

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

Employees Trust Fund,
P.O. Box 807,
1st Floor, Labour Secretariat,
Colombo 05.

Applicant – Petitioner

CASE NO: CA (PHC) 40/2003

Vs.

Ceylon Agro Industries Limited,
No:346, Negombo Road,
Seeduwa.

Respondent – Respondent

And Now
Ceylon Agro Industries Limited,
No:346, Negombo Road,
Seeduwa.

**Respondent – Respondent –
Appellant**

Vs.

Employees Trust Fund,
P.O. Box 807,
1st Floor, Labour Secretariat,
Colombo 05.

**Applicant – Petitioner –
Respondent**

Before : W.M.M.Malinie Gunarathne, J

: P.R.Walgama, J

**Counsel : ANURA MEDDEGODA with ANDRIA RANASINGHE
For the Respondent – Respondent – Appellant.**

**: N. UNAMBUWA – DSG for the Applicant –Petitioner
– Respondent.**

Argued on : 05.08.2015

Decided on: 26.02.2016

CASE- NO- CA (PHC)- 40/2003- JUDGMENT- 29.02.2016

P.R.Walgama, J

The instant appeal has been lodged by the Respondent – Appellant (in short the Appellants) to assail the order of the Learned High Court Judge, dated 25.11.2002, by which order the Appellant was ordered to pay the EPF and ETF as stated in the Certificate filed in terms of Section 28(3) of the Employees Trust Fund Act No. 46 of 1980.

In order to appreciate the issue involved in this appeal, which lies in a narrow compass, it is necessary to set out the relevant facts in brief, infra.

The Applicant – Respondent instituted action in the Magistrate Court of Negambo to recover a sum of Rs. 490,232 as the ETF and the surcharge thereto.

Pursuant to the above application by the Applicant the Learned Magistrate has released the Respondent – Appellant on the basis that the so called three

complainant – employees had signed a Memorandum of Understanding by giving effect to any non payment thereto.

It was the categorical position of the Respondent-Appellant that the three employees were foreigners, and as per Agreement the they had with them which embodied the matters vis a vis the salary paid in Sri Lanka and the other being the payment of gratuity and other benefits paid outside Sri Lanka.

The relevant Section that deals with the present situation states thus;

Section 28(3) of the Employees Trist Fund reads as follows;

“where an employer makes default in the payment of any sum which he is liable to pay under this Act, and the Board is of opinion that it is impracticable or inexpedient to recover that sum under subsection (1) or subsection (2) or where the total amount due has not been recovered by seizure and sale, then the Board 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 over the place of such employer.

Therefore it is contended for the Respondent that the above Section does not envisage the particulars of the employee as contested by the Appellant.

It is also the position of the Respondent that the Appellant was aware of the liability as per document marked P3, and as such the Appellant is estopped from taking any objection as to the correctness of the certificate filed there to.

The relevant Section 28(4) of the ETF Act reveals thus;

“the correctness of any statement in a certificate issued by the board for the purpose of this section shall not be called in question or examined by the court in any proceedings under this section and accordingly nothing in this section shall authorize court to consider or decide the correctness of any statement in such certificate of the Board shall be sufficient evidence that the amount due under this Act from the defaulting employer has been duly calculated and that such amount is in default”

The Respondent had adverted Court to the documents marked A,B, and C purported to be the Memorandum of Understanding which were signed by the Appellant and the complainant employees after taking appointments in Sri Lanka.

It is the position of the Respondent that the Appellant has failed to established the fact that the said employees had been paid gratuity or any other payment outside Sri Lanka, In deed it is said that the Memorandum of Understanding is against the Public

Policy and is a nullity in law, as it circumvent the provisions of the Employees Trust Fund Act No. 46 of 1980.

It is seen from the order of the Learned Magistrate that he was overwhelmed by the fact that existence of Memorandum of Understanding by which they have renounced to receive any gratuity payment.

But The Learned High Court Judge by his order dated 25.11.2002 has pronounced that by private agreement the provisions of the Employees Trust Fund Act No. 46 of 1980, cannot be interpreted to avoid the payment due by the employer.

The above principle was articulated in the case of BLANK DIAMONDS (PVT) LIMITED .VS. EMPLOYEES TRUST FUND BOSRD S.C. APPEA NO. 120/97- DECIDED ON 06.05.1998. It is intensely relevant to note what stemmed from the said case.

“It had been written to the Chairman/ Managing Director of the appellant company over two years prior to the termination of the first Respondent’s services and acknowledges inter alia the receipts of all the dues from the appellant’s company for services rendered by the 1st Respondent and seeks to exempt the Appellant Company from making contributions to the EPF/ETF in Sri Lanka. This is implicit acknowledgement of the fact that the Appellant Company was the employer of the 1st Respondent and was obliged in

law to make EPF/ETF on behalf of the 1st Respondent.”

“As regards the liability to make contribution 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 every 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% of the total earnings of such employee from his employment under such employer during that month.”

Therefore the threshold issue in the instant matter is to decide whether the Appellant was the employer of the alleged workman- claimants’

The Learned High Court Judge in the impugned order had observed thus; that the Learned Magistrate has dismissed the Clamant- Respondent’s application on the basis that the Respondent has sought to recover EPF/ETF in respect of three Foreign nationals, and the said Foreign nationals had entered in an agreement with the Respondent- Appellant regarding the Gratuity and salary payable to the said employees. Further it was agreed after the termination of their services in the said company that they will not claim

any money, within or outside Sri Lanka. In addition the said employees had signed the above said documents and had admitted the fact that the Respondent- Appellant has no payment to be remitted to the employees.

The Learned High Court Judge was of the view that in terms of Act No. 46 of 1980 ETF Act that no party should be allowed to enter in to any agreement that will stultify or override the provisions of the said Act. Besides the Learned High Court Judge has also considered the case cited above and was of the view that the Respondent- Appellant cannot absolve from the liability to pay EPF/ETF as stated in the above Act.

It is apparent from the documents tendered by the Appellant that the claimants were employees of the Appellant and therefore the Appellant is liable to make the payment in terms of Section 28 (3) of the said Act.

Further it is brought to the notice of Court that the employment of foreign nationals had not been approved by B.O.I. which a contravention of the law of the land.

The stance of the Appellant is that the workmen-complainants are not employees of the Appellant's Company, but independent contractors in terms of the above Act. Nevertheless it is intensely relevant to note the MOU marked as A,B, and C do not indicate, the nature of their employment, and the work they will be

handling in the business concerned. Therefore this Court is compelled to arrive at the irresistible conclusion that the said workmen-claimants are employees under the Appellant's Company.

In the teeth of the above, this Court see no reason to set aside the order of the Learned High Court Judge, and as such the appeal should stand dismissed subject to a cost of Rs.10,000/.

JUDGE OF THE COURT OF APPEAL

W.M.M.Malinie Gunarathne, J
I agree,

JUDGE OF THE COURT OF APPEAL