

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

In the matter of an application for orders in the nature of writs of certiorari, mandamus and prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA /WRIT 0353/19

National Savings Bank
No. 255, Galle Road,
Colombo 03.

Petitioner

Vs.

- 1. A. Wimalaweera**
Commissioner of Labour,
Department of Labour
Colombo 05.
- 2. Hon. R. Samaraweera**
Minister of Labour and Trade Union
Relations,
Ministry of Labour,
Colombo 05.
- 3. K.P.S. Chandrasiri**
'Sirilena'
Madara lane,
Dodanduwa.
- 4. Hon. Attorney General**
Attorney General's Office,
Colombo. 12

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Eraj de Silva for Petitioner

Hafeel Fariz for 4th Respondent

C. Ekanayake, State Counsel for 1st, 2nd and 3rd Respondents

Supported on: 25.02.2021

Decided on: 10.03.2021

Sobitha Rajakaruna J.

This application for judicial review primarily seeks to quash the decisions made by the 1st Respondent, the Commissioner General of Labour in the letters annexed to the Petition marked as P17 and P19. The Petitioner has tendered to the Labour Department, a cheque No. 619143, drawn in favour of the 3rd Respondent for a sum of Rs. 2,774,293.45 being the EPF payment due to the 3rd Respondent. The Petitioner's claim is that the 1st Respondent should withhold the payment of EPF money until the hearing and the determination of the case No. M/10530 in the District Court of Galle. The said District court action has been instituted by the Petitioner against the 3rd Respondent.

By the letters P17 and P19, the 1st Respondent has refused to withhold the Employee's Provident Fund (EPF) which is due to the 3rd Respondent. The 1st Respondent has categorically informed that he could not holdover the said cheque which had been handed over to the Commissioner of Labour, in view of his Order (P11) dated 06.03.2019. The said Order marked as P11 has been issued by the 1st Respondent consequent to an inquiry held at the Labour Department upon a complaint made by the 3rd Respondent upon the default on the part of the Petitioner.

An application for judicial review, at this stage of notice, demands t

hat a court seized of an application for notice should consider whether the case is suitable for full investigation at a hearing at which all parties have been given notice. See *R v Secretary of State for Home Department exp Begum (1990) COD 107*. The court will take into account the question whether the application for notice relates to a matter that ought to be resolved after full argument.

Therefore it is important to ascertain as to whether the 1st Respondent has the authority to withhold the EPF money that is legally entitled to the 3rd Respondent, by holding over the said cheque drawn in favour of the 3rd Respondent. In paragraph (c) of the prayer of the Petition of the Petitioner, a writ of prohibition is also sought to prevent the 1st Respondent from taking any steps that would compel the Petitioner to pay the 3rd Respondent the said sum of Rs. 2,774,293.45 until the hearing and the determination of the said District Court case.

The payment of EPF to the Petitioner bank is governed under a fund called "National Savings Bank Provident Fund", which is regulated by certain rules adopted by the said bank. The relevant documents are marked as P13A and P13B. The said special fund has been established under and in terms of the provisions of the Employee's Provident Fund Act, No. 15 of 1958, as amended ("**EPF Act**"). The 1st Respondent has made the order in P11 under Section 27 (12) of the said EPF Act. The court by perusing the available documents observes that the 1st Respondent has ordered the Petitioner to submit the aforesaid cheque in view of handing over the same in return to the 3rd Respondent. The 1st Respondent has no duty, as required under EPF Act, to deposit the EPF money of the employees of the Petitioner bank in any special account.

The scheme of the Industrial Disputes Act and the EPF Act does not provide for withholding or forfeiture of EPF that an employee is entitled for. Furthermore, it is noted that no provision in the National Savings Bank Provident Fund Rules at (P13B), to withhold or forfeit EPF, except for the provisions in its clause 29, provides for bank's rights to reduce contribution. However, only in the Payment of Gratuity Act, No. 12 of 1983, as amended, provides a mechanism for forfeiture of gratuity subject to the conditions mentioned therein. In terms of Section 13 of the Payment of Gratuity Act, a gratuity entitled for any workman can be forfeited if such workman's services have been terminated for reasons of fraud, misappropriation of funds of the employer, willful damage to the property of the employer or causing the loss of goods, articles or property of the employer. Therefore, the law provides no excuse to withhold or forfeit the EPF that is entitled by an employee with his consent despite even the fact that such employee has caused misappropriation of funds of the employer or willful damage, etc. to the property of the employer.

The learned counsel for the Petitioner making extensive submissions drew the attention of court to the case of *Themehelp Ltd. v. West & others 1995 (4) The Old England Law Reports 215* and the contents in pages 985 onwards particularly at part 35.15 of Pagets' Law of Banking 15th Ed., which are mainly based on the principles of Law of Banking.

The court observes the above case of *Themehelp* deals with a performance guarantee and also with an injunction to restrain temporarily a claim under the performance guarantee. Similarly, the said part 35.15 in the aforesaid Paget's Law of Banking deals with a grant of ex parte injunction restraining payment under letters of credit, performance bonds and guarantees.

However, the relationship between the Petitioner bank and the 3rd Respondent is based on a contract of employment which can be easily distinguished with a relationship between a bank and a debtor. In *Singer Industries (Ceylon) Ltd. v. The Ceylon Mercantile Industrial and General Workers' Union (C.M.U) and others 2011 BLR 161*, the Supreme Court held that "*....in the industrial contracts, is regarded that the employer has superior bargaining power over the employee. Thus, such a contract is referred to as a contract between unequal partners where the employer is considered the economically stronger party and the employee the weaker partner*".

The Court has further held that, "*with the objective of adjusting and declaring the rights of parties consistent with the need to ensure fairness and equity, the State has brought in legislative regulations to restore the balance of power between the parties. Therefore industrial contracts unlike the normal contracts are partly contractual between the employer and employee, and also partly non contractual, in that the State by means of legislature or through industrial adjudication may prescribe many of the obligations that an employer may owe to his employee*".

The Employee's Provident Fund is the social security system established for the purpose of providing a protective power for the retired life of employees of the private sector and corporations who work for the economic upliftment of the country. (*Vide- Handbook of Employer's Provident Fund, Central Bank of Sri Lanka and Department of Labour, 2005, page 10*). EPF has been recognized by our legislature as a terminal benefit for workers who cease employment after retirement or after dismissal of service upon disciplinary grounds or otherwise.

The 1st, 2nd and 4th Respondents have filed limited Statement of Objections together with an affidavit of the Commissioner of Labour. The documents 1R1 to 1R11 are annexed to the said statement of objections, which divulge the fact, that:

- a) The 3rd Respondent has complained to the 1st Respondent by the document 1R1 of an injustice caused to him with regard to his claim for EPF.
- b) The notes of the inquiry held by the Commissioner of Labour in reference to the above complaint are at 1R2 – 1R4.
- c) Subsequent to the said inquiry the 1st Respondent has made the Order P11 (1R5) under Section 27 (12) of the said EPF Act.
- d) The document marked 1R7 clearly indicates the breakdown of the EPF claim of the 3rd Respondent.
- e) In view of the document marked 1R8, the Petitioner has handed over the cheque No. 619143 (the value Rs. 2,774,293.45) to the Labour Department on 27th March 2019. Subsequently, on 28th March 2019 by letter marked 1R9 the Petitioner has informed that steps had been taken to stop the payment of the said cheque.

The Petitioner does not impugn the order made by the 1st Respondent in P11 (1R5) in this case. However, he challenges subsequent orders made by the 1st Respondent in P17 and P19. Therefore, it is crystal clear that the Petitioner does not challenge the EPF amount due to the 3rd Respondent or the order made by the 1st Respondent in that regard. It is further observed that the Petitioner has not complied with the order made by the 1st Respondent in P11, by taking steps to stop the payment of this above mentioned cheque.

Moreover, the Petitioner in paragraphs d (b) and d (c) of the prayer of the Petition seek for a Writ of Mandamus directing the 1st Respondent and the 2nd Respondent to make necessary references under Sections 3 and 4 respectively of the Industrial Disputes Act. The Section 3 of the Industrial Disputes Act deals with the voluntary arbitration whereas Section 4 of the Act deals with compulsory arbitration. In terms of Section 3(1) (d) the consent of the parties to the industrial dispute or the consent of their representatives is necessary to refer an industrial dispute for settlement by arbitration. In terms of Section 4(1), the Minister may if he is of the opinion that an industrial dispute is a minor dispute, refer it for settlement by arbitration.

In the instant case it appears that the 3rd Respondent has not consented to refer any dispute between him and the Petitioner for settlement by arbitration. The Commissioner or the Minister may refer a dispute for settlement by arbitration only if it is an industrial dispute that is defined in Section 48 of the Industrial Disputes Act. Hence, such an industrial dispute should be connected with the employment or non-employment or the terms of employment or with the conditions of labour, or the termination of the services, or the reinstatement in service. The alleged dispute between the Petitioner and the 3rd Respondent is very well described in the Complaint marked as P7 filed in the District Court of Galle (case No. M/10530). The Petitioner has filed the said District Court action to recover damages allegedly caused to the Petitioner bank by the 3rd Respondent and also to claim certain amount of money on unjust enrichment on the part of the 3rd Respondent.

The substantive relief prayed for in the Petition of the Petitioner in this case, is to get the payment of Rs. 2,774,293.45 to the 3rd Respondent withheld until the hearing and determination of the District Court of Galle case No. M/10530. Therefore, the main intention of the Petitioner by filing the application before this court is to set off the EPF dues of the Respondent in an event the District Court issues a decree in favor of the Petitioner (the 'Plaintiff' in the District Court action'). This court is mindful of the provisions of the Section 218 (o) of the Civil Procedure Code, and accordingly the amount standing to the credit of an employee's EPF shall not be liable to seizure or sale.

Hence, this court is of the view that the cause of action disclosed in the Complaint filed in the above action in the District Court does not amount to an industrial dispute that defined in the said section 48 of the Industrial Disputes Act. The matter in dispute in the case of *De Costa v ANZ Grindlays Bank PLC (1996) 1 SLR 306*, referred to by the Petitioner, was whether the non payment of gratuity to Mr. Costa at a higher rate than the legal minimum was justified. Further the Petitioner made submissions on the case of *S. B. Perera v Standard Chartered Bank and others 1995, 1 SLR 73*. In that case, what the court has considered was whether an unresolved industrial dispute, which has arisen when the relevant appellant was an employee of the bank, exists, when the Minister referred it to settlement by arbitration.

In the instant case no dispute has arisen in view of any provision of the EPF Act or of the "NSB Provident Fund" or upon any term of the contract of employment. That is merely because the Petitioner has well admitted the liability of making EPF payment to the 3rd

Respondent by drawing a cheque to the value of the exact amount which is due to the 3rd Respondent. Petitioner has admitted the liability although her has defaulted subsequently the payment of EPF to the 3rd Respondent by taking steps to stop the payment of the said cheque.

Therefore, in view of the above grounds this court is of the opinion that the 1st Respondent has no duty or authority whatsoever to withhold the payment of EPF claim of the 3rd Respondent. This court is satisfied that the 1st Respondent has issued the letters at P17 and P19 after an inquiry and we take the view that the Petitioner has failed to establish grounds for *ultra vires* in regard to the issuance of those two letters.

Furthermore, the 3rd Respondent has not extended his consent to refer any dispute for settlement by arbitration and also there exists no industrial dispute for the Minister to refer for settlement by arbitration.

In the circumstances, this court takes the view that the final relief prayed for in the Petition of the Petitioner is nugatory. This court is of the view that there is no merit in this application and we refuse notice accordingly.

Judge of the Court of Appeal

Dhammika Ganepola, J.

I agree.

Judge of the Court of Appeal

DETAILS OF JUDGMENTS DELIVERED BY THE COURT OF APPEAL

Court No.	303
Case No.	CA/ WRIT/ 353/2019
Party names	National Savings Bank v A. Wimalaweera & others
Bench	Justice Sobhitha Rajakaruna Justice Dhammika Ganepola
Date of judgment	10.03.2021
Judgment delivered by	Justice Sobhitha Rajakaruna
Subject	Labour
Key words	Withholding or seizure of EPF payment
Legislation	Employee's Provident Fund Act
Cases referred to:	<i>R v Secretary of State for Home Department exp Begum (1990) COD 107</i> <i>Themehelp Ltd. v. West & others 1995 (4) The Old England Law Reports 215</i> <i>Singer Industries (Ceylon) Ltd. v. The Ceylon Mercantile Industrial and General Workers' Union (C.M.U) and others 2011 BLR 161</i> <i>De Costa v ANZ Grindlays Bank PLC (1996) 1 SLR 306</i> <i>S. B. Perera v Standard Chartered Bank and others 1995, 1 SLR 73</i>