

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

Associated Motorways (Pvt) Ltd.,  
AMW Building,  
No. 185,  
Union Place,  
Colombo 2.  
Petitioner

**CASE NO: CA/19/2016/WRIT**

Vs.

1. Ms. Chandani Amaratunga,  
Commissioner General of Labour,  
Labour Secretariat,  
Colombo 5.
2. The Magistrate,  
Magistrate Court of Colombo,  
Colombo 12.
3. Naurunnage Channa Padmanath De  
Silva,  
No. 61/3,  
Maduwegedera,  
Nittambuwa.  
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Uditha Igalahewa, P.C., with Amaranath Fernando for  
the Petitioner.

Susantha Balapatabandi, S.D.S.G., for the 1<sup>st</sup>  
Respondent.

Murshid Maharooof with Nalin Fernando for the 3<sup>rd</sup>  
Respondent.

Argued on : 31.05.2018

Written Submissions:

The Petitioner and the 3<sup>rd</sup> Respondent on 21.06.2018

Decided on: 20.07.2018

Samayawardhena, J.

The petitioner employer filed this application on 18.01.2016 seeking a prerogative in the nature of a writ of certiorari to quash the decision of the 1st respondent-Commissioner General of Labour contained in the document marked P8(a) dated 23.09.2013 whereby the petitioner was directed to deposit a sum of Rs. 495,114/60 as Employees' Provident Fund payments in respect of commissions paid to the 3rd respondent-former employee.

This decision has been arrived at by the 1st respondent after a protracted inquiry which extended not several months but several years, during which *inter alia* a heap of correspondence has also been exchanged between the parties. (I must pause for a while to say that although photocopies of these letters have been tendered by the petitioner no separate markings have been given for easy reference.)

P8(a) dated 23.09.2013, as seen from the 1st sentence, is a reply to the letter sent by the petitioner to the 1<sup>st</sup> respondent dated 03.09.2013. By reading the said letter dated 03.09.2013 and P8(a) dated 23.09.2013, it is crystal clear that the predominant position taken up by the petitioner at the inquiry before the 1st respondent was that the extra amounts paid to the 3rd respondent in addition to the salary were not sale commissions but incentives and therefore the 3rd respondent employee is not entitled to EPF benefits in respect of those extra payments. This position has not been accepted by the 1st respondent.

It is significant to note that notwithstanding the petitioner has filed this application seeking to quash only P8(a), the petitioner does not pursue that argument anymore.

It is also relevant to note that the petitioner has filed this application more than 2 years and 3 months after P8(a) decision.

The sole ground upon which the petitioner challenges P8(a) before this Court is that the 1st respondent arrived at the figure, which is a sum of Rs. 495,114/60 as EPF, without sufficient proof being adduced by the 3rd respondent. Such a position has not been taken by the petitioner in the letter dated 03.09.2013 which preceded P8(a) or any other letter sent before that letter.

What I have stated so far is sufficient to deny the relief as prayed for by the petitioner. Nevertheless, I will, in brief, consider the subsequent events as well.

After the decision P8(a), it is not clear on what basis he did, the petitioner has by P9(a) dated 21.10.2013 again wrote to the 1<sup>st</sup> respondent to repeat the same thing, i.e. what was paid in addition to the salary was not sale commissions but incentives, and

thereafter stated for the first time that the documents tendered by the 3rd respondent to support his claim and which were relied upon by the 1st respondent to arrive at the figure are unreliable.

Thereafter an inquiry has again been held and as seen from P9(b) dated 23.12.2013 the 1st respondent has *inter alia* asked the petitioner to submit the documents to counter or contradict the documents tendered by the 3rd respondent in support of his (the 3rd respondent's) claim. No such documents have been tendered by the petitioner at the inquiry and the 1st respondent by letter P11(a) dated 11.08.2015 has informed the petitioner that the petitioner has no choice but to comply with P8(a).

Thereafter the petitioner has kept silent until the petitioner got summons from the Magistrate's Court to appear before it on 22.01.2016 to recover the EPF dues.

It is in that backdrop, the petitioner has filed this application on 18.01.2016 (just 4 days before the Magistrate's Court case) to quash P8(a) and obtained a stay order staying the proceedings before the Magistrate's Court which is in operation until today.

It is relevant to note that the petitioner does not produce any document to counter the documents of the 3rd respondent even before this Court.

The position of the petitioner before this Court is that the burden is fairly and squarely on the 3rd respondent to prove his claim at the inquiry before the 1st respondent, which has not been discharged.

There are no strict burden of proof principles applicable at inquiries of this nature before the Labour Commissioner or for that matter even at inquiries before Labour Tribunals.

However Justice Mark Fernando in *Anderson v. Husny*<sup>1</sup> had this to say regarding burden of proof before Labour Tribunals:

*While it is true that the Tribunal is not bound by the Evidence Ordinance, that enactment contains certain basic principles of justice and fairness relevant to adjudication by any tribunal. One common sense principle is found in section 102: that the burden of proof lies on that person who would fail if no evidence at all were given on either side. There was no good reason for departing from that principle.*

In the instant case the 3<sup>rd</sup> respondent employee at the inquiry tendered documents to the Labour Commissioner for the purpose of calculating EPF payments entitled to him from the petitioner employer. The Labour Commissioner having *prima facie* satisfied with that evidence held with the 3<sup>rd</sup> respondent. Then the petitioner complained to the Labour Commissioner stating that the documents tendered by the 3<sup>rd</sup> respondent employee were unreliable. Then the Labour Commissioner again gave an opportunity to the petitioner employer to tender documents to counter that position but no documents were tendered by the employer. May be the employee who is the weaker party did not produce the best evidence to establish his claim. But the employer who is the stronger party and who has all the resources at his disposal did not produce any document to counter that position. In this type of inquiries the employer cannot keep silent stating that he who asserts must prove.

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<sup>1</sup> [2001] 1 Sri LR 168 at 175

The Commissioner of Labour with the material tendered and matters elicited at the inquiry has come to the relevant figure. There is no reason for this Court to disturb that finding nor has the power to embark upon another inquiry to verify the correctness of the figure by exercising writ jurisdiction.

Application for certiorari to quash P8(a) is dismissed with costs.

Judge of the Court of Appeal