

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

In the matter of an Appeal to the Supreme Court under the Constitution of the Democratic Socialist Republic of Sri Lanka.

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant

SC Appeal 03/2019

SC SPL LA 234/2018
CA (PHC) 140/2014
HC Badulla: REV 49/2014
MC Bandarawela No. 72522L

Vs,

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

With

SC Appeal 03A/2019

SC Appeal 03B/2019

SC Appeal 03C/2019

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent-Respondent

And now between

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent-Respondent-Respondent

SC Appeal 03A/2019

SC SPL LA 235/2018
CA (PHC) 151/2014
HC Badulla: REV 50/2014
MC Bandarawela No. 90311L

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant

Vs,

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent**And**

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent-Respondent

And now between

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent-Respondent-Respondent

SC Appeal 03B/2019

SC SPL LA 236/2018
CA (PHC) 152/2014
HC Badulla: REV 51/2014
MC Bandarawela No. 90690L

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant

Vs,

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent-Respondent

And now between

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent-Respondent-Respondent

SC Appeal 03C/2019

SC SPL LA 237/2018
CA (PHC) 153/2014
HC Badulla: REV 52/2014
MC Bandarawela No. 90754L

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant

Vs,

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent

And

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent**And**

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellan

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent-Respondent**And now between**

Stitches Private Limited,
Kahagallawaththa, Udawelakotuwa, Diyathalawa

Respondent-Petitioner-Appellant-Appellant

Vs,

Assistant Commissioner of Labour
District Labour Office, Haputhale

Complainant-Respondent-Respondent-Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent-Respondent-Respondent

**Before: Justice Vijith K. Malalgoda, PC
Justice A.H.M.D. Nawaz,
Justice Achala Wengappuli,**

Counsel: Upul Jayasuriya, PC with P. Radhakrishnan for the Respondent-Petitioner-Appellant-Petitioner

Suranga Wimalasena, DSG for the Complainant-Respondent-Respondent-Respondent and Respondent-Respondent-Respondent

Argued on: 03.10.2023

Decided on: 12.03.2024

Vijith K. Malalgoda PC J

The Complainant-Respondent-Respondent-Respondent (hereinafter referred to as the 'Complainant-Respondent') filed four separate certificates in the Magistrate's Court of Bandarawela under section 38 (2) of the Employees' Provident Fund Act No 15 of 1958 (as amended) against Stitches Private Limited' the Respondent-Petitioner-Appellant-Petitioner (hereinafter referred to as the 'Petitioner') for the recovery of Employees' Provident Fund dues for four separate periods referred to in those certificates.

A representative of the Petitioner Company, K.M. Samarakoon had appeared on notice along with Director Board Member Rajarathnam Vinodan and accepted the responsibility to pay the Employees' Provident Fund contribution due in all four cases in instalments. (Journal Entry dated 03.04.2007)

In case No. 72522 Magistrate's Court, Bandarawela which is presently in appeal before this court bearing No. 03/2019, Rs. 24,57,414.90 was due as EPF arrears and accordingly sum of Rupees 200,000/- had been paid by the Petitioner up to 02.10.2007. Similarly, part payments were also made in the other three cases as well. The learned President's Counsel who represented the Petitioner in all four cases and the Counsel for the Complainant-Respondent before this Court had agreed to abide

by the decision in SC Appeal 03/2019, and made submissions in the said case. I will only refer to the matters that were reflected in the arguments in the instant judgment.

As revealed before us, the Petitioner had neither made any payment nor had appeared before the court through its representative since 02.10.2007. The Court noticed the directors of the Petitioner to appear before the Magistrate's Court of Bandarawela. Later on, an application was made on behalf of one of the directors, Anthony Ruwan Sanjeewa, the Court discharged the said party from the proceedings considering that he is no longer a director of the Petitioner. After a long lapse, on 24.06.2014 the other Director Rajarathnam Vinodan appeared before the Magistrate's Court of Bandarawela and moved time to make payment. When the case was called on 05.08.2014, the Court made an order to pay all dues within a period of one year (Journal Entry dated 05.08.2014) and the matter was to be called on 30.09.2014.

However as revealed from journal entries, it appears that the party noticed had neither appeared before the Court nor paid any money as agreed before the Court. On 14.10.2014 Court issued a warrant on the party noticed and the warrant was re-called on 2014.11.17 when the said party was produced before the Magistrate's Court by the prison authorities.

In the meantime, four applications were filed before the Provincial High Court of the Uva Province holden in Badulla invoking the revisionary jurisdiction of the said Court challenging the orders made by the learned Magistrate Bandarawela in the four connected matters including Magistrate's Court, Bandarawela Case No. 72522.

When invoking the revisionary jurisdiction of the Provincial High Court of Uva Province the Petitioner took up the position that under the provisions of the Employees' Provident Fund Act No 15 of 1958 (as amended), the Commissioner of Labour is not empowered to file a certificate in the Magistrate's Court under section 38 (2) of the Act in the 1st instance without having first proceeded under sections 17 and 38 (1) of the Act. The Petitioner sought interim relief preventing the Magistrate from proceeding with the cases filed before the Magistrate's Court, which was initially granted but was later revoked with the dismissal of the revision applications filed before the said Court.

The Petitioner challenged the said decisions of the Provincial High Court of Uva holden in Badulla before the Court of Appeal, but the said applications were dismissed by the Court of Appeal.

The instant applications seeking special leave were filed challenging the decisions of the Court of Appeal and this Court having considered the applications filed, had granted special leave on the following questions of law.

1. Did the Court of Appeal err in law in holding that directors of a defaulting company are liable under section 38 (2) of the Employees' Provident Fund Act No 15 of 1958 (as amended)?
2. Did the Court of Appeal err in law penalizing the directors for the improper exercise of discretion by the Commissioner?
3. At what state, the directors of a company will become liable for the nonpayment of the Employees' Provident Fund by a company, of which they are directors under the Employees Provident Act No. 15 of 1958 as amended..?

When placing material before this Court the learned President's Counsel for the Petitioner developed an argument on two main issues. Firstly, the Petitioner heavily relied on the decision in the case of ***K A Dayawathie Vs D S Edirisinghe***¹ and argued that the Commissioner of Labour cannot institute an action in the Magistrate's Court in the very first instance according to the provisions of the Employees' Provident Fund Act, (as amended) whilst challenging the ambit of discretionary powers vested with the Commissioner of Labour in deciding as to how he is going to recover EPF dues under the Act.

Secondly, the learned President's Counsel argued that the learned Magistrate did not have the jurisdictions under section 38 (2) to substitute the directors in place of the defaulting company named in the certificate filed under section 38 (2) of the Act.

There are 3 sections under which default contribution could be recovered under the Employee's Provident Fund Act; namely sec 17, 38(1) and 38(2),

*Sec 17 - Any moneys due to the Fund shall be recoverable, as a debt due to the State, by an action in which proceedings may be taken by way of **summary procedure**. The provisions of the Civil Procedure Code relating to actions of which the procedure is summary shall apply to an action under this section*

Sec 38(1) - Where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Commissioner is of opinion that recovery under section 17 of the Act

¹ [S.C. (FR) No. 241/2008; S.C.M. 01.6.2009]

*is impracticable or inexpedient, he may issue a certificate to the **District Court** andthe court shall thereupon direct a writ of execution to issue to the Fiscal authorising and requiring him to seize and sell all the property, movable and immovable, of the defaulting employer, or such part thereof as he may deem necessary for the recovery of the amount so due, and the provisions of sections 226 to 297 of the Civil Procedure Code shall, mutatis mutandis, apply to such seizure and sale.*

*Sec 38(2) -Where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Commissioner is of opinion that it is impracticable or inexpedient to recover that sum under section 17 or under subsection (1) of this section or where the full amount due has not been recovered by seizure and sale, then, he 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**, which the sum shall be deemed to be a fine imposed by a sentence of the magistrate.(Emphasis added)*

When considering the procedures identified under the Act to recover dues from the defaulting employers, it appears that the three procedures referred to are distinct remedies available to the Commissioner.

When the recovery procedure is initiated under Section 38(2), the sum due from a defaulting employer is considered a fine, and the failure to pay the fine results in imprisonment in accordance with Section 291 of the Criminal Procedure Code Act. The procedure provided in Section 38 (2) differs from the procedures prescribed in Sections 17(1) and 38(1) as the procedure prescribed in Section 38(2) is deterrent and speedy because of the punishment with imprisonment to the defaulters.

However, when looking at the ambit of the discretion available for the Commissioner of Labour in deciding the procedure available for recovering EPF dues under the said provisions, there appears to have been deference of opinion taken by Appellate Courts. One being the dicta of Thilakawardene J. in *Dayawathie's case*.²

The above three procedures are not alternative procedures for recovery. The legislature very clearly has sets out the scheme step by step as to how the Commissioner becomes entitled to use the procedures set out in Section 38(2) of the said Act. The 3rd Respondent has no

² Ibid.

jurisdiction or power under the said statute to file a certificate in the Magistrates Court in terms of Section 38(2) of the EPF Act without first proceeding under Section 17 and thereafter under Section 38(1) of the said Act. [pg 8]

On the other side, there are several cases where the weight of authority of the Supreme Court is clearly in favour of giving the Commissioner of Labour discretion on the procedure to be followed in between sections 17, 38(1), and 38(2) of the Act.

In ***Jewelarts Limited v. The Land Acquiring Officer and others***³ Srisikandarajah J. held that the Commissioner of Labour has discretion in deciding between the procedures set out in sections 17, 38(1) and 38(2) of the Act. Similarly in ***Messrs Narthupana Tea & Rubber Co Ltd v. The Commissioner of Labour***⁴ Wimalaratne J. and Colin Thome J. held that there is no necessity for the Commissioner to have first resorted to the other two remedies provided in sections 17 and 38(1) before he instituted the proceedings in the Magistrates Court.

In Dayawathie's case, the Supreme Court did not consider the provisions in section 38(4) of the Act which states that the provisions of that section shall have effect notwithstanding anything in section 17 of the Act. Sub-section 4 to Section 38 was introduced by Act No. 24 of 1971. In amending section 38, as referred to above the legislature quite clearly states that the new section takes effect notwithstanding the provisions in section 17.

When looking at sections 17, 38 (1), 38(2) and section 38(4), it is quite clear that there is no necessity at all for the Commissioner General of Labour to resort to Section 17 of the Act before filing a certificate under Section 38(2) of the EPF Act. The said 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 Section 38(1) of the EPF Act. 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.

³ [C.A./Writ/App/No.1126/2004; C.A.M. of 28.01.2009]

⁴ [SC Appeal 510/74; S.C.M. 13.03.1978]

In ***Chinthananda v. Assistant Commissioner of Labour***,⁵ the Commissioner of Labour filed a certificate in terms of Section 38(2) of the Act in the additional Magistrate Court of Matara for recovery of EPF dues. After an inquiry, the Magistrate ordered that the sum due is deemed to be a fine imposed on the employer. An appeal has been made to the Provincial High Court of the Southern Province, *inter alia*, on the ground that the certificate had been filed under Section 38(2) without initially resorting to Section 17 and Section 38(1). In this case, the High Court agreed with the decision of the Court of Appeal in *Agro Trading Lanka (Pvt) Ltd*⁶ with regard to the option available to the Commissioner for recovery of EPF dues. In the *Chinthananda* case, while delivering the judgment, the High Court observed that “.....the decision in the *Dayawathi* case is not binding and decisions in *Narthupana* and *Agro Trading Lanka (Pvt) Ltd* provide binding precedence on the issue.”⁷

Special leave was sought from the Supreme Court against the decision of the High Court on the basis that the High Court had erred in law by concluding that it was unnecessary for the Commissioner to resort to Sections 17 and 38(1) before invoking the jurisdiction of the Magistrate Court in terms of Section 38(2). The Petition of the Employer further stated that the High Court had erred in law by not taking cognizance of the law set out in *Dayawathi's* case. However, Tllakawardane J. [with Sripavan J. (as he then was) and Ekanayake J. agreeing] refused special leave to appeal.⁸ This refusal of special leave to appeal itself can be regarded as a decision which affirmed the discretionary power of the commissioner of labour as per ***People's Bank vs Kasthuriarachchi***⁹ which expressed the view that the refusal of leave itself is a decision.

A related question that would be raised in this situation is whether there is a need for the Commissioner of labour to ascertain the practicability of recovering the alleged dues under Section 38(1) of the EPF Act before acting under Section 38(2). The EPF Act gives the option to the Commissioner to decide whether it is *impracticable or inexpedient* to recover the defaulting EPF dues under sec 17 or sec 38(1). However, the provisions do not clearly state whether the opinion should be a well-founded opinion or an opinion based on assumption.¹⁰

⁵ S.C Spl.L.A No. 277/2012.

⁶ C.A.(Rev) No 1/2010

⁷ High Court Appeal No. 188/2008 (Matara).

⁸ SC (Special) I.A. 277/2012; S.C.M. of 04.04.2013

⁹ 2011 BLR 62.

¹⁰ A Reflection on the Recovery Procedure of Contributions to Employees' Provident Fund and Employees' Trust Fund- A. Sarweswaran -pg 3

In answering an identical issue raised in the Court of Appeal,¹¹ 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 Ac.

In ***Yahala Kelle Estates Company (Pvt) Ltd*** case,¹² Gooneratne, J. commented on the EPF Act as “*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.*” Therefore, Courts should not interfere with the formation of the opinion of the Commissioner unless the Commissioner has formed the opinion with *malafides* or ulterior motives.¹³

The certificate filed before the learned Magistrate was issued under the name of the body corporate. Since in this case ‘employer named in the certificate’ was only the Stitches Pvt Ltd and not the directors, the question arises as to who is liable for the failure of the company to act in accordance with the EPF Act and if the liability could be imposed upon directors at what stage would the directors’ become liable.

Sec 10 of the EPF Act states as follows;

an employee to whom this Act applies shall, in respect of each month during which he works in a covered employment, be liable to pay to the Fund a contribution of an amount equal to eight per centum of his total earnings from that employment during that month.

Sec 40 of the EPF Act states as follows;

Where an offence under this Act is committed by a body of persons, then—

- (a) if that body of persons is a body corporate, every director and officer of that body corporate,*
- (b) if that body of persons is a firm, every partner of that firm, and*

¹¹ CA. 234/2013 (Writ) C.A.M. of 13/12/2013

¹² CA. 234/2013 (Writ) C.A.M. of 13/12/2013

¹³ A Reflection on the Recovery Procedure of Contributions to Employees’ Provident Fund and Employees’ Trust Fund (n 10).

(c) if that body of persons is a trade union, every officer of that trade union shall be deemed to be guilty of that offence: Provided that a director or an officer of such body corporate, or a partner of such firm or an officer of such trade union, shall not be deemed to be guilty of such offence if he proves that such offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

The definition of the 'Employer' in terms of Section 47 of the Act reads as, "Any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade Union)

The offences under the said EPF Act are contained in Sec 34 of the Act and the punishment for the offence can be found in Sec 37.

Section 34: *Any person who—*

- (a) contravenes any provision of this Act or of any regulation made thereunder;*
- (b) furnishes, for the purposes of this Act, any information which is, or any document the contents of which are, or any part of the contents of which is, to his knowledge untrue or incorrect;*
- (c) wilfully delays or obstructs the Commissioner or any other officer in the exercise of his powers under section 32; or*
- (d) contravenes any direction made by the Commissioner in the exercise of his powers under section 27,*

shall be guilty of an offence under this Act

Section 37:

Every person who is guilty of an offence under this Act shall be liable, on conviction after summary trial before a Magistrate, to a fine not exceeding one thousand rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment, and shall, in addition, be liable to a fine not exceeding fifty rupees for each day on which the offence is continued after conviction.

It is important to consider the rules of interpretation in determining whether petitioners are liable, qua directors of the offending company, to be summoned before a court in proceedings under section 38 (2) of the Act and sentenced to pay the sum in default by way of fine and serve a term of imprisonment in lieu, if the fine remains unpaid.

The precise meaning of a provision can only be ascertained when the Statute is studied in its entirety and not parts of the same in isolation. Therefore, to determine the purpose of the legislature, it is necessary to have regard to the Act as a whole and not to focus attention on a single provision to the exclusion of all others. In **Brett v Brett**¹⁴ Sir John Nicholl stated that *'to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute: it is to be viewed in connection with its whole context.'*

The preamble to EPF Act states that *"An act to establish provident fund for the benefit of certain classes of employees and to provide for matters connected therewith or incidental thereto."* However, if the court were to hold directors of a body corporate do not fall within the ambit of the employer in Section 38(2) of the EPF Act, then the establishment of the provident fund would be redundant. Further, such an interpretation, would defeat the purpose of the Act and lead to absurdity.

In **Ranasinghe and another v. The Commissioner of Labour and others**¹⁵ Sisira De Abrew J. noted that:

If the employer is a body corporate and if it does not comply with section 38(2) of the EPF Act, how is the Magistrate going to implement the default sentence. In short, the question that must be considered is: if the employer is a body corporate and the amount ordered by way of a fine is not paid, who is going to be sent to jail. Obviously, the Magistrate cannot send the body corporate to jail. If the contention that the directors of a body corporate cannot be sent to jail as they have not committed an offence is accepted, then the amount set out in the certificate cannot be recovered. Was this the intention of the legislature when it enacted Section 38(2) of the EPF Act? Should Courts interpret Statute to frustrate the intention of the legislature and the purpose of the Statute? The answer is clearly no.

¹⁴162 ER 456.

¹⁵ [CA(PHC) 69/2009; C.A.M. 27.01.2011]

In ***Colombo Apothecaries Ltd. and others v. Commissioner of Labour***¹⁶ Ranaraja J. held that,

A default in making payments due as EPF contributions, makes the 'employer' at the relevant time, liable for contravening the provisions of section 10 of the Act. As an alternative to prosecution for such an offence under section 41 of the Act or civil proceedings under section 17 of the Act, the Commissioner is empowered to institute proceedings against the defaulting employer for the recovery of contributions due under the provisions of section 38 (2). The petitioners are thus liable, qua directors of the offending company, to be summoned before court in proceedings under section 38 (2) of the Act and sentenced to pay the sum in default by way of fine and serve a term of imprisonment in lieu, if the fine remains unpaid.

A statute is a communication between the parliament and the public and therefore it is very important to identify the context even when the words are clear because there could be issues in delivering the message. As statutory law is never enacted in a vacuum, when construing a legislation, courts are entitled to consider the legal, social, economic aspects of the society in which the legislation operates.

The historical setting of passing this Act can be traced back to the social and political changes that took place in the country after gaining independence from the British colonial rule in 1948. One of the major changes that occurred during that time was the emergence of strong labour movements that demanded better working conditions, social security and economic democracy for the workers. These labour movements were led by trade unions, political parties and progressive intellectuals who advocated for a welfare state and a mixed economy

The EPF Act was introduced by T. B. Ilangaratne, who was the Minister of Labour and Social Services who was also a prominent trade unionist who championed the cause of the working class. The Act was passed by the Parliament on 15 April 1958 and came into effect on 1 June 1958. The Minister noted in his speech while presenting the Bill *“the scheme has been conceived primarily as a means of providing retirement benefits to the employees at the time when due to advanced age, they are unable to work.”*¹⁷

¹⁶ [(1998) 3 Sri LL.R. 320 at 330]

¹⁷ 60th Anniversary Commemorative Volume of the Central Bank of Sri Lanka: 1950 – 2010 < www.cbsl.gov.lk > accessed 23 October 2023

As correctly points out by Prof. Sarveswaran in his article, '***A Reflection on the Recovery Procedure of Contributions to Employees' Provident Fund and Employees' Trust Fund***' sometimes, the employers who fail to make contribution to the EPF Fund may prefer to be imprisoned rather than attempting to make the contributions to the Funds whereas the employees will prefer recovery of their dues under the Fund to the imprisonment of their employers.

Moreover the imprisonment of employers without recovery of their contributions will defeat the objective of the legislation which it was passed- that is providing social security to the employees after their retirement. In this context, it could be observed that the utmost importance lies in the ability of the state to be able to recover the dues from such defaulters rather than imposing sanctions of punitive nature.

In the circumstances, it is clear that the Act had provided to add directors as parties to a proceeding that is pending before a Magistrate's Court under Section 38 (2) of the Act. Further, could be seen that the directors of the company are liable to pay the amount in question if it is not recoverable from the defaulting company.

For the above reasons, I hold that 'employer' in Section 38(2) of the EPF Act includes directors of a body corporate and it is lawful for the Magistrate to order the directors of a body corporate to pay the amount set out in the certificate filed in terms of Section 38(2) of the EPF Act if it is not recoverable from the Body Corporate.

The facts revealed that in the instant case, the plaint had never been amended to include the Directors of the Petitioner Company and it is the director who came before the Magistrate's Court and accepted the liability to pay EPF dues to the employees of the Petitioner Company. Since then, a representative was permitted to represent the Petitioner Company and when the Petitioner Company abundant the case and defaulted to make the balance payment, the court notified the Director who had already accepted the liability before the Magistrate's Court. As per the Journal Entries, the director had once again accepted liability and moved time to make payments. It is at this stage only the learned magistrate ordered to recover the dues as a fine from the director of the Petitioner Company.

In the circumstances I answer all 3 questions of law as follows;

1. No
2. No
3. When it is not possible to recover from the company or the company defaults making the payment

Appeal dismissed.

Accordingly, SC Appeals 3A, 3B, 3C also dismissed. No costs.

Justice A.H.M.D. Nawaz,

I agree,

Judge of the Supreme Court

Justice Achala Wengappuli,

I agree,

Judge of the Supreme Court

Judge of the Supreme Court