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 a Writ of Certiorari under and in terms of Article 140 of the Constitution.

Sri Lanka Insurance Corporation Ltd
No. 21, Vauxhall Street, Colombo 02.

Petitioner

Case No. C. A. (Writ) 402/2013

Vs.

1. The Assistant Commissioner of Labour
   Matara District Labour Office,
   No. 4A, Rahula Cross Road, Matara.

2. Ms. S. M. P. Pasqual
   Inquiring Officer,
   Matara District Labour Office,
   No. 4A, Rahula Cross Road, Matara.

3. Prince Premasiri Jayasinghe
   "Hilltop Garden", Mapalana, Kamburupitiya.

Respondents

Before: Janak De Silva J.

Counsel:

Faiz Musthapha P.C. with Thushani Machado for the Petitioner

Manohara Jayasinghe SSC for the 1st and 2nd Respondents

N. Mahendra for the 3rd Respondent

Written Submissions tendered on:

Petitioner on 05.02.2019, 25.03.2019 and 17.06.2019

1st and 2nd Respondents on 28.05.2019

3rd Respondent on 01.10.2018

Argued on: 11.02.2019

Decided on: 26.09.2019

Janak De Silva J.

The Petitioner is seeking to impugn the decision of the 1st Respondent dated 20.09.2013 (P17) granting benefits and entitlements under the Employees Provident Fund Act No. 15 of 1958 as amended (EPF Act) to the 3rd Respondent and the consequential right to payment/contributions under the EPF Act and the 1st Respondent's decision dated 15.11.2013 (P22) directing the Petitioner to pay contributions/surcharge amounting to Rs. 1,789,773.13.

The Petitioner seeks to assail P17 and P22 on the following grounds:

(1) The 3rd Respondent does not come within the ambit and scope of "covered employment" under the EPF Act

(2) The purported determination P17 is not valid in law

Ambit and Scope of "Covered Employment"

The learned President's Counsel for the Petitioner submitted firstly that the 3rd Respondent is not an "employee" within the meaning of the EPF Act and secondly that in any event the 3rd Respondent is not in a "covered employment".

The learned Senior State Counsel submitted that the doctrine of estoppel prevents the Petitioner from claiming that the 3rd Respondent is not an "employee" within the meaning of the EPF Act. The argument is factually based on previous litigation between the Petitioner and 3rd Respondent arising from the termination of employment of the 3rd Respondent by the Petitioner whereupon the 3rd Respondent made an application to the Labour Tribunal which held the termination to be unjust and made award in favour of the 3rd Respondent. The Petitioner contended in the answer filed in the Labour Tribunal that the 3rd Respondent was not an employee but only an independent contractor. The Labour Tribunal held otherwise.

The Petitioner appealed to the High Court of the Southern Province which affirmed the order of the Labour Tribunal. The Petitioner then filed a leave to appeal application which was withdrawn on 20.03.2012 and the relevant journal entry reads:

> "Since no specific relief has been granted to the Respondent by either the Labour Tribunal or the High Court, the appellant moves to withdraw this appeal reserving itself the right to canvass **the status of an Insurance Organizer or Insurance Agent in the future in an appropriate case**". (emphasis added)

The learned Senior State Counsel submitted that this reservation does not apply to the 3rd Respondent but is only a reservation enabling the Petitioner to challenge the correctness of the general proposition that an insurance agent is an employee and that the Petitioner is not entitled to challenge the characterisation of the 3rd Respondent as an employee of the Petitioner.

I am persuaded to hold that this is the correct reading of the above journal entry in particular due to the fact that by 03.03.2009 (P14) the 3rd Respondent had made his claim in terms of the EPF Act and the inquiry thereon was proceeding on the date of withdrawal of the leave to appeal application. If the Petitioner wanted to reserve his right to canvass the status of the 3rd Respondent as an employee the journal entry should have made a specific reference to the 3rd Respondent which is not the case.

In any event, I am not convinced that the Petitioner could have reagitated that issue even if it made a reservation specifically in relation to the 3rd Respondent due to the application of the doctrine of issue estoppel.

In *Thoday v. Thoday* [(1964) 1 All.E.R. 341, (1964) 2 W.L.R. 371, (1964) P. 181] Diplock L.J. stated that if in a litigation on a cause of action, which can only be established by proving that two or more different conditions are fulfilled, any issue whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on an admission by a party, neither party can, in subsequent litigation between them on any cause of action, which depends on the fulfillment of the identical condition, assert the opposite of what has been determined in the first litigation – that the condition was fulfilled or not fulfilled, as the case may be.

A more recent judicial exposition on the ambit of issue estoppel was made by Lord Keith in the House of Lords in *Arnold v. National Westminster Bank plc* [(1991) 2 A.C. 93] in a speech with which all the House concurred. He stated (at page 105):

> "issue may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

The question arises whether issue estoppel is part of our law of evidence as some jurists have expressed doubts as to whether the doctrine of issue estoppel is covered by Section 40 of the Evidence Ordinance[1].

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[1] *The Law of Evidence*; E.R.S.R. Coomaraswamy; Vol. I, 550, 2nd Ed., (1989) Lake House Investments Ltd.

However, the mere fact that Section 40 of the Evidence Ordinance does not provide for the application of the doctrine of issue estoppel is not determinative of the issue. A duty is cast upon this Court in terms of section 100 of the Evidence Ordinance to examine whether issue estoppel is part of English Law of Evidence and if so to apply it.

While the House of Lords in *Director of Public Prosecutions v. Humphrys* [(1976) 2 All.E.R. 497] held that issue estoppel does not apply in English criminal proceedings the House of Lords in *Mills v. Cooper* [(1967) 2 Q.B. 459] held that the doctrine applies in civil cases.

I have therefore previously held that issue estoppel is part of our law of evidence in civil cases [*Ran Menika v. Gunasena and Others* (CA 471/2000, C.A.M. 23.09.2019), *Saundra Marakkala Imasha Lahiruni Upeksha and Others v. Hasitha Kesara Weththimuni Principal, Dharmasoka College, Ambalangoda and Others* (CA 166/2017, C.A.M. 04.04.2019)].

The following conditions must be fulfilled for the doctrine to apply[2]:

(i) Finality of the decision on the issue

(ii) The determination must be fundamental, not collateral

(iii) Identity of Parties

(iv) Same Capacity

(v) Precisely the same and identical issues or questions must have been decided

There is the further requirement that the particular issue should have been determined by a court of competent jurisdiction [*Mills v. Cooper* (1967) 2 Q.B. 459 at 468].

The proceedings before the Labour Tribunal and the High Court satisfy the criteria in (i) to (iv) above and the requirement in *Mills v. Cooper* (supra). The only issue which merits a consideration by this Court is whether precisely the same and identical issues were decided.

The Petitioner contends that the 3rd Respondent is only an insurance agent and that insurance agents are not "employees" who fall within the category of "covered employment" under the EPF Act and therefore not eligible to claim benefits under it.

[2] *Supra.* 551

Subject to the other provisions of the EPF Act, every person over a prescribed age who is employed by any other person in any covered employment shall be an employee to whom the Act applies [Section 8(3) EPF Act]. Hence for the 3rd Respondent to fall within the ambit and scope of the EPF Act he must firstly be an "employee" and secondly, he must be employed in any "covered employment".

Section 47 of the EPF Act defines the term "employee" to mean:

> "any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, or oral or in writing and whether it is a contract of service or of apprenticeship or a contract personally to execute any work of labour, and includes any person ordinarily employed under any such contract, whether such person is or is not in employment at any particular time"

Section 48 of the Industrial Disputes Act No. 53 of 1973 as amended (Industrial Disputes Act) defines a "workman" to mean:

> "any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated."

The meaning of "employee" in the EPF Act and "workman" in the Industrial Disputes Act is the same and the only difference is that the latter brings within the meaning of "workman" a person whose services have been terminated.

When the Labour Tribunal held that the 3rd Respondent is a "workman" of the Petitioner it was effectively holding that he was also an "employee" under the EPF Act. The doctrine of issue estoppel applies and the Petitioner cannot now contend to the contrary.

The learned President's Counsel submitted that the earlier proceedings does not prevent the Petitioner from agitating the issue of "employee" since it dealt with the termination under the Industrial Disputes Act whereas the present application deals with the dues under EPF Act. The Petitioner is seeking to equate the doctrines of res judicata and issue estoppel which are distinct. Issue estoppel applies when the identical condition was determined earlier even for a different cause of action [*Thoday v. Thoday* (supra)].

Notwithstanding the above position, the learned President's Counsel for the Petitioner sought to argue that the EPF Act does not apply to the 3rd Respondent as he was not in a "covered employment". He submitted that the State has not established that the 3rd Respondent is in a "covered employment" within the meaning of the EPF Act.

"Covered Employment" means an employment declared by regulation to be a covered employment [Section 47 of the EPF Act]. T.S. Fernando J. in *Sinnathamby v. Ratnaweera* (67 N.L.R. 518) states:

> "By regulation 1 of the regulations of October 29,1958, made by the Minister under section 46 of the Act- (see Government Gazette No. 11,573 of October 31,1958)-every employment specified in the First Schedule to those regulations has been declared to be a covered employment, save as provided in regulations 3 and 4. The employments specified in the First Schedule embrace "every employment other than employment under the Government of Ceylon, under any local authority or under the Local Government Service Commission ". Therefore, every employment other than those under these excluded authorities is a covered employment unless such employment can be shown to be excepted by regulations 3 and 4."

He further held that when an employer is charged with having failed, in contravention of section 15 of the EPF Act, to pay a contribution on behalf of an employee, and when the sole question is whether or not the employment of the employee is a covered employment within the meaning of section 8 of the Act, read with regulation 3, section 105 of the Evidence Ordinance imposes the burden of proof on the employer to establish that the employment of the employee is on some work which is excepted by regulation 3.

I see no reason as to why the burden of proof needs to be changed to the Commissioner of Labour or the 3rd Respondent in these proceedings. The question is whether the Petitioner fulfilled this burden of proof.

The Petitioner did not at the inquiry into the claim made under the EPF Act by the 3rd Respondent raise the issue of "covered employment". The learned President's Counsel relied on the decision in *Pararajasekeram v. Viyaratnam* (76 N.L.R. 470) and submitted that doctrine of estoppel cannot be invoked in the face of a statute for against a statute no estoppel can prevail. It is true that the EPF Act applies only to "covered employment". However, there is nothing preventing an employer not raising an objection on that ground and making payments under the EPF Act to an

employee if it is the desire of the employer. As such the principle relied on by the Petitioner has no application to the facts of the case.

The learned President's Counsel relies on section 8(1) of the EPF Act which reads:

> "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"

He submits that the Petitioner comes within this provision and in the absence of a regulation made thereunder the 3rd Respondent is not in a "covered employment". I have no hesitation in rejecting this submission on at least two grounds. Firstly, the Petitioner is a company [paragraph 2 of the petition]. Section 8(1) of the EPF Act applies to corporations. Secondly, in any event, the employments specified in the First Schedule embrace "every employment other than employment under the Government of Ceylon, under any local authority or under the Local Government Service Commission ". Therefore, every employment other than those under these excluded authorities is a covered employment unless such employment can be shown to be excepted by regulations 3 and 4 [*Sinnathamby v. Ratnaweera* (supra)].

I hold that the 3rd Respondent is in a "covered employment".

P17 is not valid in law

The learned President's Counsel for the Petitioner submitted that P17 is not valid in law for the following reasons:

(a) The 1st Respondent has failed to give reasons
(b) Violation of the rules of natural justice
(c) Decision unsupported by evidence
(d) Decision offends the principles of proportionality

Failure to give reasons

The 1st Respondent has in P17 stated that in view of the order made by the Labour Tribunal as affirmed by the High Court the 3rd Respondent is an employee of the Petitioner. Therefore, the reasons have been given. As pointed out earlier the Petitioner did not urge the issue of "covered employment" in the written submissions filed before the 1st Respondent.

Violation of the rules of natural justice

This submission is also based on the purported failure to give reasons. As explained above P17 gives reasons.

Decision unsupported by evidence

This is a mere ground that has been set out in the written submissions without further elaboration. The 1st Respondent acted on the evidence before him in the form of the Labour Tribunal award and the judgment of the High Court. Hence his decision is supported by evidence.

Decision offends the principles of proportionality

The principle of proportionality has no application to the circumstances of this case since once the requirements in the EPF Act are fulfilled the 3rd Respondent is entitled to claim its benefits. There is no discretion on the part of the 1st Respondent to deny the 3rd Respondent of those benefits.

For all the foregoing reasons, the application of the Petitioner is dismissed with costs.

Judge of the Court of Appeal