit. Therefore no one can join after 55 years of age. Considering the relevant sections which deals with section 23 of the said act, it reads as follows:



Section 23.

*Time at which benefits will be paid off.*

- (1) *Save as hereinafter provided in this section and subject to the deductions made in section 22, a member of the Fund shall be paid the total amount lying to the credit of such member's individual account as soon as may be practicable:*
- (a) *after such member, being a male, attains the age of fifty-five years, or being a female, attains the age of fifty years, or*
  - (b) *after such member, being a female, ceases to be employed in consequence of marriage, or*
  - (c) *after such member ceases to be employed by reasons of a permanent and total incapacity for work and is certified by a registered medical practitioner to be unfit for work any longer for that reason, or*
  - (d) *before the date of such member's departure from Sri Lanka if such member declares in writing that such departure is with the intention of not returning to Sri Lanka, or*
  - (e) *after such member ceases to be employed in a covered employment and takes up pensionable employment-*
    - (i) *in the public service;*
    - (ii) *in the Local government Service constituted by the Local Government Service Act, No 16 of 1974;*

- (iii) *in the District Service established under section 47 of the Development Councils Act, No. 35 of 1980;*
- (iv) *in the service of any local authority other than as a member of the Local government Service;*
- (f) *after such member-*
  - (i) *ceases to be employed in a business undertaking, upon establishment of a public corporation for the purpose of taking over and carrying on such business undertaking, by an Incorporation Order made under section 2 of the Conversion of Government Owned Business Undertakings into Public Corporations Act, No. 22 of 1987, and has not taken up employment in the public corporation so established;*
  - (ii) *ceases to be employed in a public corporation or business undertaking, as the case may be, upon incorporation of public company for the purpose of taking over the functions of such public corporation or taking over and carrying on such business undertaking, as the case may be, by an Order made under section 2 of the Conversion of Public corporations or Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987, and has not taken up employment in the public company so incorporated;*

- (iii) *ceases to be employed in a public corporation upon retrenchment of that member;*
- (iv) *ceases to be employed in a public corporation upon the dissolution of that public corporation or the closure of the business undertaking of that public corporation:*

*Provided that, where a member of the Fund, being a male, continues to work in a covered employment after he has attained the age of fifty-five years, or, being a female, continues to work in a covered employment after she has attained the age of fifty years, such member shall not be entitled to the payment under the preceding provisions of this section until such member ceases to be in such employment:*

*Provided, further, that a member of the Fund shall not be entitled to withdraw any sum standing to his credit in his individual account more than once in a period of five years.*

*In this section-*

- (i) *“business undertaking” means any business undertaking acquired by, or vested in, the Government under the Business Undertakings (Acquisition) Act, No. 35 of 1971;*

- (ii) *“public corporation” shall have the same meaning as in the Constitution of the Democratic Socialist Republic of Sri Lanka;*
- (iii) *“registered medical practitioner” means a medical practitioner registered under the Medical Ordinance; and*
- (iv) *“retrenchment” shall have the same meaning as in the Industrial Disputes Act.*

(2) The Commissioner of Labour may, where he has reason to doubt the genuineness of a Medical Certificate submitted by a member under paragraph ( c )of subsection (1) of this section, refer the member concerned for re-examination by a duly constituted Medical Board or a Government Medical Officer and where on such re-examination the original Medical Certificate is found to be false in any material particular, the Commissioner shall reject such certificate, and he shall be entitled to refuse to accept future medical certificates issued by such registered medical practitioner.

Considering the entire Act especially Sections 8, 10, 15 and 23. I find that there is a minimum age to join the EPF but there is no maximum age to join the said Fund. Further it is mandatory under the Act to contribute to the said fund and there are no exceptions other than provided by the said Act.

On the question of interpretation of Statutes, the Chief Justice Sharvananda, in the case of *Tennnakoon v Thenekoon* 1986 1 SLR 90 cited the following passage from *R. v. Sheen* 28 L.J.M. 9, wherein the Court held:

*Whenever the language of a legislature admits of two constructions and, if construed in one way, would lead to obvious injustice the courts act upon the view that such a result could not have, been intended: unless the intention had been manifested in express words. It is a cardinal, rule, governing the interpretation of statutes that when the language of the legislature admits of two constructions, the court should not adopt a construction which would lead to an absurdity or obvious injustice."*

It is also held on the case of **Wickremaratne V. Samarawickrema and others** 1995 2 SLR 212 S. N. Silva CJ held:

*"The basic rule of interpretation is that the legislative objective should be advanced and that the provisions be interpreted in keeping with the purpose of the legislature, Interpretation should not have the effect of defeating the objective of the Legislature and of detracting from its purpose."*

Considering the entire EPF Act, I find that there is no Prohibition of joining any one who is above 55 years (if female 50 years). It is in fact mandatory for all employers, who are covered, to contribute the said fund if not, it is a punishable offence under the EPF Act.

I also observed that the Petitioner had contributed EPF on the 3<sup>rd</sup> Respondent employee at the initial stage even though the 3<sup>rd</sup> Respondent was above 55 years. Suddenly the petitioner stopped the contribution to the EPF. Conduct of the petitioner contradict his submissions in Court. I find that the conduct of the petitioner is now estopped.

Considering all, I find that the petitioner is liable to contribute under EPF Act and the Court refuse to grant Writ of Certiorari to quash the said order at P6.

This deals with the payment of an employee's EPF, hence, I order cost on the petitioner and I fix it at Rs. 12,500.00.

Application dismissed with cost.

JUDGE OF THE COURT OF APPEAL

**Vijith K. Malalgoda, P.C., J (P/CA)**

I agree.

PRESIDENT OF THE COURT OF APPEAL

*Akn*