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

In the matter of an appeal in terms of Article 154(P)(6) read together with Article 138 of the Constitution from an Order of the Provincial High Court of Badulla.

Stitches Private Limited,

Kahagalla Watha, Udawela Kotuwa,

Diyathalawa.

Case No. C.A. (PHC) 140/2014

H.C. Badulla Case No. Revision/49/2004

M.C. Bandarawela Case No. 72522/Labour

Respondent-Petitioner-Appellant

Vs.

Assistant Commissioner of Labour,

District Labour Office,

Haputhale.

Complainant-Respondent-Respondent

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

P. Radhakrishnan for Respondent-Petitioner-Appellant

Suranga Wimalasena Senior State Counsel with Maithree Amerasinghe Jayathilleke for Complainant-Respondent-Respondent

Written Submissions tendered on:

Respondent-Petitioner-Appellant on 5th June 2018

Complainant-Respondent-Respondent on 28th May 2018

Argued on: 2nd May2018

Decided on: 20th June 2018

Janak De Silva J.

This is an appeal against the order dated 4th December 2014 by the learned High Court Judge of the Uva Province Holden in Badulla by which he refused notice in the revision application filed by the Respondent-Petitioner-Appellant (Appellant).

The Complainant-Respondent-Respondent (Respondent) filed a certificate in the Magistrates Court of Bandarawela under section 38(2) of the Employees Provident Fund Act as amended (Act) to recover a sum of Rs. 24,57,414.90 as provident fund dues for the period 01.01.2004 to 30.06.2004 from the Appellant.

Upon summons been issued a representative of the Appellant appeared in Court on 03.04.2007 and admitted liability to pay the amount in default in instalments. Accordingly, a sum of Rs. 200,000/= had been paid upto 02.10.2007.

No payments were made thereafter by the Appellant. Thereafter names of two Directors of the Appellant, namely Rajaratnam Vinothan and Anthony Ruwan Sanjeewa had been submitted to Court. Later, on an application made on his behalf Anthony Ruwan Sanjeewa had been discharged.

Rajaratnam Vinothan had appeared in Court for the first time on 24.06.2014 and was enlarged on bail. The next date his foreign travel was prohibited and, on his application, he was granted time to pay the sum in default within a period of one year.

The Appellant submits that on 17.11.2014 the lawyers appearing for the Appellant sought to make an application that in terms of the Act, the Commissioner of Labour cannot file a certificate in the Magistrates Court under section 38(2) of the Act in the first instance without having proceeded under sections 17 and 38(1) of the Act and therefore the Magistrates Court did not have jurisdiction. The Appellant submits that the learned Magistrate indicated that the said objection could be entertained but the order will have to be reserved for another date and until such time the Director will be remanded.

The Appellant submits that as such the lawyers for the Appellant had to refrain from making the said application and were compelled to move for a date to pay the instalment although such payment was not warranted by law. Thereafter, they filed a revision application in the High Court of the Uva Province holden in Badulla seeking to dismiss the action filed by the Respondent in the Magistrates Court.

The learned High Court judge after hearing the Appellant refused notice and hence this appeal by the Appellant.

The Appellant urged two grounds before the High Court. Firstly, it was submitted that before acting in terms of section 38(2) of the Act, the Respondent must act under sections 17(1) and 38(1) of the Act and it is only thereafter, that steps can be taken under section 38(2) of the Act. Secondly, it was submitted that the learned Magistrate did not have jurisdiction under section 38(2) of the Act to substitute the directors in place of the defaulting company named in the certificate filed under section 38(2) of the Act.

The first ground appears to have been formulated on the judgement of Tilakawardane J. in *K.A. Dayawathi v. D.S. Edirisinghe* [S.C. (FR) No. 241/2008; S.C.M. 01.6.2009]. There Tilakawardane J. held as follows:

> "The above three procedures are not alternative procedures for recovery. The legislature very clearly has sets out the scheme step by step as to how the Commissioner becomes entitled to use the procedures set out in Section 38(2) of the said Act. The 3rd Respondent has no jurisdiction or power under the said statute to file a certificate in the Magistrates Court in terms of Section 38(2) of the EPF Act without first proceeding under Section 17 and thereafter under of Section 38(1) of the said Act." (page 8 of the judgement)

I most respectfully beg to differ from the views expressed above for several reasons.

Firstly, the weight of authority of the Supreme Court is clearly in favour of giving the Commissioner of Labour a discretion on the procedure to be followed as between section 17, 38(1) and 38(2) of the Act. In *Messrs Narthupana Tea & Rubber Co Ltd v. The Commissioner of Labour* [SC Appeal 510/74; S.C.M. 13.03.1978] Wimalaratne J. and Colin Thome J. held that there is no necessity for the Commissioner to have first resorted to the other two remedies provided in sections 17 and 38(1) before he instituted proceedings in the Magistrates Court. In *Jewelarts Limited v. The Land Acquiring Officer and others* [C.A./Writ/App/No.1126/2004; C.A.M. of 28.01.2009] Sriskandarajah J. held that the Commissioner of Labour has a discretion in deciding between the procedures set out in sections 17, 38(1) and 38(2) of the Act. The Supreme Court refused special leave to appeal against the said judgement in *Jewelarts Limited v. The Land Acquiring Officer and others* [S.C. (Special) L.A. 34/2009; S.C.M. of 22.06.2009]. In *Peoples Bank and others v. Kasthuriarachchi* (2011 B.L.R. 59) the Supreme Court held that where the Supreme Court refuses leave to appeal against a judgement of the Court of Appeal, that refusal of leave itself becomes a decision of the Supreme Court. Furthermore, in S.C. (Special) L.A. 277/2012; S.C.M. of 04.04.2013 Tilakawardane J. [with Sripavan J. (as he was then) and Ekanayake J. agreeing] refused special leave to appeal in a case where the same question i.e. discretion between the procedures set out in sections 17, 38(1) and 38(2) of the Act was the main question urged in support of the application for special leave to appeal.

Secondly, Tilakawardane J. herself appears take a different view in *K.A. Dayawathi v. D.S. Edirisinghe*(supra) that there is in fact a discretion vested in the Commissioner in deciding between the procedures set out in sections 17, 38(1) and 38(2) of the Act. She states as follows:

> "Put simply, the 1st, 2nd and 3rd Respondents are required to institute action in accordance with Section 17. However, if and *only* if, the Commissioner is of the opinion that recovery under Section 17 of the said Act is (1) **impracticable and inexpedient**, and/or (2) where the full amount due has not been recovered by seizure and sale, *only then* can recovery be made, and *only if* the Commissioner complies with the certificate issuance requirements of 38(1) and 38(2)." (page 7 of the judgement)

Thirdly, clearly the dicta relied on by the Appellant in *K.A. Dayawathi v. D.S. Edirisinghe*(supra) is not the *ratio decidendi*. The issue in that case was whether the arrest and detention of the petitioner was legal. In *Yahala Kelle Estates Company (Pvt) Ltd. v. Commissioner of Labour and others* [C.A. 234/2013(writ), C.A.M. of 13.12.2013], *Chairman, Employees Trust Fund Board v. Agro Trading Lanka (Pvt) Ltd.* [C.A. (Rev) 1/2010] and *Assistant Labour Commissioner v. Ranaweera* [(CA(PHC)APN 92/2011, C.A.M. 29.01.2016] the Court of Appeal was of the view that the part of the judgement relied on by the Appellant is obiter.

Fourthly, the Supreme Court did not consider the provisions in section 38(4) of the Act which states that the provisions of that section shall have effect notwithstanding anything in section 17 of the Act. Section 38 of the Act was amended by Act No. 24 of 1971. Hence, section 17 of the Act was part of the original Act whereas section 38 was included as an amendment. In amending section 38, the legislature quite clearly states that the new section takes effect notwithstanding the provisions in section 17. This is a clear pointer, that it was never the intention of the legislature to compel the Commissioner to resort to section 17 before he takes steps under section 38 of the Act.

For the forgoing reasons, I have no hesitation in upholding the findings of the learned High Court judge on the question of discretion vested in the Commissioner of Labour in deciding between the procedures set out in sections 17, 38(1) and 38(2) of the Act.

Although the learned High Court judge correctly held that the Commissioner of Labour has a discretion in deciding between the procedures set out in sections 17, 38(1) and 38(2) of the Act, in my view the question whether such a discretion was correctly exercised should never arise for determination before the Magistrate in proceedings instituted under section 38(2) of the Act. Where the wrongful exercise of discretion is sought to be challenged, it must be in appropriate proceedings where administrative law principles are applicable.

The second ground urged on behalf of the Appellant is that the legislature did not vest the Commissioner with any discretion between the procedures set out in sections 38(1) and 38(2) of the Act and that the Commissioner must first have recourse to section 38(1) of the Act, specifically when the defaulting employer is a legal person as opposed to a natural person. It was further submitted that the learned Magistrate did not have jurisdiction under section 38(2) of the Act to substitute the directors in place of the defaulting company named in the certificate filed under section 38(2) of the Act.

This submission is tenuous and without any legal basis and I have no hesitation in rejecting it.

As explicated above, the weight of authority is that the Commissioner has a discretion in selecting between the procedures set out in sections 17, 38(1) and 38(2) of the Act. In *Jewelarts International Ltd. v. The Assistant Commissioner of Labour* [C.A. 745/2003, C.A.M. 08.08.2003] Udalagama J. held that on a plain reading of section 38(1) of the Act, he was of the view that the Commissioner is not mandated to comply with sections 17 or 38(1) of the Act initially before resorting to section 38(2) of the Act.

There is nothing wrong in the Magistrate summoning the directors of the Appellant. It must be pointed out that rather than substituting the names of the directors in place of the Appellant company as submitted by the Appellant, the learned Magistrate issued summons on the directors of the Appellant after the Appellant admitted liability, made part payment and then defaulted.

It must be noted that section 40 of the Act is a deeming provision by which every director of a body corporate is deemed to be guilty of an offence where an offence under the Act is committed by the body corporate. The meaning of the word "deemed" was considered and explained by Ranasinghe, J. (as he then was) in *Jinawathie v. Emalin* [(1986) 2 Sri.L.R. 121 at 130,131] in the following words:

> "In statutes, the expression deemed is commonly used for the purpose of creating a statutory function so that a meaning of a term is extended to a subject-matter which it properly does not designate. . . Thus, where a person is deemed to be something it only means that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were".

Ranasinghe, J. went onto explain the legal effect and consequences of such a legal fiction in the following terms:

> "Thus, where in pursuance of a statutory direction a thing has to be treated as something which in reality it is not or an imaginary state of affairs is to be treated as real, then not only will it have to be treated so during the entire course of the proceedings in which such assumption is made but all attendant consequences and incidents, which if the imagined state of affairs had existed would inevitably have flowed from it have also to be imagined or treated as real". (supra. page 130)

In that context the opportunity that a director of a defaulting company gets in proceedings under section 38(2) of the Act can be viewed as an application of the rules of natural justice.

This Court has previously approved the summoning of the directors of the defaulting company in proceedings instituted under section 38(2) of the Act. In *Colombo Apothecaries Ltd. and others v. Commissioner of Labour* [(1998) 3 Sri.L.R. 320 at 330] Ranaraja J. held as follows:

> "A default in making payments due as EPF contributions, makes the 'employer' at the relevant time, liable for contravening the provisions of section 10 of the Act. As an alternative to prosecution for such an offence under section 41 of the Act or civil proceedings under section 17 of the Act, the Commissioner is empowered to institute proceedings against the defaulting employer for the recovery of contributions due under the provisions of section 38 (2). **The petitioners are thus liable, qua directors of the**

offending company, to be summoned before court in proceedings under section 38 (2) of the Act and sentenced to pay the sum in default by way of fine and serve a term of imprisonment in lieu, if the fine remains unpaid." (emphasis added)

In *Ranasinghe and another v. The Commissioner of Labour and others* [CA(PHC) 69/2009; C.A.M. 27.01.2011] this Court was called upon to decide a similar issue. There the Learned Counsel for the petitioner relying on the judgement of Tilakawardene J. in *K.A.Dayawathiv. D.S.Edirisinghe*[SC(FR) No.241/2008; S.C.M. 01.6.2009] 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 Act. He therefore contended that making petitioners who are directors of the company, liable is wrong.

Sisira De Abrew J. without any hesitation rejected the argument and stated as follows:

> "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*(sic)*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."

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." (emphasis added)

The reasoning is logical and compelling and I have no hesitation in adopting it as the correct exposition of the law on this issue.

For the foregoing reasons, I see no reason to interfere with the order dated 4th December 2014 by the learned High Court Judge of the Uva Province Holden in Badulla.

The appeal is dismissed with costs.

The parties in CA(PHC) 151/2014, CA(PHC) 152/2014 and CA(PHC) 153/2014 agreed to be bound by the judgement delivered in this case as the issues to be decided in all four cases were identical. Accordingly, the appeals bearing nos. CA(PHC) 151/2014, CA(PHC) 152/2014 and CA(PHC) 153/2014 are dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal