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

In the matter of an application under Article 140 of the Constitution for mandates in the nature of Writ of Certiorari.

STRABAG AG

Ortenburgorstrasse 27,

9800 Spittal Drau, Austria.

Also of –

63, Detagamuwa, Kataragama.

Also of –

278, Union Place, Colombo 02.

Petitioner

Case No. C. A. (Writ) Application 63/2017

Vs.

1. The Commissioner General of Labour
   Labour Secretariat, Narahenpita, Colombo 05.
2. H. M. Razeek
   Senior Labour Officer, Colombo South,
   Department of Labour,
   Narahenpita, Colombo 05.
3. R. P. Iresha Udayangani
   Assistant Commissioner of Labour,
   Colombo South, Department of Labour,
   Narahenpita, Colombo 05.

Website Copy

4. Manoharan Gopalaswamy
   No. 2, Padmavathiar Road, Gopalauram,
   Chennai 0 6000086, India.
   Also of –
   200, Lake Drive, Colombo 08.

Respondents

Before: Janak De Silva J.

Counsel:

Manoli Jinadasa for the Petitioner

Chaya Sri Nammuni SSC for 1st to 3rd Respondents

Written Submissions tendered on:

Petitioner on 29.08.2018

1st to 3rd Respondents on 21.11.2018

Decided on: 23.01.2020

Janak De Silva J.

The Petitioner is seeking writs of certiorari quashing the orders dated 03.10.2016 (P9) and 29.10.2016 (P10) made by the 3rd Respondent. These two documents contain decisions to the effect that there was a contract of employment between the Petitioner and the 4th Respondent in relation to which the Petitioner has failed to pay the Employee Provident Fund (EPF) contributions as required by the Employee Provident Fund Act No. 15 of 1958 as amended (EPF Act) and action to be taken to recover the said dues.

Partied agreed that this matter can be disposed by way of written submissions. The Petitioner in the written submissions contends that the said decisions are ultra vires and/or in breach of the principles of natural justice and/or without jurisdiction for the following reasons:

(1) The 1st to 3rd Respondents completely ignored that the contract between the Petitioner and the 4th Respondent does not fall within the definition of Covered Employment in the EPF Act especially in view of the presumption in statutory interpretation that statutes are territorial in application.

(2) The 1st to 3rd Respondents acted in excess of jurisdiction by failing to correctly and properly consider whether the EPF Act provisions apply to the contract of employment between the Petitioner and the 4th Respondent.

(3) The 1st to 3rd Respondents erred in applying the provisions of the EPF Act to the contract of employment between the Petitioner and the 4th Respondent when the governing law of the contract was Austrian Law.

(4) The principles of approbate and/or reprobate prevents the 4th Respondent from recovering EPF dues as he represented to the Petitioner that he is not entitled to EPF/ETF dues.

I will now consider each of these submissions although not in the same order.

Governing Law

The principal submission of the learned counsel for the Petitioner is that it is well settled law that when the parties elect a jurisdiction of a country the contract of employment is governed by that country [paragraph 3 of the written submissions]. The decision in *International Science and Technological Institute Inc. v. Rosa and Another* [(1994) 3 Sri.L.R. 233] was cited in support where this Court held that when there is an express selection by the parties of the law applicable to a foreign contract of employment, the selected law shall be the proper law (substantive law) governing the contract of employment.

Before addressing this point in detail, I must point out that this submission overlooks the basic distinction between a choice of law clause and a choice of place of jurisdiction. A choice of law clause is a clause by which the parties agree as to the law that will govern the relationship between the parties. A law so chosen is known as the governing law or the proper law of the contract. A choice of place of jurisdiction on the other hand is a clause by which parties agree to the place where any dispute between them will be adjudicated which may not be the same country as the legal system as of the proper law.

The point raised requires a consideration of the conflict of laws rules. These can be either codified rules such as the Rome Convention or the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) or common law rules. However, in Sri Lanka there is neither statutory rules containing conflict of law rules nor have our courts developed a set of common law rules in that area. A miniscule number of judgments appear to refer to the conflict of law rules of English Law developed by common law rules. I am of the view that it is apposite that the issue before Court is determined by the application of the conflict of law rules as developed by English common law.

The contract of employment between the Petitioner and the 4th Respondent [P5(X2)] contains a choice of law clause which reads:

> "In so far as a matter is not specifically regulated in this contract, the Contract of Employment as per the Austrian Civil Code shall be used in addition. Austrian public labour, social and collective bargaining law, including the 'Betriebsverfassungsgesetz' (Industrial Constitution Law) are not applicable on principle."

The question is whether this governing law clause has the effect of preventing the EPF Act applying to the contract of employment.

Subject to a number of exceptions the formation and validity of the contract, its interpretation and its discharge are all governed by the governing or the proper law. However, this general principle has several exceptions with regard to particular types of contracts.

A contract of employment is, in general, but subject to important statutory exceptions, governed by its proper law [Dicey and Morris on *Conflict of Laws*, 11th Ed., page 1296]. The proper law of a contract of employment will determine such questions as the terms which will be implied in the contract, the circumstances in which the employee will be entitled to remain on the employer's premises, and to receive wages or other forms of compensation, whether notice of termination is effective and whether an exemption clause in the contract is valid [supra. page 1297].

However, in relation to contracts of employment and in particular social legislation the proper law of the contract gives way to statutory provisions when they take the form of "mandatory rules" of the forum (*lex fori*). In *Irish Shipping Ltd. v. Commercial Union Assurance Co. plc* [(1991) 2 QB 206, (1989) 3 All E.R. 853] Straughton L.J. held that the intention of Parliament could be frustrated if it were open to the parties to a contract of insurance to exclude the operation of section 1 of the Third Parties (Rights against Insurers) Act 1930 by choosing a foreign proper law.

Accordingly, if the provisions of the EPF Act are construed as "mandatory rules" of Sri Lanka, it applies to the contract of employment between the Petitioner and the 4th Respondent irrespective of its governing or proper law being Austrian Law as submitted by the Petitioner.

Cheshire and North, *Private International Law*, 13th Ed., pages 579-582 explains different formulations by which the overriding effect of an Act may be ascertained as a matter of statutory construction:

(1) The Act may expressly provide that it is to have complete overriding effect.

An example of such an English Act is the Employment Rights Act 1996 which in section 204(1) states that for the purposes of the Act it is immaterial whether the law governing the contract is the law of the part of the United Kingdom or not.

(2) The Act expressly provides that it is to have limited overring effect.

The Unfair Contracts Terms Act 1977 is an example of an English Act which by its own terms makes clear that it has only limited overriding effect.

(3) The Act expressly provides that it is to have no overriding effect.

(4) The Act has no express provision on its overriding effect but has a provision on its territorial scope.

Where the Act has provision dealing with its territorial scope without specifying expressly whether it is intended to have overriding effect, an inference of its overriding effect can be more easily drawn.

(5) The Act has no express provision as to its overriding effect and no provision on its territorial scope.

In this situation as well, it is a matter of statutory construction to ascertain whether it has an overriding effect although this exercise is difficult in the absence of any indication on its territorial scope.

I will now consider whether the EPF Act gives any indication of its overriding effect to apply to the contract of employment between the Petitioner and the 4th Respondent despite its governing law being Austrian Law.

Scope of the EPF Act

The EPF Act applies to every person over a prescribed age who is employed by any other person in any covered employment [Section 8(3) of the EPF Act]. Section 8(1) of the EPF Act provides that any employment, including service of a corporation may by regulation be declare as a covered employment.

Employees' Provident Fund Regulations, 1958 (EPF Regulations) published in Gazette Extraordinary No. 11,573 dated 31st October 1958 as amended from time to time specified various industries which fall within "covered employment" in Sri Lanka.

Regulation 2 of the EPF Regulations read:

> "2(1) *Save as hereinafter provided in regulations 3 and 4-*
>
> *(a) every employment specified in the First Schedule to these regulations, and*
>
> *(b) every employment outside Ceylon which is in connection with or for the purposes of, the trade or business of any employer in any employment referred to in that Schedule and which would be a covered employment if it were in Ceylon.*
>
> *shall be covered employment.*
>
> *(2) Every person employed in any covered employment other than-*
>
> *(a) a person holding the office of director in respect of his employment as such director*
>
> *(b) a person who is a partner in any partnership in respect of his partnership,*
>
> *(c) a person who is employed in a managerial, executive or technical employment and for whom superannuation benefits or benefits on termination of employment are provided under any provident*

fund or pension scheme or any other fund or scheme, established or administered outside Ceylon, and

(d) a person who is employed outside Ceylon, for the purpose of such employment but who is not ordinarily resident in Ceylon,

shall be an employee to whom the Act applies."

The learned counsel for the Petitioner submitted that the term "employment" in section 8 of the EPF Act and section 2 of the EPF Regulations must be interpreted in accordance with accepted principles of statutory interpretation so that it refers to employment within Sri Lanka and not employment outside Sri Lanka [paragraph 4.4 of the written submissions].

As a further extension of this submission the learned counsel for the Petitioner submitted that the EPF Act does not apply to foreigners in view of the presumption in statutory interpretation that statues are territorial in its application. Extracts from *Bindra, Interpretation of Statutes*, 10th Ed., 195-196, Principles of Statutory Interpretation by Justice G.P. Singh, 12th Ed., 621-623 and *Maxwell on Interpretation of Statutes*, 12th Ed., 177 was cited in support.

The contract of employment between the Petitioner and the 4th Respondent is marked P5(X2) with the petition. It states that the country of employment is Sri Lanka. The project/construction site is identified as Kataragama. He was employed as a Project Manager in a project undertaken by the Petitioner consequent to a Contract Agreement with the Government of the Democratic Socialist Republic of Sri Lanka through the National Water Supply and Drainage Board. Clearly the work that the 4th Respondent was to perform under the contract of employment was an essential component of the larger development agenda of Sri Lanka. The claim of the 4th Respondent for EPF dues are only for the period he worked in Sri Lanka in terms of the contract of employment marked P5(X2). In these circumstances, it is

illogical to argue that his employment is outside Sri Lanka merely because he is a foreign national working for a foreign organisation.

Furthermore, in the Supreme Court decision in *Blanka Diamonds (Pvt) Ltd. v. Van Els* [S.C. Appeal 52/95, S.C.M. 15.02.1996] Fernando J. (at page 5) referring to the EPF Regulations held:

> "If expatriates as a class were intended to be excluded, that might have been done but it was not. The designated class was made wider."

It is also to be noted that the Petitioner did not at any point seek to establish that the 4th Respondent was a beneficiary of any provident fund scheme in terms of the Austrian Law. In fact, the governing or proper law clause appears to exclude Austrian public labour, social and collective bargaining law, including the 'Betriebsverfassungsgesetz' (Industrial Constitution Law).

The learned counsel for the Petitioner further submitted that the intention of the legislature can be gathered from the Hansard and that in this case the intention of the legislature was to provide benefits only to residents in Sri Lanka in order to provide them with some level of social security at the time of retirement or leaving of employment for various reasons specified in the EPF Act.

It is true that in *Shiyam v. Officer-in-Charge, Narcotics Bureau and another* [(2006) 2 Sri. L.R. 156] the Supreme Court held that in case of doubt, it is competent to look at Parliamentary debates on Acts to ascertain the intention of the law. But in this instant, there can be no doubt given the clear statement made by the Supreme Court in *Blanka Diamonds (Pvt) Ltd. v. Van Els* (supra).

Furthermore, any interpretation that the EPF Act does not apply to foreign nationals working in Sri Lanka is counter-productive to the Sri Lankan workforce in that it will facilitate the employment of foreign nationals in Sri Lanka at a lower cost to the employer than employing a Sri Lankan. In any event, the Hon. Minister of Labour, Housing and Social Services during the second reading of the National Provident Fund Bill refers to the fact that the earlier draft of the Bill had to be "completely re-modelled to accord with the policy of the present Government to improve the lot of the working class" and that "this scheme is by far one of the most important measures ever affected for the welfare of the workers" [X1 filed with Statement of Objections, 3310]. The welfare of the working class certainly cannot be improved by making it less costly to employ foreign nationals in Sri Lanka.

I therefore hold that the EPF Act is mandatory in nature and applies to the contract of employment between the Petitioner an the 4th Respondent.

Waiver

The learned counsel for the Petitioner submitted that the 4th Respondent cannot approbate and reprobate as he had agreed with the Petitioner that he is not entitled to EPF. The issue is whether the application of the EPF Act can be waived by parties to a contract of employment which otherwise falls within the EPF Act.

Section 10 (2) of the EPF Act reads:

> "Subject to the provisions of subsection (3) of this section and of section 27, *the employer of every employee to whom this Act applies* and who is liable to pay contributions to the Fund ***shall***, *in respect of each month during which such employee is* in a covered employment under such employer, *be liable to pay* to the Fund on or before the last day of the succeeding month, *a contribution of an amount equal to* nine per centum of such employee's *total earnings from that employment during that month.*" (emphasis added)

Section 16 of the Employees Trust Fund (ETF) Act No. 46 of 1980 reads:

> "*The employer of every employee to whom this Act applies* shall, *in respect of each 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 per centum of the *total earnings of such employee from his employment under such employer during that month*".

In *Blanka Diamonds (Pvt) Ltd. v. Van Els* [(2004) 3 Sri.L.R. 314 at 321] the Supreme Court held that this provision prevented any waiver of ETF contributions by agreement between the employer and employee. This decision was cited with approval and followed by this Court in *Ceylon Agro Industries Limited v. Employees Trust Fund* [CA(PHC) 40/2003, C.A.M. 26.02.2016].

Section 16 of the ETF Act and Section 10(2) of the EPF Act are substantially similar in application. It is an established rule of interpretation that where there are statutes made *in pari materia*, whatever has been determined in the construction of one of them is a sound rule of construction for the other [*Craies on Statute Law*, 7th Ed., page 139]. In *Crosley v. Arkwright* [(1788) 2 T.R. 603, 608, (1788) 100 E.R. 325, 328] Buller J. held that all Acts relating to one subject must be construed *in pari materia*.

Hence, I hold that the application of the EPF Act to the employment contract between the Petitioner and the 4th Respondent cannot be waived by agreement between parties.

For all the foregoing reasons, I dismiss the application with costs fixed at Rs. 50,000/=.

Judge of the Court of Appeal