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

In the matter of an application in terms of Article 140 of the Constitution of Sri Lanka for a mandate in the nature of a Writ of Certiorari.

Singer Sri Lanka PLC,
No.112, Havelock Road,
Colombo 05.

PETITIONER

C.A. Case No. WRT- 0201/21 **Vs**

1. The Commissioner General of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 05.

2. A. H. L. Rushika Padmini,
   Assistant Labour Commissioner(PPF)
   Employees' Provident Fund,
   Labour Secretariat,
   Narahenpita,
   Colombo 05,

3. M. D. Dayarathne,
   No. 57, Sri Dharmarama Mawatha,
   Katukurunda,
   Kalutara.

4. D. M. Hewavithana,
   Assistant Labour
   Commissioner (Recoveries),
   Employees' Provident Fund,
   Labour Secretariat, Narahenpita,
   Colombo 05.

5. Ceylon Chamber of Commerce,
   No. 50, Nawam Mawatha,
   Colombo 02.

RESPONDENTS

BEFORE : M. T. MOHAMMED LAFFAR, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Manoli Jinadasa with Shehara Karunarathna, for the Petitioner.

Manohara Jaysinghe, DSG, for the 1st, 2nd, and 4th Respondents.

Raneesha de Alwis, instructed by F J & G. de Saram for the 5th Respondent.

WRITTEN SUBMISSIONS

TENDERED ON : 08.12.2023 (On behalf of the Petitioners)

15.12.2023 (On behalf of the 1st 2nd and 4th Respondents)

ARGUED ON : 30.10.2023

DECIDED ON : 31.01.2024

WICKUM A. KALUARACHCHI, J.

The Petitioner Company has filed this Writ Application seeking to quash the orders contained in the letters marked P-21 and P-23. P-21 is a letter dated 13.01.2020, sent by the 4th Respondent to the Petitioner informing that the loan granted to the 3rd Respondent by the Petitioner cannot be recovered from the Employees' Provident Fund and to present a cheque in favour of the 3rd Respondent for a sum of Rs. 639,575.09 to their office within two weeks. P23 is a notice dated 05.02.2022, sent by the 2nd Respondent informing the Petitioner to draw a cheque in favour of the 3rd Respondent for the recovery of a sum of Rs. 639,575.09 and the interest thereon as the Petitioner had not truly granted a loan to the 3rd Respondent.

The 3rd Respondent was the Branch Manager of Sisil World Showroom, Mathugama of the Petitioner Company. When losses in the said outlet managed by the 3rd Respondent were discovered by the Petitioner, the 3rd Respondent requested by the letter marked P8-(4) that Rs.600,000/- to be utilized from his security deposit to settle a part of the outstanding dues to the Petitioner. The Petitioner stated that his request had to be rejected, as the security deposit had already been utilized to settle part of the outstanding dues.

According to the Petitioner, initially, they found only a loss but later it was found that it was a fraud. Then, a show cause letter was issued to the 3rd Respondent on 31.03.2017 and a domestic inquiry was held. As per the Letter of Termination marked P8-(3) dated 13.07.2017, the 3rd Respondent's service was terminated upon being found guilty of all the charges brought against him. A District Court case has also been filed against the 3rd Respondent to recover the balance sum of Rs.3,811,345.30 allegedly misappropriated by him, the case has been heard *ex-parte*, and

the Judgment (Y-2) has been delivered in favour of the Plaintiff after this application was filed.

After the 3rd Respondent's request that Rs.600,000/- be utilized from his security deposit to settle a part of the outstanding dues was rejected, the 3rd Respondent requested and entered into a loan agreement with the Petitioner in respect of a sum of Rs.600,000.00/- in order to settle a portion of a loss caused by him to the Petitioner while he was working as a Branch Manager of a showroom of the Petitioner Company. This agreement contains a specific clause that if the 3rd Respondent fails to settle the said loan by reason of death, retirement, resignation, or termination on or before the settlement date of the loan, the Petitioner Company shall be entitled to recover the balance sum outstanding on the loan by way of a claim under Section 43 of the Rules of the Mercantile Services Provident Society; an unincorporated entity and a Private Provident Fund approved by the 1st Respondent and established by the 5th Respondent. (Clause 4 of the Loan Agreement)

After entering into the said loan agreement, the Petitioner suspended the service of the 3rd Respondent because of several acts of misconduct related to mismanagement of cash and hire purchase collection at the aforesaid showroom. Upon termination, the Petitioner has recovered the sum of Rs.600,000/- from the money lying to the credit of the 3rd Respondent in the Mercantile Services Provident Society (hereinafter referred to as "MSPS"). The 3rd Respondent thereafter made a complaint to the Department of Labour on 16.02.2017 (P-2) that his service was suspended without preliminary inquiry and requested an order to grant EPF, ETF, Compensation, and a letter of resignation. The Petitioner stated that an inquiry was held in respect of the said complaint, but no order was given.

Again, the 3rd Respondent made a complaint to the 1st Respondent on 20.11.2017 (P-4(A)). In the said complaint, the 3rd Respondent stated that his service was wrongfully terminated on 14.02.2017 and requested an order to pay his EPF, on the basis that remitting a sum of Rs.639,575.09 to the account of the Petitioner Company from his EPF is unjustifiable. An inquiry was held regarding the said complaint. Thereafter, the 4th Respondent conveyed to the Petitioner, the Order marked P-21 and subsequently, the 2nd Respondent conveyed to the Petitioner, the Order marked P-23. The Petitioner Company challenges these two orders in this Writ Application.

The learned Counsel for the Petitioner, and the learned Deputy Solicitor General for the 1st, 2nd, and 4th Respondents, made oral submissions at the hearing of this application. The 5th Respondent was also represented at the hearing. The 3rd Respondent was not present and he was not represented. Written submissions have been filed on behalf of the Petitioner and on behalf of the 1st, 2nd, and 4th Respondents.

The issue to be determined in this application is whether the Petitioner Company is legally entitled to recover the loan granted to the 3rd Respondent by the Petitioner from the money lying to the 3rd Respondent's credit in the Mercantile Services Provident Society. (hereinafter referred to as "MSPS") Fund.

On 13.01.2020, the 4th Respondent informed the Petitioner by the letter P-21 that the loan granted to the 3rd Respondent by the Petitioner could not be recovered from the EPF and therefore, to draw a cheque in favour of the 3rd Respondent for a sum of Rs.639,575.09. On 05.02.2021, the 2nd Respondent informed the Petitioner by the letter P-23 that the loan granted by the Petitioner Company was not truly a loan released to the 3rd

Respondent and therefore, to draw a cheque in favour of the 3rd Respondent for a sum of Rs.639,575.09. So, the Petitioner Company has been directed by the aforementioned two letters to draw a cheque in favour of the 3rd Respondent for a sum of Rs.639,575.09 on two different grounds. Firstly, it was informed that the loan granted to the 3rd Respondent by the Petitioner could not be recovered from the EPF. Secondly, it was informed that the loan granted by the Petitioner Company was not truly a loan released to the 3rd Respondent.

The learned Counsel for the Petitioner contended that MSPS is the oldest approved Private Provident Fund in the country and not only the Petitioner Company but across the mercantile sector who are members of the MSPS grant loans to their employees against a lien as specified in Rule 43 of the MSPS, where the balance of the loan at the time of termination of employment can be recovered. Furthermore, the learned Counsel submitted that these Rules have been approved by the Commissioner of Labour as per Section 27 of the EPF Act. Therefore, he contended that the Petitioner has recovered the loan granted to the 3rd Respondent from MSPS Funds in accordance with the law and the decisions contained in P-23 and P-21 are bad in law.

The learned Deputy Solicitor General for the Respondents (the 1st, 2nd, and 4th Respondents are referred to as "Respondents") contended that the Petitioner Company has engaged in corrupt, oppressive, and exploitative practices to punish and harass their employees. He contended that although in terms of the Payment of Gratuity Act, the employer can forfeit the gratuity of an employee whose service has been terminated as a result of fraud, there is no comparable provision in the Employes' Provident Fund Act. Hence, he submitted that even though an employee causes damage or loss to the company, the employer cannot withhold the payment of the

employee's EPF benefits. It is stated in paragraph 15 of the statement of objections that Rule 43 of the Mercantile Service Provident Society is inconsistent with the provisions of the EPF Act and cannot be given effect.

The learned Deputy Solicitor General further contended that it seems that the Petitioner was pushing the workman to take a loan from the company, enabling the workman to compensate for the losses he is alleged to have caused, which is an unusual and strange arrangement. The learned DSG submitted that there was no actual fund transfer in granting the loan, and this is an instance where delictual liability is being repackaged as a contractual liability.

The learned DSG submitted that there was no actual fund transfer. The 2nd Respondent informed the Petitioner that the loan granted by the Petitioner Company was not truly a loan released to the 3rd Respondent. The learned Deputy Solicitor General argued that if the Petitioner applies Rule 43, there must be an actual loan agreement. He contended that a loan agreement is a contract; to formulate a contract, there must be an offer and acceptance, and a consideration. Consideration, he submitted is essentially money or something of value, which is given in exchange for either goods or services or for a promise to refrain from doing something. The learned DSG contended that in this loan agreement, as no consideration was passed to the workman, there was no loan agreement, and as such, the refusal to pay the EPF benefit on the basis that the same has been used to recover the loan is illegal.

I agree with the legal position regarding a contract described by the learned DSG while submitting the relevant judicial authorities. However, for the following reasons, I am unable to agree with his argument in relation to the Loan Agreement marked P8-(6):

Firstly; The 3rd Respondent did not come to this Court and stated that he was pushed to take a loan. It is apparent that the 3rd Respondent in his own handwriting, filled up the Loan Application Form and requested a loan of Rs.600,000/-. Thus, the other Respondents cannot state that the 3rd Respondent was pushed to take a loan or obtaining this loan was an unusual and strange arrangement.

In the written submission submitted on 27.02.2018, by the 3rd Respondent (P-10) at the inquiry held in the Labour Department, the Respondent has stated that he could not understand the language in which the Loan Agreement P8-(6) (he referred to as the document R-(6) was written. The 3rd Respondent was the Branch Manager of the Sisil World Showroom of the Singer Sri Lanka PLC (the Petitioner Company). The Petitioner stated that as the Branch Manager, he had to enter into many hire purchase contracts for consumer goods, that are generally in English Language. P8-(6) is not a complicated, lengthy agreement. It contains only 5 clauses. It cannot be believed that a Branch Manager of the Singer Company, who has perfected and tendered the loan application (P8-(5)) in his own handwriting in English cannot understand the five clauses contained in the Loan Agreement. Furthermore, until the said written submission is filed, the 3rd Respondent has never complained that his signature was obtained on a document that was in a language that he did not understand. In addition, the 3rd Respondent has not come to this Court and stated that his signature was obtained on the Lease Agreement which was in English and he could not understand the contents therein.

Secondly; the 3rd Respondent acknowledged the receipt of a sum of Rs.600,000/- by the Petitioner Company by signing the Loan Agreement P8-(6). Section 91 and Section 92 of the Evidence Ordinance read as follows:

Section 91 of the Evidence Ordinance reads:

"*Evidence of terms of contracts, grants or other disposition of property reduced to form of document. - "When the terms of a contract, or a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained*".

Section 92 of the Evidence Ordinance reads;

"*When the terms of any such grant or other disposition of property or any matter required by law to be reduced to the form of a document have been proved according to the last Section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms.*"

After reproducing the aforementioned two sections in the Evidence Ordinance, it is stated in the Judgment of ***Dangolla Appuhamilage Wimalawathie V. Dankoluwa Hewa Bulath Kandage Dona Subashini Ruchira Manjari*** - SC Appeal 167/10, SC/HC(CA)/LA/195/09, decided on 14.03.2017, that "in simple language, the aforementioned provisions of the Evidence Ordinance provides that if two or more parties get together and sign a legal document with terms and conditions contained therein, binding each party, then, the same parties cannot give oral evidence to contradict the contents of the written document. Section 92 clearly excludes any oral evidence to vary, add, subtract, or contradict what is included in the legally signed document".

In the instant application, the Loan Agreement marked P8-(6) has been reduced to a form of a document with the consent of the 3rd Respondent and the Petitioner Company. In addition, an agreement of this nature is required by law to be reduced to the form of a document. Therefore, the 3rd Respondent cannot give oral evidence, taking up a contrary position to what is in the Loan Agreement and state that he has not truly obtained the loan. In fact, as stated previously, the 3rd Respondent has not come to this Court and said so. In addition, when the 3rd Respondent applied for the loan, he has specifically stated in the loan application that he requested the loan "in order to clear short remittance". In the circumstances, other Respondents cannot argue that the loan was actually not given to the 3rd Respondent or there was no actual fund transfer. The 2nd Respondent was also erred in deciding that the loan granted by the Petitioner Company was not truly a loan released to the 3rd Respondent and directing the Petitioner to draw a cheque in favour of the 3rd Respondent for the recovery of a sum of Rs. 639,575.09 and the interest thereon.

Considering the aforementioned facts, it is apparent that the 3rd Respondent entered into a Loan Agreement with the Petitioner Company and acknowledged receipt of the loan in the amount of Rs.600,000/-. The petitioner recovered the loan granted to the 3rd Respondent from the MSPS Funds as per Rule 43 of the MSPS.

Now, I consider whether the Petitioner Company can legally act upon the rules of the Mercantile Services Provident Society Fund in respect of the EPF of its employees.

Section 27 of the Employees' Provident Fund Act reads as follows:

27(1) Where a provident fund or a contributory pension scheme has been established before the appointed date for the benefit of any employees in a covered employment, the administrators of such fund or scheme shall, within three months after the declaration of that employment as a covered employment by regulation made under this Act, furnish the Commissioner with the prescribed particulars relating to such fund or scheme, and, if the Commissioner, after examining such particulars and making such investigations as he may deem necessary, is of the opinion that such fund or scheme satisfies the prescribed requirements and that it is expedient that such fund or scheme should be declared to be an approved provident fund or an approved contributory pension scheme, he shall declare such fund or scheme to be an approved provident fund or an approved contributory pension scheme; and, if he so declares, no contributions shall, with effect from the date fixed in relation to such fund or scheme, be payable to the Fund by such employees and the employer of such employees.

27(2) *The employer in a covered employment who proposes to establish, after the appointed date, a provident fund for the employees in such employment shall furnish the Commissioner with the prescribed particulars relating to the proposed provident fund, and, if after examining such particulars and making such investigations as he may deem necessary, the Commissioner is of opinion that the proposed provident fund satisfies the prescribed requirements and that it is expedient that such fund should be declared to be an approved provident fund, the Commissioner shall declare the proposed provident fund to be an approved provident fund ; and, if he so declares and the provident fund is established, contributions to the Employees' Provident Fund shall, with effect from the date fixed in*

relation to such approved provident fund by the Commissioner, cease to be payable by such employees and such employer.

Hence, it is apparent that Section 27 of the EPF Act permits the Commissioner of Labour to approve a Private Provident Fund, if the Commissioner is satisfied after examining and investigating the particulars of the fund that such fund satisfies the prescribed requirements. The document Z-1, which was tendered with the counter affidavit proves that MSPS Provident Fund is an approved Provident Fund. Therefore, the Petitioner Company is legally entitled to act in terms of the MSPS Provident Fund when dealing with all matters relating to its Employees' Provident Fund.

At this juncture, it is important to pay attention to Rule 43 of the Mercantile Services Provident Society as well. Rule 43 is as follows:

The contributor for the time being in respect of a member shall subject to the provisions of Rule 40 have a lien (a) in the case of a loan granted prior to the 20th July 1959 on the full amount, and (b) in the case of a loan granted after 20th July 1959 on seventy-five per centum (75%) of the amount standing to the credit of a member in respect of contributions made by that contributor to the member and interest (if any) on such loan. On the member ceasing to be employed by that contributor or on the member becoming entitled to receive payment from the Society or on the death of the member (whichever shall be the earliest of such events), and on receipt of a certificate from the contributor as to the amount due in respect of the money so lent, the committee **shall after deducting the amount outstanding on any loan made by the Society under Rule 40 to that member payout of the balance standing to the credit of the member** in the register the amount due to the contributor: In the event of such balance being insufficient to meet the contributor's claim the full

amount of such balance shall be paid to the contributor. The contributor's receipt for the money's so paid shall be a good discharge to the committee as against the member or any person claiming through or under him." (emphasis added)

According to Rule 43, the amount outstanding on any loan can be deducted from the MSPS Provident Fund. What the Petitioner Company has done was, recovering the amount outstanding from the loan granted to the 3rd Respondent in terms of Rule 43 of the MSPS Fund. Undoubtedly, the payment of EPF to the employees by the employer is mandatory. But in the case at hand, it is not a refusal to pay EPF as contended by the learned DSG. The 3rd Respondent applied for the loan to clear short remittances, the loan was granted, the Petitioner then recovered the amount outstanding from the loan according to the provisions of the MSPS.

By signing the Loan Agreement marked P8-(6), the 3rd Respondent agreed as per clause 4 of the agreement that if he fails to settle the loan by reason of his death, retirement, resignation, or termination of his service on or before the settlement date mentioned in the agreement, the company shall be entitled to recover the balance sum outstanding on the loan by way of a claim under Section 43 (Employers Lien) of the Rules of the Mercantile Services Provident Society. Hence, I hold that the Petitioner Company recovered the loan from the MSPS Fund lawfully, and the Petitioner Company is legally entitled to do so. When the Petitioner Company recovered the loan in a lawful manner, it is incorrect for the Respondents to allege that the Petitioner engaged in a corrupt, oppressive, and exploitative practice to punish and harass the 3rd Respondent. In the domestic inquiry, the 3rd Respondent was found guilty of all the charges

leveled against him. After filing this application, the District Court made an order to recover the balance sum of Rs.3,811,345.30 allegedly misappropriated by the 3rd Respondent. When a loss was initially discovered by the Petitioner, the 3rd Respondent requested by letter P8-(4) which has been written in his handwriting to utilize Rs.600,000/-from his security deposit. After the Petitioner rejected his request, as the security deposit was already utilized to settle part of the outstanding, the 3rd Respondent requested this loan, filling out the loan application in his handwriting. In the said application, he has specifically stated that the reason for requesting the loan is to clear short remittances. Under these circumstances, The Petitioner recovered the loan acting in terms of Rule 43 of the Mercantile Services Provident Society.

Therefore, the 4th Respondent's direction contained in P-21 to draw a cheque in favour of the 3rd Respondent for a sum of Rs.639,575.09, as the loan granted to the 3rd Respondent by the Petitioner cannot be recovered from the EPF is erred in law. Further, the 2nd Respondent's direction contained in P-23 to draw a cheque in favour of the 3rd Respondent for a sum of Rs.639,575.09 as the loan granted by the Petitioner Company was not truly a loan released to the 3rd Respondent is also erred in law because the 3rd Respondent himself has acknowledged the receipt of a sum of Rs. 600,000/- by signing the Loan Agreement P8-(6). Therefore, orders P-21 and P-23 are illegal and liable to be quashed.

Accordingly, a Writ of Certiorari is issued as prayed for in the prayer (b) of the petition quashing the orders contained in the letters marked P-23 and P-21. Parties should bear their own costs.

Application allowed.

JUDGE OF THE COURT OF APPEAL

M. T. Mohammed Laffar, J

I agree.

JUDGE OF THE COURT OF APPEAL