

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

Yahala Kelle Estates Company (Pvt.) Ltd.,
"Yahala House",
No.33, Staples Street,
Colombo 2.

PETITIONER

C.A. 234/2013 (Writ)

Vs.

1. Commissioner General of Labour,
Labour Secretariat, Narahenpita,
Colombo 05.
2. Commissioner of Labour,
Labour Secretariat, Narahenpita,
Colombo 05.
3. L. M. Hewawithana
Assistant Commissioner of Labour
District Labour Office,
No. 219/1/1, Galle Road,
Walana, Panadura.

RESPONDENTS

BEFORE:

Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL:

Dr. Jayatissa de Costa P.C., for the Petitioner
S. Wimalasena S.C for Respondents

ARGUED ON: 30.10.2013

DECIDED ON: 13.12.2013

GOONERATNE J.

This is an application for a Writ of Certiorari to quash the decision of Commissioner General of Labour made under Section 38(2) of the Employees Provident Fund Act No. 15 of 1958 as amended. Learned President's Counsel having supported this application, on 02.09.2013, court issued formal notice on the Respondents. However on 17.07.2013 learned President's Counsel moved this court to support for interim relief as per subparagraphs 'e' & 'f' of the prayer to the petition.

The learned President's Counsel for the Petitioner at the hearing for interim relief argued that the Commissioner of Labour was obliged to in terms of the law to have first resorted to the Provisions contained in Section 17 of the above statute prior to filing a certificate in the Magistrate's Court under Section 38(2) of the Act. As such it was his position that the certificate filed under Section 38(2) is illegal and or no force in law and or ultra vires, unreasonable and is liable to be quashed by way of a Writ of Certiorari.

Section 17 of the Act reads that:

17(1) Any moneys due to the Fund shall be recoverable, as a debt due to the State, by an action in which proceedings may be taken by way of summary procedure. The provisions of the Civil Procedure Code relating to actions of which the procedure is summary shall apply to an action under this section, and, for the purposes only of the application of such provisions to such action, section 8 of that Code shall have effect as if, for the words "by this Ordinance" occurring in that section, there were substituted the words "by this Ordinance or by any other written law".

(2) Proceedings for the recovery of any moneys due to the Fund may be instituted by the Commissioner or any officer authorized in that behalf by him, and the Commissioner or such officer may, notwithstanding anything to the contrary in any other written law, conduct such proceedings.

(3) The provisions of the Prescription Ordinance shall not apply to the recovery of any sums payable as contributions or surcharges under this Act.

Section 38(2) of Act reads thus:

Where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Commissioner is of opinion that it is impracticable or inexpedient to recover that sum under section 17 or under subsection (1) of this section or where the full amount due has not been recovered by seizure and sale, then, he may issue a certificate containing particulars of the sum so due and the name and place of residence of the defaulting employer, to the Magistrate having jurisdiction in the division in which such place is situate. The Magistrate shall, thereupon, summon such employer before him to show cause why further proceedings for the recovery of the sum due under this Act should not be taken against him and in default of sufficient cause being shown, such sum shall be deemed to be a fine imposed by a sentence of the Magistrate on such employer for an offence punishable with imprisonment and the provisions of section 291 (except paragraphs (a), (d) and (i) of subsection (1) thereof) of

the Code of Criminal Procedure Act, relating to the default of payment of a fine imposed for such an offence shall thereupon apply and the Magistrate may make any direction which, by the provisions of that subsection, he could have made at the time of imposing such sentence.

We find that on a perusal of the above provisions that there is no necessity at all for the Commissioner General of Labour to resort to Section 17 of the Act prior to filing a certificate under Section 38(2) of the Statute. The above provisions are very clear and it is for the Commissioner to form an opinion that it is impracticable or inexpedient to recover the sums due under Section 17 or under Section 38(1) of the Employees Provident Fund Act. We are unable to accept the views of the learned President's Counsel. It is not for the defaulter to decide the required statutory provisions under which the Commissioner is expected to proceed and recover the amount in default. If the learned President's Counsel's argument is accepted such a course of action would defeat the intention of the Statute. This is a piece of social legislation enacted to grant superannuation benefits for employees, and not a statute enacted to delay the process and defeat the intention of the legislature.

We also heard learned State Counsel who objected to interim relief. We have also fortified our views accordingly on perusing the judgment in the case of Narthupana Tea & Rubber Estate Vs. The Commissioner of Labour (SC 510/74

decided on 13.03.1978. Wimalaratne J. and Colin Thome J. decided that there is no necessity for the Commissioner to have first resorted to the other two remedies provided in Section 17 and in Section 38(1) before the institution of proceedings in the Magistrate's Court. No doubt that seems to be the correct legal position. Learned State Counsel cited SC Spl. L.A No. 277/12 where a Three Judge Bench of the Supreme Court refused to grant Leave to Appeal in a identical matter which attempt to test the same views as that of the learned President's Counsel as above.

The learned President's Counsel rely on the judgment in S.C (FR) case No. 241/08, which is in our view has no relevance, it being a fundamental Rights Case where the Petitioner's fundamental rights had been violated as ruled by the Supreme Court in that case. The ratio decided of the above case very briefly was the illegal arrest and detention of the Petitioner in that case, for being incorrectly and improperly named or implicated as a defaulter of Provident Fund dues. The Supreme Court very correctly having considered the material conclude that the arrest and detention of the Petitioner was illegal and thereby declared that the Petitioner's fundamental rights violated and awarded a sum of Rs. 50,000/- . What the learned President's Counsel failed to appreciate is the difference in obiter dicta and ratio decidendi. In the above judgment in the process the

presiding Judge had also given her mind to the proposition envisaged by learned President's Counsel and expressed similar views, which are obiter dicta. As such this court is only bound by the ratio of the above judgment but not the statement expressed on the applicability of Section 38(2), being obiter.

I wish to observe that obiter dicta is not binding on any subsequent court. According to Granvele Williams (pp 76-77) "a mere saying by the way, a chance remark, a statement not relevant to the central issue between the parties e.g a rule of law stated merely by way of explanation, analogy or illustration or a suggested rule upon which the decision is not finally rested".

In all the facts and circumstances as stated above, we refuse to grant interim relief as per the prayer to the petition.

Application for interim relief rejected and refused, with costs.

JUDGE OF THE COURT OF APPEAL

W. M. M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL