
UKWATTE**Vs.****DEPUTY PROVINCIAL COMMISSIONER OF REVENUE AND OTHERS**

COURT OF APPEAL
WICKREMASINGHE, J.
J. DE SILVA, J.
CA/PHC/45/2009
HC COLOMBO REV/80/2007
MC COLOMBO 72700/5
JANUARY 9, 2019

Turnover tax—Financial Statute of the Western Province, No. 6 of 1990, sections 21(1), 85(3) and 89— Income Tax Ordinance, sections 62 and 81— Inland Revenue Act, No. 4 of 1963, sections 90(1) and 106— “Defaulter” for the purposes of turnover tax—Liability of principal officers of the company when there is a tax default by the company

A certificate under section 89 of the Financial Statute of the Western Province had been filed in the Magistrate’s Court against the respondent company for the recovery of turnover tax. The appellant, who was the Chairman of the respondent company, filed an affidavit objecting to the same. At the conclusion of the inquiry, the Magistrate’s Court made an order directing the respondent company to pay the tax in default, and in the event that the respondent company failed to do so, the same was to be recovered from the appellant as a fine with a sentence of 12 months rigorous imprisonment to be imposed in default.

The argument before the Court of Appeal broadly concerned whether the appellant was the “defaulter” for the purposes of the certificate filed in the Magistrate’s Court and whether a director of the respondent company not named in the certificate can be made vicariously liable for the taxes in the said certificate.

Held:

1. The word “defaulter” in section 89(1) of the Financial Statute of the Western Province includes the respondent company, which was assessed, and its secretary, manager, director, or another principal officer of the respondent company on whom a statutory obligation to perform all acts of the company has been imposed by section 21 (1) of the Statute.
2. The appellant is a defaulter as, firstly, there is a default by the respondent company and, secondly, the appellant has admitted that he is the Chairman of the respondent company.
3. There is no vicarious liability imposed on the appellant, as tax in default was sought to be recovered from the appellant only in the event that the respondent company failed to pay the tax in default as directed.

Cases referred to:

1. M. E. De Silva v. Commissioner of Income Tax 51 NLR 280
2. Ranjit Wijemanne v. Commissioner of Income Tax Reports of Ceylon Tax Cases Vol. 1437
3. Philip v. Commissioner of Inland Revenue Sriskantha’s Law Reports Vol. I Part 10 133
4. Hamza v. Commissioner of Inland Revenue [1988] 1 Sri LR 312
5. Ramlin v. Commissioner of Inland Revenue [1988] 2 Sri LR 259
6. Dias v. Commissioner General of Inland Revenue [2011] 2 Sri LR 15
7. Jinawathie and others v. Emalin [1986] 2 Sri LR 121 at 130
8. Meridian Global Funds Management Asia Ltd v. Securities Commission Respondent (1995) 2 AC 500 at 506
9. Seneviratne v. Abeykoon [1986] 2 Sri LR 1
10. Government Medical Officers Association and another v. Senanayake [2001] 3 Sri LR 377

APPEAL from the Order of the High Court of Colombo.

Faisz Musthapha, P. C., with Riad Ameen for the Petitioner-Appellant.

Anusha Samaranyake, D. S. G., for the Complainant-Respondent-Respondent and Respondent-Respondent.

cur. adv. vult.

May 3, 2019

J. DE SILVA, J.

This is an appeal against the order of the learned High Court Judge of the Western Province holden in Colombo dated 02. 02. 2009.

The Complainant-Respondent-Respondent (Complainant) filed a certificate against Three Coins Company (Pvt) Limited, who is the Respondent-Respondent-Respondent (Respondent Company) under section 89 of the Financial Statute of the Western Province No. 06 of 1990 as amended (Statute) for the recovery of turnover tax in the Magistrate's Court of Colombo. The amount sought to be recovered as turnover tax was a sum of Rs. 3, 069, 418/- inclusive of penalty. The Respondent Company was noticed to show cause.

The Petitioner-Appellant (Appellant) filed an affidavit in his official capacity as the Chairman of the Respondent Company and took up several objections to the application. After due inquiry the learned Magistrate held that the Respondent Company is liable to pay the amount set out in the certificate and directed the Respondent Company to deposit the said sum in Court. He made further order that in the event the Respondent Company failed to do so, the said amount should be recovered as a fine from the Appellant and imposed a default sentence of 12 months rigorous imprisonment.

The Appellant filed a revision application in the High Court of the Western Province holden in Colombo which was dismissed and hence this appeal.

The Appellant on the invitation of Court by motion dated 17. 09. 2018 set out the grounds raised in appeal which reads:

- 1) Was the Appellant cited as a defaulter in the certificate filed by the Commissioner in terms of section 89 of the Statute?
- 2) Can a fine be imposed on a person other than a defaulter cited in such certificate in terms of section 89 of the Statute?

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- 3) Can a sentence in lieu of such fine be imposed on a person other than a defaulter cited in such certificate in terms of section 89 of the Statute?
 - 4) Can a director of a company who has never been summoned by Court be imposed a fine in terms of section 89 of the Statute?
 - 5) Can a director of a company who has never been summoned by Court be imposed a sentence in lieu of such fine in terms of section 89 of the Statute?
 - 6) Is the imposition of a fine on a person who has never been summoned by Court in terms of section 89 of the Statute a breach of the rules of natural justice?
 - 7) Can the director of a company who is not cited as a defaulter in such certificate be made vicariously liable for the taxes in such certificate in terms of section 89 of the Statute?
 - 8) Is section 89 of the Statute ultra vires the legislative power of the Western Provincial Council?

Before proceeding to consider the issues raised by the Appellant, it is important to appreciate the basis of the order made by the learned Magistrate. The order has two parts. Firstly, he held that the Respondent Company is liable to pay the amount set out in the certificate and directed the Respondent Company to deposit the said sum in Court. Secondly, he further held that in the event the Respondent Company failed to do so, the said amount should be recovered as a fine from the Appellant, who appeared as the Chairman of the Respondent Company, and imposed a default sentence of 12 months rigorous imprisonment. Hence the second part of the order became effective if and only when the Respondent Company failed to deposit the money as directed.

Although the Respondent Company did not seek to impugn the order of the learned Magistrate it failed to deposit the said amount in Court.

Was the Appellant cited as a defaulter in the Certificate?

The learned President's Counsel for the Appellant relying on section 89(1) of the Statute submitted that it requires a certificate filed thereunder to identify the "defaulter" which in this case was the Respondent Company and as the Appellant was not cited as a defaulter there was no legal basis

to make order against the Appellant when the law permitted orders to be made only against the “defaulter”.

The learned DSG submitted in response that the provisions of the Statute require a purposive interpretation and that in terms of the deeming provision in section 85(3) read with section 21 (1) of the Statute the term “defaulter” includes both the Respondent Company and the Appellant.

The learned President’s Counsel relied on the decisions in *M. E. De Silva v. The Commissioner of Income Tax*,¹*Ranjit Wijemanne v. Commissioner of Income Tax*,²*Philip v. Commissioner of Inland Revenue*,³*Hamza v. Commissioner of Inland Revenue*,⁴*Ramlin v. Commissioner of Inland Revenue*⁵ and *Dias v. Commissioner General of Inland Revenue*⁶ in support of his contention.

In *M. E. De Silva v. The Commissioner of Income Tax (supra)* the Commissioner of Income Tax instituted proceedings under Section 80 of the Income Tax Ordinance for the recovery of a sum of Rs. 9, 720 as the amount in default. However, the defaulter was a company carrying on business under the name of The Ceylon Building Syndicate Limited whereas the party named as the defaulter in the certificate was the Managing Director of the said Company namely one Mr. M. E. De Silva. Gratiaen J. held that a defaulter for the purposes of Section 80 of the Income Tax Ordinance is a person who having been duly assessed under Section 64 of the said Ordinance as being “chargeable with tax”, has omitted, in contravention of Section 70, to pay such tax on or before the date specified in the notice of assessment served on him as the person so chargeable.

This decision is based on the fact that it was the Managing Director who was named as the defaulter in the certificate and not the company which had defaulted in the payment of taxes. Furthermore, it is also based on the fact that section 62 of the Income Tax Ordinance does not make the principal officer of a company chargeable out of his personal assets with income tax levied on the Company’s assessable income.

In order to have a better appreciation of the legal regime considered by Court in that case, a consideration of Section 62 of the Income Tax Ordinance is necessary. It reads as follows:

The secretary, manager or other principal officer of every company or body of persons corporate or incorporate shall be answerable

for doing all such acts, matters or things as are required to be done under the provisions of this Ordinance by such company or body of persons:

Provided that any person to whom a notice has been given under the provisions of this Ordinance on behalf of a company or body of persons shall be deemed to be the principal officer thereof unless he proves that he has no connection with the company or body of persons, or that some other person resident in Ceylon is the principal officer thereof. (emphasis added)

Having considered the above provision Gratiaen J. held that it does not impose any vicarious liability on a Managing Director to pay the tax in default of the company. Thus, the ratio of *M. E. De Silva v. The Commissioner of Income Tax (supra)* in my view is that a Managing Director of a defaulting company cannot be named in the certificate filed before the Magistrates Court under Section 80 of the Income Tax Ordinance as a defaulter for the recovery of the amount in default of the company from his personal assets.

In *Ranjit Wijemanne v. Commissioner of Income Tax (supra)* Nagalingam S. P. J. quoted with approval the reasoning of Gratiaen J. in *M. E. De Silva v. The Commissioner of Income Tax (supra)* in a case where a Managing Director of a company was named in a certificate issued under section 80(1) of the Income Tax Ordinance.

In *Philip v. Commissioner of Inland Revenue (supra)* a principal officer of a company was named in the certificate filed in terms of section 111 (1) of the Inland Revenue Act No. 4 of 1963 in relation to tax in default of the company. Having regard to the judgment of Gratiaen J. in *M. E. De Silva v. The Commissioner of Income Tax (supra)* G. P. S. De Silva J. (as he was then) held that there is no provision in the said Act to make the petitioner personally liable for tax due from the company.

In *Hamza v. Commissioner of Inland Revenue (supra)* Ramanathan J. held that taxes assessed against a person who dies thereafter can in default of payment be recovered by recovery proceedings filed in the Magistrate's Court against the administrator of the estate of the deceased. It was held that the defence that he was not the person assessed is not available to the administrator when recovery proceedings are filed against him in the Magistrate's Court to recover taxes due from the deceased person whose estate he is administering. Although this case was cited

by the Appellant in support of the proposition that proceedings can only be taken against a defaulter, it in fact supports the opposite.

However, the reasoning must be understood in the context of the specific provision in section 49 of the Inland Revenue Act No. 4 of 1963 which reads as follows:

An executor of a deceased person shall be liable, to do all such acts, matters and things as such deceased person would be liable to do under this Act if he were alive, and shall be chargeable with income tax, wealth tax or gifts tax with which such deceased person would be chargeable if he were alive in respect of all periods prior to the date of the death of such person.

But, in *Ramlin v. Commissioner of Inland Revenue* (supra) two judges of this Court did not follow the reasoning in *Hamza v. Commissioner of Inland Revenue* (supra). There the certificates in respect of unpaid taxes were filed under Section 111 (1) of the Inland Revenue Act No. 4 of 1963 on the basis that the petitioner had defaulted in the payment of the said sums payable as taxes on behalf of her late husband. This Court held that the executor of a deceased person's estate is chargeable with tax with which such deceased person would be chargeable if he were alive; but for such liability to arise the executor should be charged with tax qua executor. It was further held that a defaulter is a person who having been duly assessed as being 'chargeable with tax' has omitted to pay such tax on or before the due date. As the petitioner had not been assessed she was not a defaulter and therefore not liable to pay her late husband's taxes. Here again, the court followed the reasoning in *M. E. De Silva v. The Commissioner of Income Tax* (supra).

In *Dias v. Commissioner General of Inland Revenue* (supra) the Deputy Commissioner of Inland Revenue filed a certificate of tax in default in the name of the petitioner claiming a certain sum of money. The tax defaulter was a Company and the petitioner was sued on the basis of vicarious liability. The trial Court held that in terms of Section 166(1) of Inland Revenue Act No. 38 of 2000 no action could be instituted against the Managing Director to recover tax defaulted by the Company.

In appeal this Court held that the imposition of vicarious liability under a statute is not lightly to be presumed and such liability must necessarily be imposed in clear and unambiguous language and that there is no provision in the Inland Revenue Act No. 38 of 2000 which makes the

principal officer liable for tax due from the company and that he is not liable to pay from his personal assets. Hence this decision is also based on facts similar to the facts in *M. E. De Silva v. The Commissioner of Income Tax (supra)*.

The facts in the instant case are different to the cases relied on by the Appellant, Here the Respondent Company who was assessed and had to pay the turnover tax was named as the defaulter. As the learned DSG correctly pointed out in the cases relied on by the Appellant the attention of Court does not appear to have been drawn to section 81 of the Income Tax Ordinance and section 106 of the Inland Revenue Act No. 4 of 1963 which are similar to section 85(3) of the Statute which reads:

Where the tax payable during every quarter . . . under section 11 and 12 and under section . . . is not paid on or before the date specified therein such tax together with a penalty of 10 per cent of the tax and 2 percent of the tax in default for every month of non-payment shall be deemed to be in default and the person liable to pay the tax shall be deemed to be a defaulter. (emphasis added)

The consequences of the use of the word “deemed” were explained by Ranasinghe J. (as he was then) in *Jinawathie and Others v. Emalin* 7as follows:

In statutes the expression “deemed” is commonly used for the purpose of creating a statutory function so that the meaning of the word is extended to a subject matter which it properly does not designate. Thus where a person is “deemed to be something” it only means that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were. Where a thing is deemed to be something, it does not mean that it is that which it is deemed to be, but rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing it is nevertheless deemed to be that thing. Where a statute declares that a person or thing shall be deemed to be or shall be treated as something which in reality it is not, it shall have to be treated as so during the entire course of the proceeding . . .

Section 85(3) of the Statute deems every person liable to pay the tax as a defaulter. In the case of natural persons this will in most instances be the person assessed. However, in relation to every company or body of persons corporate or unincorporated there is no natural person who can

be held liable to perform the acts that must be done for example by a company in terms of the Statute which is a consequence of the artificial imputation of legal personality on a company by law.

Section 21 (1) of the Statute reads:

The Secretary, Manager, Director or other Principal Officer of every company or body of persons corporate or unincorporated, shall be liable to do all such acts, matters or things as are required to be done under the provisions of this Statute by such company or body of persons. (emphasis added)

This section seeks to make a certain category of officers liable to perform such acts which are required to be done under the Statute by a company or body of persons corporate or unincorporate. This is because a company can only act through its employees, from the board of directors down. As Lord Hoffman stated in *Meridian Global Funds Management Asia Limited v. The Securities Commission Respondent*:⁸

Judges sometimes say that a company “as such” cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. And of course, the meaning is usually perfectly clear. But a reference to a company “as such” might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no ding an sich, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.

The learned President’s Counsel for the Appellant submitted that section 21 (1) of the Statute is similar to section 62 of the Income Tax Ordinance and section 90(1) of the Inland Revenue Act No. 4 of 1963 which were considered in *M. E. De Silva v. The Commissioner of Income Tax (supra)*, *Ranjit Wijemanne v. Commissioner of Income Tax (supra)*, *Philip v. Commissioner of Inland Revenue (supra)*, *Hamza v. Commissioner of Inland Revenue (supra)*, *Ram/in v. Commissioner of Inland Revenue (supra)* and *Dias v. Commissioner General of Inland Revenue (supra)* which held that these provisions were insufficient to impose vicarious liability on the directors. However, as pointed out above, the attention of Court in those cases does not appear to have been drawn to section 81

of the Income Tax Ordinance and section 106 of the Inland Revenue Act No. 4 of 1963 which are similar to section 85(3) of the Statute.

Furthermore, as the learned DSG submitted there is a qualitative difference in the terminology in that the provisions that the Court considered in the above revenue law cases use the word "answerable" whereas section 21(1) of the Statute uses the word "liable" while the Sinhala text, which is the governing text, uses the word "වගකිවයුතුය" thereby imposing a higher obligation.

For the foregoing reasons, I hold that the word "defaulter" in section 89(1) of the Statute includes the Respondent Company which was assessed and the Secretary, Manager, Director or other Principal Officer of the Respondent Company on whom a statutory obligation to perform all acts of the Company has been imposed by section 21 (1) of the Statute.

The Appellant is a defaulter as firstly there is a default by the Respondent Company and secondly in his affidavit filed in the Magistrate's Court it is admitted that he is the Chairman of the Respondent Company.

Can a fine be imposed on a person other than a defaulter?

For the reasons set out above, the Appellant is a defaulter. Furthermore, firstly, the learned Magistrate held that the Respondent Company is liable to pay the amount set out in the certificate and directed the Respondent Company to deposit the said sum in Court and only where it failed to do so did, he ordered the said amount to be recovered as a fine from the Appellant.

Can a sentence in lieu of such fine be imposed on a person other than a defaulter cited in such certificate in terms of section 89 of the Statute?

This issue is raised on the basis that the Appellant is not a defaulter within the meaning of the Statute. For the reasons set out above he is a defaulter.

Can a director of a company who has never been summoned by Court be imposed a fine in terms of section 89 of the Statute?

Can a director of a company who has never been summoned by Court be imposed a sentence in lieu of such fine in terms of section 89 of the Statute?

Is the imposition of a fine on a person who has never been summoned by Court in terms of section 89 of the Statute a breach of the rules of natural justice?

Alf these issues are based on the alleged violation of the rules of natural justice as the Appellant contends that he was never summoned under section 89(1) of the Statute and asked to show cause.

There is no dispute that the Appellant filed an affidavit and was heard by the learned Magistrate. He appeared before court voluntarily. He cannot now be heard to state that he was not given a hearing. In considering this issue it is important to reiterate the order made by the learned Magistrate.

Firstly, he held that the Respondent Company is liable to pay the amount set out in the certificate and directed the Respondent Company to deposit the said sum in Court. Secondly, he further held that in the event the Respondent Company failed to do so, the said amount should be recovered as a fine from the Appellant, who appeared as the Chairman of the Respondent Company, and imposed a default sentence of 12 months rigorous imprisonment. Hence the second part of the order became effective if and only when the Respondent Company failed to deposit the money as directed.

Thus, any implications on the Appellant from the said order arises only where the Respondent Company failed to pay the outstanding tax which amount the Respondent Company has not contested before a Court of law.

Yet the Appellant has not given any reasons as to why the Respondent Company has still not paid the outstanding tax. Such an explanation is most appropriate from the Appellant given that he is the Chairman of the Respondent Company. Instead he has sought to raise legal arguments as to why he should not be held liable.

This raises the issue of the conduct of the Appellant which the learned DSG did during the argument. The Supreme Court in *Seneviratne v. Abeykoon*⁹ held that the conduct of the plaintiff (failure to make full disclosure of the material facts in his application for revision, delaying tactics when the defendant sought restoration of possession in the District Court, forcibly evicting the tenant and leaving the island after installing another tenant in the premises) disentitled him to revisionary relief.

Similarly, given that the Appellant is the Chairman of the Respondent Company and the fact that the Respondent Company has not assailed the order of the learned Magistrate, and that the Appellant has failed to explain as Chairman why the Respondent Company has not paid the turnover tax is a ground by itself which entitled the learned High Court Judge to refuse any relief to the Appellant in the revision application.

Can the director of a company who is not cited as a defaulter in such certificate be made vicariously liable for the taxes in such certificate in terms of section 89 of the Statute?

No vicarious liability has been imposed on the Appellant. The first part of the order holds that the Respondent Company is liable to pay the amount set out in the certificate and directs the Respondent Company to deposit the said sum in Court. In the event the Respondent Company failed to do so, the said amount should be recovered as a fine from the Appellant, who appeared as the Chairman of the Respondent Company, and imposed a default sentence of 12 months rigorous imprisonment. Hence the second part of the order became effective if and only when the Respondent Company failed to deposit the money as directed and is based on the provisions contained in sections 85(3) and 21 (1) of the Statute as explained above. In other words, the liability of the Appellant arises as he failed to do all such acts, matters or things as are required to be done under the provisions of the Statute by the Respondent Company.

Is section 89 of the Statute ultra vires the legislative power of the Western Provincial Council?

This ground was never raised before any of the two lower Courts. None of the parties submitted that this issue involves an interpretation of the Constitution and therefore that the matter should be referred to the Supreme Court.

The learned President's Counsel for the Appellant submitted that section 89(1) of the Statute seeks to set out the power of the Magistrate's Court whereas the Provincial Council does not have power to legislate on the power of the Court. He relied on the Reserved List item which reads "Justice in so far as in relates to the judiciary and the Courts structure".

The learned DSG on the other hand submitted that the Provincial Council has power in terms of the Provincial Council List to legislate on turnover taxes (item 36. 1), fines imposed by Courts (item 36. 8) and offences against statutes with respect to any of the matters specified in the list

(item 32) which includes recovery proceedings on the principle that the greater power includes the lesser.

I hold that on a plain reading of the relevant constitutional provisions the procedure set out in section 89(1) of the Statute is recovery proceedings simpliciter on the principle that the greater power includes the lesser (*Government Medical Officers Association and Another v. Senanayake*¹⁰) and is not caught up within Reserved List item “Justice in so far as in relates to the judiciary and the courts structure”.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the Western Province holden in Colombo dated 02. 02. 2009.

I dismiss the appeal with costs.

WICKREMASINGHE, J. - *I agree.*

Appeal dismissed.

Judgment by: Janak De Silva, J.

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