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

In the matter of an application for mandates in the nature of Writs of Certiorari, Prohibition and Mandamus under and in terms of Article 140 of the Constitution.

C.A. (Writ) Application No.355/2018

1. Distilleries Company of Sri Lanka PLC
   No.110, Norris Canal Road, Colombo 10.

Petitioner

-Vs-

1. K.L.K. Perera
   Commissioner of Labour
   Employee's Provident Fund –
   Department of Labour
   Colombo Central District Labour Office
   6th Floor,
   No.56, Kirula Road,
   Narahenpita, Colombo 05.

2. W.M.D.R. Weerakoon
   Assistant Commissioner of Labour
   Employee's Provident Fund –
   Department of Labour
   Colombo Central District Labour Office
   6th Floor,
   No.56, Kirula Road,
   Narahenpita, Colombo 05

3. Warnakulasooriya Walter Jayatilake
   No.210 E, Sandun Mawatha,
   Minuwangoda Road,
   Udugampola

4. The Hon. Attorney General
   Attorney General's Department
   Hultsdorp
   Colombo 12

Respondents

Before: C.P. Kirtisinghe – J
Mayadunne Corea – J

Counsel: S.A. Parathalingam PC with Nishkan Parathalingam for the Petitioner
Rajeev Amarasuriya with Malith Pitipanaarachchi and Ravindu Bandara for the 3rd Respondent
Nayomi Kahawita SC for the 1st and 2nd Respondents

Argued on : 08.10.2021
Decided On : 21.03.2022

C.P. Kirtisinghe – J

The Petitioner is seeking for a mandate in the nature of a writ of certiorari which quashes the decision of the 1st and/or 2nd Respondents contained in the letter dated 14.03.2018 marked as X6 and in the alternative for a mandate in the nature of a writ of certiorari to quash that part of the decision or determination contained in the aforesaid document marked X6 whereby the 1st and/or 2nd Respondents have indicated to the Petitioner that,

i. The applicable surcharge would increase up to 50% in the event that the Petitioner fails to make the full payment which the Petitioner has been directed to pay within a period of 12 months from the date of that letter and that
ii. Legal proceedings would be initiated against the Petitioner in the event that the Petitioner fails to make the entire payment as directed within a period of 14 days from the receipt of that letter.

The Petitioner Company had recruited the 3rd Respondent on a contract basis with effect from 03.07.1995 to serve the Petitioner Company as an investigator.

The letter of appointment is marked as X1. The 3rd Respondent had signed the letter of appointment and accepted it. The Petitioner states that prior to signing the said letter of appointment, the 3rd Respondent had indicated to the Petitioner that he did not require EPF and ETF payments at the end of his employment, but instead he preferred the said payments to be made directly by the Petitioner to him by way of a proportionate increase in his monthly take home salary. The said letter of appointment expressly provided as follows,

"No EPF or ETF benefits will accrue to this appointment".

According to the Petitioner, by the endorsement placed on the document marked X1a, the 3rd Respondent's aforesaid request pertaining to EPF was approved by the Petitioner and the 3rd Respondent's monthly take home salary was decided to be proportionately increased by the Petitioner in lieu of making EPF and ETF contributions. The first phase of the 3rd Respondent's employment under the Petitioner Company came to an end when the 3rd Respondent resigned from the service on 31.10.2006 as evidenced by the letter marked X2. Thereafter, the 3rd Respondent had rejoined the service on 8th November 2006 as evidenced by the letter of appointment/contract marked X3. In that letter of appointment/contract of employment, there is a clause to the effect that the 3rd Respondent will be enrolled as a member of the Employees' Provident Fund to which the 3rd Respondent will contribute a minimum of 10% of his salary per month and the Petitioner will contribute a sum of 15% from the 3rd Respondent's monthly salary. There is another clause to the effect that the Petitioner Company will contribute 3% of the monthly salary of the 3rd Respondent to the 3rd Respondent's account in the Employees' Trust Fund. The Petitioner states that there was no complaint by the 3rd Respondent against the Petitioner Company for the period of the 3rd Respondent's first phase of employment. After joining the services of the Petitioner Company for the second time, the 3rd Respondent's second phase of employment had come to an end on 27th May 2014 when the 3rd Respondent had left the services of the Petitioner Company. After some time, the 3rd Respondent had made a complaint to the Commissioner of Labour concerning the non-payment of EPF by the Petitioner Company. Thereafter, the Commissioner of Labour had held an inquiry regarding the complaint through one of his subordinates with the participation of the Petitioner Company. At the conclusion of the inquiry, the 2nd Respondent who inquired into that matter had ordered the Petitioner to pay a sum of Rs. 329,248.05 as the EPF contributions for the relevant period for the employment of the 3rd Respondent. The 2nd Respondent had further decided and notified the

Petitioner that in the event that the said some is not paid within a period of 12 months, the applicable surcharge would increase up to 50% and in the event that the Petitioner does not make the aforesaid payment within a period of 14 days from the date of the receipt of the decision, legal steps would be taken to recover the aforesaid sum of money. The Petitioner states that the aforesaid decision or the determination contained in the letter marked X6 is illegal and/or *ultra vires* and/or irregular and/or contrary to the principles of natural justice and a decision which is in excess of the powers of the Commissioner of Labour conferred by the Act No. 15 of 1958 and a decision which adversely affects the rights and legitimate expectations of the Petitioner.

It is the case of the Petitioner that the Petitioner refrained from contributing to the EPF and ETF funds for the 3rd Respondent for the first phase of the 3rd Respondent's employment under the Petitioner Company for the following reasons,

1. The 3rd Respondent had indicated and expressly requested the Petitioner that he did not require EPF or ETF payments at the end of the employment but instead he preferred the said payments to be made directly to him by the Petitioner by way of a proportionate increase in his monthly take home salary.
2. There was an express agreement between the parties in the letter of appointment marked X1 to the effect that no EPF or ETF benefits will accrue to the appointment of the 3rd Respondent.
3. The Petitioner in fact paid the 3rd Respondent, by way of a proportionate increase in his monthly take home salary what the 3rd Respondent would have otherwise received as the Petitioner's contribution to the relevant EPF and ETF funds.

The Petitioner states that the actions of the 3rd Respondent in preferring his complaint/claim against the Petitioner is manifestly unjust and *mala fide*. The Petitioner further states that the 3rd Respondent did not make any complaint or a claim against the Petitioner for a period of more than two years after leaving the services of the Petitioner Company which is indicative of the clear knowledge of the 3rd Respondent of the aforesaid matters and the genuineness of the Petitioner's stance. The Petitioner states that the 3rd Respondent had sought to unjustly enrich himself and commit an injustice and a wrong to the Petitioner.

The learned President's Counsel for the Petitioner submitted that the 2nd Respondent had failed to take into consideration the aforementioned facts and circumstances when he made the determination marked X6.

It was submitted on behalf of the Petitioner that the 1st and/or the 2nd Respondents have not made any determination on the Petitioner's stance. The learned President's Counsel for the Petitioner submitted that the determination contained in the letter marked X6 does not make any determination on the stance advanced by the Petitioner at the relevant inquiry and does not make any determination as to whether the Petitioner in the circumstances pertaining to the employment of the 3rd Respondent during the relevant period was liable to make contributions under the Act No. 15 of 1958 (as amended) and if so, to what extent.

The learned President's Counsel for the Petitioner has also submitted that in making a determination of the 3rd Respondent's claim, the 1st and/or the 2nd Respondents have taken into consideration irrelevant matters and hearsay evidence. In the letter marked 1R1, written by one Mr. Subasinghe who was another employee of the Petitioner, Mr. Subasinghe has stated that the 3rd Respondent of this case had not agreed to accept an increase in his monthly wages in lieu of making contributions to the relevant EPF and ETF funds. Therefore, it is the submission of the learned President's Counsel that when one considers the entirety of the matters pleaded in paragraph 11 of the Statement of Objections of the 1st, 2nd and 4th Respondents, it is clear that in making a determination of the claim the 1st and/or 2nd Respondents have taken into account the matters stated by the said Subasinghe in the letter marked 1R1.

When one peruses the decision marked X6 in totality one cannot come to the conclusion that the second Respondent had taken into consideration matters stated by Subasinghe in the letter marked 1R1. There is no reference to that letter in X6. There is also no reference to the Petitioner's version in X6. The 2nd Respondent had not made any determination on the Petitioner's stance. Therefore, one cannot come to the conclusion that the 2nd Respondent had taken into consideration the Petitioner's version. There is no documentary proof to show that the 3rd Respondent had expressly requested the Petitioner and informed that he did not require EPF and ETF payments at the end of his employment but instead he preferred the said payments be made directly to him by way of proportionate increase in his monthly take home salary. However,

when the 3rd Respondent signed and accepted the conditions in his letter of Appointment marked X1 he was aware of the fact that no EPF or ETF benefits will accrue to his appointment. By Signing that letter of Appointment, the 3rd Respondent had agreed to that condition. The Petitioner may have paid the 3rd Respondent by way of proportionate increase of his monthly take home salary what the 3rd Respondent would have otherwise received as the Petitioner's contributions to EPF and ETF funds but the decision of the 2nd Respondent can be justified for the following reason.

It is settled law that a mutual agreement between the employer and the employee cannot override or supersede the statutory obligations imposed under the Employees' Provident Fund Act no. 15 of 1958 (as amended). In the case of **Blanka Diamonds (Pvt) Ltd Vs Van Els** reported in **2004 (3) SLR 314**, Wijetunge J has held as follows;

"**As regards the liability to make contributions to the ETF, there can be no waiver of contributions by agreement between employer and employee** as section 16(1) of the ETF Act provides that "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 3 per centum of the total earnings of such employee from his employment under such employer during that month".

In that case the 1st Respondent employee had written a letter to the Appellant Company who was his employer and informed as follows;

"Further, I wish to mention that as you are already making contributions towards a Social Security Scheme outside Sri Lanka on expatriate officers, I do not expect you to contribute towards EPF on ETF in Sri Lanka on my behalf." However, the Supreme Court held that the liability of the employer to make contributions to the ETF cannot be waived off by agreement between the employer and the employee irrespective of the fact that the employer was making contributions to a Social Security Scheme outside Sri Lanka.

In the case of **Lanka Marine Services (Pvt) Ltd Vs Sri Lanka Ports Authority And others** reported in **(2005) 3 SLR 60**, Siripavan J (as he then was) held that the

statute being superior reflects the will of the legislature and takes priority over a private arrangement. In that case the Petitioner sought to quash the licenses issued by the Minister of Power and Energy under the provisions of Act no. 33 of 2002 to the 4th and 5th Respondents. A CUF agreement was entered among the Petitioner, 1st Respondent, 3rd Respondent and the Secretary to the Treasury acting for and on behalf of the Government of Sri Lanka. The government had in terms of the CUF agreement covenanted, promised and undertaken that all bunkers/ marine fuel handled and transported within the Port of Colombo should be handled and transported using the CUF. Siripavan J held that as the impugned licenses were issued in terms of the provisions contained in section 5 of the Act no. 33 of 2002 the powers of the Minister as contained in the Act cannot be taken away by the CUF agreement. The statute being superior reflects the will of the legislature and takes priority over the CUF agreement. The *ratio decidendi* in that case applies to this case as well and therefore the statutory obligations imposed by Employees' Provident Fund Act no. 15 of 1958 (as amended) on the employer cannot be waived off by any private agreement between the employer and the employee. The statute being superior takes priority over such private agreement. Therefore, the Petitioner company is liable to contribute to the EPF and ETF for the services rendered by the 3rd Respondent and the 2nd Respondent has come to a correct conclusion in respect of that matter.

Therefore, the Petitioner cannot complain that the decision marked X6 is illegal, ultra vires and contrary to the principles of natural justice.

The Petitioner states that the decision of the 2nd Respondent marked X6 is in clear contravention of the Petitioner's statutory rights and in excess of the power of the 2nd Respondent. Section 28 of the Act No. 15 of 1958 (as amended) reads as follows:-

"All claims to benefits shall be determined by the Commissioner or by any officer authorized in that behalf by him and the determination of the Commissioner or such officer shall, subject to any decision on an appeal made against such determination in accordance with the provisions of this Act, be final."

Therefore, it is clear that Section 28 of the Act expressly recognizes that any determination made by the Commissioner is subject to any decision on an appeal made against such determination.

Section 29 of the Act provides as follows:-

(1) Any person aggrieved by any determination made under Section 28 may appeal from such determination to a Tribunal of Appeal constituted in the prescribed manner and the decision of the Tribunal on such appeal shall, subject to any Order which the Court of Appeal may make on appeal made from such decision in accordance with the provisions of subsection (2) of this section, be final

(2) Where the commissioner or any party to an appeal made to the Tribunal is dissatisfied with the decision of the Tribunal on such appeal, the commissioner or that party may, by written petition in which every other party to the appeal is mentioned as a respondent, appeal to the Court of Appeal from that decision on a question of law. The Petition of Appeal should state the question of law to be argued, shall bear a certificate by an attorney-at-law that such question is fit for adjudication by the court of appeal, shall be presented to the Tribunal by the appellant within twenty-one days after the date of the Tribunal's decision from which the appeal is preferred, and shall be accompanied by a sufficient number of copies for service on each of the persons mentioned as respondents. Every such petition of appeal shall be accompanied by the prescribed fee.

Subsections 3, 4, 5, 6 and 7 of Section 29 lay down the procedure in Appeal to the Court of Appeal.

Therefore, Section 29 of the Act grants the Petitioner an express right of appeal against the decision of the 2nd Respondent and the Petitioner has more than one right of appeal.

It has been submitted on behalf of the Petitioner that the Petitioner has been granted a statutory right of appeal and the Petitioner is entitled as a matter of law to prefer such an appeal. It is the duty of the relevant minister to make regulations in respect of the Tribunal of Appeal referred to in Section 29 and whether the minister has in fact constituted the Tribunal of Appeal or not, is beyond the control of the Petitioner. Therefore, it is the submission of the learned President's Counsel for the Petitioner that the 2nd Respondent acted illegally, *ultra vires*, irrationally and in breach of the Petitioner's express

statutory rights and legitimate expectations when the 2nd Respondent made the determination in X6 to the effect that,

(i) In the event that the Petitioner fails to pay the said sum within a period of 12 months, that the applicable surcharge would increase up to 50% and

(ii) In the event that the Petitioner fails to pay the said sum within a period 14 days from the receipt of X6, that legal steps would be taken against the Petitioner.

Therefore, it has been submitted on behalf of the Petitioner that until the Petitioner is permitted to exercise its statutory right of appeal and subject to the outcome of such appeals no surcharge can be imposed on the Petitioner and no legal steps can be taken against the Petitioner.

It is common ground that a Tribunal of Appeal in terms of Section 29 is not in existence and it has not been constituted. Therefore, the Petitioner is not in a position to exercise its statutory right of appeal expressly provided to it by Section 29 of the Act. Therefore, some prejudice is caused to the Petitioner and the statutory right of the Petitioner is in violation. The Petitioner can also legitimately expect to exercise that right of appeal and as there is no appeal tribunal in existence, the Petitioner's legitimate expectations are also in violation. The question that has to be decided by this Court is whether a substantial prejudice is caused to the Petitioner which warrants the intervention of this Court by way of an order in the nature of a writ of certiorari.

In the case of **Jayaweera v Assistant Commissioner of Agrarian Services, Ratnapura 1996 2 SLR 70**, F.N.D. Jayasuriya J observed as follows:-

"I hold that the Petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the court has a discretion to deny him relief having regard to his conduct; delay, laches, waiver, submission to jurisdiction – are all valid impediments which stand against the grant of relief".

In the case of **Best Footwear (PVT) LTD and Two Others v Aboosally, Former Minister of Labour and Vocational Training and Others 1997 2 SLR 137**, F.N.D. Jayasuriya J held as follows:-

“The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order…..Judicial Review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the decision under appeal…..but in judicial review the Court is concerned with its legality. On appeal, the question is right or wrong? On review, the question is lawful or unlawful? Judicial Review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, a court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not”.

In the landmark judgment of **Sinnetamby J in P.S. Bus Company LTD v Members and Secretary of Ceylon Transport Board 61 NLR 491**, it was held that “A prerogative writ is not issued as a matter of course and it is in the discretion of court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A writ, for instance will not issue where it would be vexatious or futile”. It was further held thus:- “…… the Court should also take into consideration the disastrous consequences of granting a writ”.

Although a Tribunal of Appeal is not in existence and there is a lack of an actual Appellate Procedure despite a right of appeal being provided by the Act, it cannot cause a substantial prejudice to the Petitioner for the following reasons,

Despite the Tribunal of Appeal, still there is an appellate procedure to the Commissioner under Section 46 of the Act. Section 46 reads as follows:-

“A determination made under section 28 of the Act by any officer may be reviewed by the Commissioner within a period of one month from the date of such determination”.

If the Petitioner was dissatisfied with the determination of the 2nd Respondent, the Petitioner had every opportunity to make an application to the Commissioner to review that determination. It is also open to the Petitioner to challenge such determination by way of a writ of certiorari as the Petitioner had done in this case. Even if a Tribunal of Appeal is in existence, there is a second

appeal to the Court of Appeal and now the Petitioner is there. Therefore, one cannot say that the Petitioner was materially/substantially prejudiced by the non-existence of the appellate procedure laid down by the Act. The non-existence of the appellate procedure laid down by the Act is one of the matters that a Court will take into consideration in exercising its discretion. The court will also consider the probable consequences of granting the writ. In this case, the consequences of granting the writ can only be described as disastrous. It would affect the rights of several thousands of employees who will lose the opportunity of recovering their EPF and ETF benefits under the provisions of the Act and the Commissioner will not be able to recover same from the employers. Therefore, in those circumstances, even if the grounds on which the application is made are valid and a substantial prejudice is caused to the Petitioner because of the non-existence of the appellate procedure, no court would exercise its discretion in favour of the Petitioner.

The next question that has to be taken up for consideration is the delay on the part of the Petitioner in invoking the jurisdiction of this court. The 3rd Respondent has taken up this objection in his statement of objections although the 1st, 2nd and 4th Respondents have not taken up this objection. The 2nd Respondent had made the determination contained in X6 on 14.03.2018. The Petitioner has filed this application on 19.11.2018 more than 8 months after the determination. The Petitioner had stated that he did not make this application sooner as it was attempting to obtain a certified copy of the entire proceedings of the relevant inquiry.

One cannot expect a person to take more than 8 months to obtain a certified copy of the proceedings. That explanation cannot be accepted. Therefore, a delay of more than 8 months cannot be excused and that factor will go against the Petitioner in exercising the discretion of this court.

For the aforementioned reasons, we refuse to make an order in the nature of a writ of certiorari quashing the decision of the 2nd Respondent marked X6. We also refuse to issue an order in the nature of a writ of certiorari which quashes that part of the decision in the said letter marked X6 whereby the 1st and/or 2nd Respondents have indicated to the Petitioner that the applicable surcharge would increase up to 50% in the event that the Petitioner fails to make the full payment which the Petitioner has been directed to pay and that legal proceedings would be initiated against the Petitioner in the event that the

Petitioner fails to make the entire payment as directed within a period of 14 days from the receipt of the letter X6.

Application is dismissed without costs.

Judge of the Court of Appeal

Mayadunne Corea – J

I Agree

Judge of the Court of Appeal