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

In the matter of an application in terms of Article 154P(6) read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka against the judgment dated 30.07.2014 in Provincial High Court of the North Western Province (holden at Chilaw) case No. HCR 06/2012

Warnakulasooriya Jagath Herman Paul Fernando,
Running the Business under the name and style of "New Meditech Pharmacy and Laboratory",

Respondent-Respondent-Appellant

Court of Appeal Case No:
CA/PHC/86/2014
HC Chilaw Case No:
HCR 06/2012
MC Marawila Case No: 46462/C

-Vs-

Kahanawita Liyanage Dona Vineetha
Rathnakumari,
Assistant Commissioner of Labour,
District Labour Office,
Chilaw.

Substituted Applicant-Petitioner-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

Dr. Ruwan Fernando J.

Counsel : Hilary Livera for the Respondent-Respondent-Appellant.

Safrina Ahamed, SC for the Substituted Applicant-Petitioner-Respondent.

Written Submissions: By the Substituted Applicant-Petitioner-Respondent on 23/10/2019

By the Respondent-Respondent-Appellant on 15/11/2019

Argued on: 25/09/2020

Judgment on : **18/11/2020**

A.L. Shiran Gooneratne J.

This is an Appeal from an order made by the Provincial High Court of Chilaw, arising from an application in revision filed by the Applicant-Petitioner-Respondent, (Assistant Commissioner of Labour) seeking to set aside the order made by the learned Magistrate dated 17/06/2011, refusing an application to recover a sum of Rs. 265,015/- due to the Respondent from the Respondent-Respondent-Appellant, in terms of Section 38(2) of the Employee's Provident Fund Act No. 15 of 1958. (as amended) (EPF Act). Upon the tender of certificate dated 07/06/2010, in terms of Section 38(2) of the Act, the learned Magistrate

summoned the Appellant to show cause as to why further proceedings for the recovery of the sum due under the act should not be taken against him. The Magistrate by the said order dated 17/06/2010, refused the application on the basis that the Respondent had instituted action under Section 38(2) of the Act before resorting to the procedure laid down under Section 17 and 38(1) of the Act to recover the due amount and therefore dismissed the application in limine. The learned High Court Judge by order dated 30/07/2014, directed that the Applicant-Respondent to proceed with the inquiry initiated before the Magistrates Court.

When this case was taken up, the Appellant confined his argument to the following grounds in revision; that,

a) the Applicant-Petitioner could not have invoked the jurisdiction of the Magistrates Court under Section 38(2) without first resorting to Section 17 and 38(1) of the Act.
b) the failure of the learned High Court Judge to consider the delay of 9 months when filing the application for revision.
c) the order of the High Court was not available at the time the reasons for the order was given.

It is observed that the learned Magistrate made his order following the dictum laid down in ***Dayawathi vs. Edirisinghe and others S.C. (FR) 241/2008; S.C.M. 01/06/2009***, where it was held that before acting in terms of Section 38(2) of the EPF Act, the Respondent must act under Section 17 and 38(1) of the Act,

The contention of the Appellant is that the Commissioner has exercised his discretion wrongly by filing the certificate under Section 38(2) without first resorting to the provisions of Section 17 and 38(1) of the Act.

However, the learned High Court Judge having considered the findings in ***Dayawathi vs. Edirisinghe (supra)*** *and* ***Chiththananda vs. Assistant Commissioner of labour (SPL/LA/277/12)*** held, that the decision in *Dayawathi vs. Edirisinghe* is not binding precedence on the said issue and that there was no necessity for the Commissioner to have first resorted to Section 17 and 38(1) of the Act before resorting to Section 38(2).

It is noted that the Respondent by application dated 09/06/2010, has sought to recover a default in EPF dues from the Appellant as employer, amounting to Rupees 2,65,015.00, due to 18 employees in terms of Section 38(2) of the EPF Act. The Appellant appeared in Court on summons and moved for a date to show cause.

In terms of Section 38(2) of the Act, the Commissioner is vested with the discretion on the procedure to be followed to recover the money due, when it is impracticable or inexpedient to recover the said sum under Section 17 or under Section 38(1) of the Act.

"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)****.*

In an identical issue raised in ***C.A. 234/2013 (Writ) decided on 13/12/2013, Anil Gooneratne J.*** held that;

"We find that on a perusal of the above provisions that there is no necessity at all for the Commissioner General of Labour to resort to Section 17 of the Act prior to filing a certificate under Section 38(2) of the Statute. The above provisions are very clear and it is for the Commissioner to form an opinion that it is impracticable or inexpedient to recover the sums due under Section 17 or under Section 38(1) of the Employees' Provident Fund Act. We are unable to accept the views of the learned President's Counsel. It is not for the defaulter to decide the required statutory provisions under which the Commissioner is expected to proceed and recover the amount in default. If the learned President's Counsel's argument is accepted such a course of action would defeat the intention of the Statute. This is a piece of social legislation enacted to grant superannuation benefits for employees, and not a statute enacted to delay the process and defeat the intention of the legislature."

With reference to ***Dayawathi vs. Edirisinghe (supra),*** the court observed that;

"The learned President's Counsel rely on the judgment in S.C. (FR) case No. 241/08, which is in our view has no relevance, it being a fundamental rights case where the Petitioner's fundamental rights had been violated as ruled by the Supreme Court in that case. The ratio decided of the above case very briefly was the illegal arrest and detention of the Petitioner in that case, for being incorrectly and improperly named or implicated as a defaulter of Provident Fund dues. ..... As such this court is only bound by the ratio of the above judgment but not the statement expressed on the applicability of Section 38(2), being obiter."

Therefore, we do not see any statutory impediment preventing the Commissioner to recover the dues in terms of Section 38(2), when in his opinion it is impracticable or inexpedient to recover the sum due under Section 17 or under sub section 38(1) of the Act. If the grievance of the Appellant was that the authority failed on its part to adhere to the rules of natural justice or the duty to act fairly, the enforcement of such procedural safe guards should be remedied by the excise of public law principles.

The Appellant contends that the Respondent had failed to explain the delay of 9 months in filing the application before the High Court on the basis that the Court has a discretion to deny the Respondent relief, having regard to his conduct and laches which stand against the grant of discretionary remedy. It is also

contended that the Petitioner had failed to explain the exercise of the right of appeal instead of making an application in revision to the Provincial High Court.

"Unlike an appeal, which depends on the availability of a right of appeal conferred by statute, revision is a discretionary remedy. The object of revisionary jurisdiction is to ensure due administration of justice and the correction of errors in regard either to the law or the facts in order to avoid a miscarriage of justice". See ***Meeriam Beebee vs. Seyed Mohamed 68 NLR 36***.

It is well settled law that the facts and circumstances of each case would be a matter for consideration to decide on the existence of exceptional circumstances. In an appeal to this Court arising on a claim being preferred to a property seized in execution of a degree, *Anil Gooneratne J.* held that *"the revisionary jurisdiction of the Appellate Court is wide enough to be exercised to avert any miscarriage of justice irrespective of availability of remedy or inordinate delay".* (***L.B. Finance Company vs. Walisinghe and others 2012 (BLR) 294),***

The facts of this case clearly point out to the irresistible conclusion that there is no statutory inhibition for the commissioner in his discretion to proceed with the appropriate statutory provision to initiate legal action against the Appellant. Therefore, the conclusion of the learned Magistrate that the Commissioner has arbitrarily decided to institute the present action in terms of Section 38(2) of the Act, should be set aside in order to avoid a procedural irregularity.

The next ground raised by the Appellant is that in such a situation as observed above, can the Petitioner prefer an application in revision when a right of appeal is granted. This too is well settled law. Where any misgivings or uncertainty as to the scope of the court's revisionary jurisdiction it *"must unhesitantly be resolved in favour of a wider than a narrower jurisdiction".* ***(Sirimavo Bandaranayake vs. Times of Ceylon Ltd. (1995) 1SLR 22).*** *"The powers given to the Supreme Court by way of revision are wide enough to give the right to revise any order made by an original court whether an appeal has been taken against it or not."* ***(Athukorale vs. Samyanathan 41 NLR 165, Silva vs. Silva 44 NLR 494, Abdul Cader vs. Sithy Nisa 52 NLR 536, Soysa vs. Soysa (2000) 2SLR 235).***

In ***Attorney-General vs. Ratnayake and Others (2003) 3 SLR 105,*** *Raja Fernando J.* observed, thus,

"When the application for revision was taken up learned counsel for the respondents took up a preliminary objection that the petitioners have failed to exercise their right of appeal against the order and therefore unless exceptional grounds are shown the Court of Appeal should not exercise their powers of revision. Having considered the importance of the issue raised by the petitioners and the injustice caused to the virtual complainant we think this is a fit case in which the revisionary jurisdiction of this court should be exercised."

In the circumstances we find that this is a fit case to exercise revisionary jurisdiction of this court, in order to correct the error made by the learned Magistrate.

The Appellant is also aggrieved that the reasons for the order made by the Provincial High Court judge was not available on the date that the order was pronounced. According to journal entry dated 30/07/2014, the High Court Judge has delivered the order on the said date. The order, at page 113 of the brief, bears the same date. As contended by the learned Counsel for the Appellant, it is possible that the order was not filed of record on the date the Appellant applied to obtain a copy of the proceedings. However, the Appellant admits that he was in possession of the impugned order prior to filing this action. Assuming that the order was not available at the time of obtaining the extracts of proceedings, the Appellant has failed to plead or properly enumerate the prejudice that has been caused to him due to such non-availability to diligently prosecute this application before Court.

In all the above circumstances, we uphold the order made by the Provincial High Court to permit the Respondent to proceed in terms of Section 38(2) of the EPF Act and accordingly, we set aside the order made by the learned Magistrate. Therefore, we direct the learned Magistrate to relist case No. 46462/C to hear and determine the application made by the Assistant Commissioner of Labour, dated 09/06/2010, on its merits.

The application for revision is dismissed with costs fixed at Rupees 50,000/-. The said costs and the costs fixed by the Provincial High Court to be paid prior to re commencement of proceedings in the Magistrates Court.

Application dismissed with costs.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL