

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

W.B.J. Gunawardena and Sons (Ltd.),
Hethuka Arjuna Gunawardena,
No. 293 B,
Stanly Thilakerathne Mawatha,
Nugegoda.

Defendant/Respondent-
Petitioner-Appellants

Court of Appeal Case No:
CA (PHC) 128/2014
HC Colombo Case No:
HCRA 188/2011
MC Colombo Case No: **80366/5**

-Vs-

Provincial Commissioner of Inland Revenue,
Department of Provincial Inland Revenue,
Provincial Council of Western Province,
Hague Road,
Bambalapitiya,
Colombo 03.

Plaintiff-Respondent-Respondent

Before : A.L. Shiran Gooneratne J.

&

Mahinda Samayawardhena J.

Counsel : Chathura Galhena with Dharani Weerasinghe for the
Respondent-Petitioner-Appellant.

Sumathi Dharmawardhana, P.C. Additional Solicitor
General for the Respondent.

Written Submissions: By the Respondent-Petitioner-Appellant on 03/07/2018

By the Respondent on 02/10/2018

Argued on : 23/09/2019

Judgment on : 30/10/2019

A.L. Shiran Gooneratne J.

The Provincial Commissioner of Inland Revenue, Complainant-Respondent-Respondent (hereinafter referred to as the Respondent) instituted action against the Respondent-Petitioner-Appellant (hereinafter referred to as the Appellant) in the Magistrates Court of Colombo, to recover a sum of Rupees 14,023,644/- by a certificate of Turnover Tax in default, in terms of Section 89 of the Financial Statute of the Western Province No. 06 of 1990. By an amended certificate dated 15/06/2007, the sum claimed was reduced to Rs. 11,142,572/-. On 24/06/2009, the Appellant was ordered to pay the amount reflected in the amended

certificate by installments and a default prison sentence was also imposed. The Appellant appealed to the High Court of the Western Province holden in Colombo against the said order. The learned High Court Judge by order dated 05/07/2012, affirmed the said order, however, the amount payable as monthly installment was varied. The Appellant is before this Court to canvass the said order.

Section 89(1) of the Regulation reads as follows;

"Where the Commissioner is of the opinion in any case that recovery of tax in default by seizure and sale is impracticable or inexpedient or where the full tax has not been recovered by seizure and sale, he may issue a certificate containing particulars of such tax and the name and last known place of residence of the defaulter to a Magistrate having jurisdiction in the division in which such place is situated.

The Magistrate shall thereupon summon such defaulter before him to show cause why further proceedings for the recovery of tax should not be taken against him, and in default of sufficient cause being shown, the tax in default shall be deemed to be a fine imposed by a sentence of the Magistrate on such defaulter for an offence punishable with a fine only or not punishable with imprisonment, and the provisions of subsection (1) of Section 291 (except paragraphs (a), (b) and (i) thereof) of the code of Criminal Procedure Act, No.15 of 1979, relating to default of payment of a fine imposed for such 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."

At the outset it is to be noted that the respective parties are not at variance that;

1. the certificate was filed in terms of Section 89(1) of the Western Province Finance Regulation No. 6 of 1990.
2. the amended amount of default turn-over tax payable by the Appellant was 11,142,572/-
3. the powers and discretion exercised by the Commissioner of Labour relevant to Section 38(2) of the Employees' Provident Fund Act is similar to the procedure in Section 89(1) of the Western Province Financial Regulations. ("whatever has been determined in the interpretation of one of several statutes in *pari materia* is a sound rule of interpretation of the other."- Rex Vs. Mason (1788), 2 T.R. 581, cited with approval in Yakoob Bai Vs. Samimuttu 51 NLR 345)

The Appellant contends the following grounds of Appeal;

- *The Respondent has failed to comply with the provisions of Section 89(1) of the Western Province Finance Regulation No.06 of 1990.*
- *Both the learned Magistrate as well as Hon. High Court Judge have failed to consider that there is no amended certificate in terms of Section 89 (1) tendered to court and have acted on the value of such an unavailable certificate.*

The Appellant submits that proceedings in the Magistrates Court under Regulation 89(1) should be initiated by the Respondent only where the default

taxes cannot be recovered from the seized properties of the defaulter by an action instituted in the District Court. The said argument is raised on similar grounds with reference to Section 38(2) of the Employees' Provident Fund Act as amended, where discretion on the procedure to be followed in respect of Section 17, 38(1) and 38(2) of the Act is "*where the full amount due has not been recovered by seizure and sale then, the Commissioner may issue a certificate containing particulars of the sum so due ---.*" The Appellant relies in the judgment of ***Kodagoda Arachchilage Dayawathi Vs. D.S. Edirisinghe S.C. (F/R) No. 241/08***, where Shiranee Thilakawardane J. held at page 8 that;

"The above three procedures are not alternative procedures for recovery. The legislature very clearly has sets out the scheme 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."

In that, the Appellant submits that the Respondent is in violation of a statutory requirement by initiating proceedings in the Magistrates Court without following the recovery process in the District Court by seizure and sale of the property of the Appellant Company.

The learned Additional Solicitor General relied upon several decided cases to emphasize the fact that in terms of the Western Province Financial Regulations, the discretion is vested with the Respondent to decide the procedure to be adopted to recover the default money. It is noted that, the judgment in *Kodagoda Archchilage Dayawathi Vs. D.S. Edirisinghe (supra)* can be distinguished from the present case under consideration on the basis that the dicta relied by the Appellant is not the ratio decidendi in the said case.

Section 89(1) of the Regulation provides that, "*Where the Commissioner is of the opinion in any case that recovery of tax "Where any tax in default and the Commissioner is of opinion that recovery by the means provided in subsection (2) is impartible or inexpedient, he may issue a certificate to a District Court having jurisdiction in any district where the defaulter resides-----."* A similar procedure contains in Section 38(2) of the Employees' Provident Fund Act. The question then is, can the criminal provisions contained in the Regulations be invoked in the first instance to recover Turnover Tax in default or is it condition precedent to follow the recovery process in the District Court to collect default taxes by seizure and sale of the properties of the Appellant company before initiating proceeding in the Magistrates Court in terms of Section 89(1) of the Regulations.

In defining the discretion of the Commissioner of Labour on the procedure to be followed in dealing with the procedure related to the Employees' Provident Fund Act, the Court has held that there is no necessity for the Commissioner to

have first resorted to the procedure in Sections 17 and 38(1) in order to file a certificate in the Magistrates Court under Section 38(2) of the said Act. (*M/s Narthupana Tea and Rubber Company Ltd. Vs. The Commissioner of Labour SC Appeal 510/74 S.C.M. 13/03/1978*). A Similar conclusion was arrived in *Jewelarts Ltd. Vs. The Land Acquiring Officer and others (CA/Writ/App/No. 1126/2004)*.

When collecting defaulted taxes owing to the Provincial Council, a narrow interpretation of the available procedure would certainly confine and/or limit the procedure of collection of Taxes, which would be detrimental to the scope of Section 89(1) of the Regulation. Therefore, the intention of the legislature was to enable the Commissioner, in his opinion, to decide the required procedure to collect the taxes due to the Provincial Council and also to enable the defaulter of the taxes 'to show cause why further proceedings for the recovery of tax should not be taken against him'.

In the circumstances, taking into consideration the alternate procedures for recovery of the defaulted taxes, I am of the view that, there is a discretion vested in the Respondent to decide the procedure to be adopted that is, whether to invoke criminal proceedings by filling a certificate in the Magistrates Court or by seizure and sale of the properties of the Appellant by an action in the District Court.

The next ground of Appeal is in respect of the amended certificate filed, which has disclosed the amount of taxes due from the Appellant. The contention

of the Appellant is that the certificate amending the amount of the taxes to be paid is not filed of record or not produced to Court by the Commissioner. The Certificate of Turnover Tax in Default dated 30/06/2005, which was filed prior to the amended certificate is at page 69 of the brief. The Turnover Tax in default has been amended by certificate dated 15/06/2007. The Appellant is challenging the impugned order on the basis that there is no such amended certificate filed of record.

It is correct that there is no such certificate to be found in the brief. However, it is observed that the journal entry dated 27/06/2007, at page 72 of the brief, which was recorded in the presence of the Appellant, specifically states that the amended certificate containing the sum due has been tendered to Court and accordingly, the amount to be collected is Rs. 11,142,572/-. Therefore, at this stage the Appellant cannot take up the argument that the certificate was not filed or not produced to Court by the Commissioner. It is also observed that, in the Notes of Interview at page 250 and 251 of the brief, the Appellant has agreed to pay the amended sum due as a settlement between the parties by placing his signature in the said document before the Commissioner.

The Appellant is not contesting the validity or the legality of the amended certificate. His grievance is limited only to the non-availability of the amended certificate produced to Court by the Commissioner. As observed earlier, the Appellant was fully aware of the amount due on the amended certificate, when he

was summoned before the learned Magistrate to show sufficient cause why further proceedings for the recovery of the sum due should not be taken against him. In all the above circumstances, I am of the view that the Appellant was well aware of the sum due, when he was summoned before the learned Magistrate to show cause and therefore, no illegality exists or prejudice being caused to the defaulter.

Therefore, I do not find any reason to overturn the findings of the learned High Court Judge or the learned Magistrate.

Accordingly, the Application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL