JEFFERJEE
v
COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
W.L.R. DE SILVA, J.
SALAM, J.
CA 1234/06
FEBRUARY 2, 2008
APRIL 3, 28, 2008

Employees Provident Fund Act 15 of 1958 amended by 26 of 1981, 42 of 1988, 14 of 1992 – 312, S38 (2) Provident Fund dues – Employee or Independent Contractor? – Inquiry – No reasons given – Is it imperative to give reasons – If not given could the Court arrive at a decision?

The 3rd respondent complained to the 2nd respondent Assistant Commissioner of Labour of the failure on the part of the petitioner to contribute to Employees Provident Fund in favour of the 3rd respondent. It was contended at the inquiry that the 3rd respondent was an independent contractor. The respondents held that, the petitioner is liable to contribute to the Fund.

The petitioner sought a *Writ of Certiorari* to quash the said decision, as reasons were not given.

Held:

(1) Except in the case of an appealable decision, not giving reasons for a decision does not *ipso facto* vitiate that decision.

(2) The purported decision does not contain any reasons. Let alone reasons the impugned order for the payment of EPF does not even contain determination on the crucial issue whether the 3rd respondent was an independent contractor or an employee, and the respondents have not thought it fit to produce the record or any document which contained the reasons.

Per Ranjith Silva, J.

"I do not intend to invoke the jurisdiction of this Court *ex mero motu* to call for the record for the examination of this Court. If I do so that would only

encourage public officials performing public duties wielding powers under draconian laws to disregard the sacred duty of observing the principles of natural justice and then flout the law unscrupulously.

(3) The remedy by way of *Writ of Certiorari* cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically different from appeals; when hearing appeals the Court is concerned with the merits of the decision under appeal. .

In appeal the Appellate Court can modify, alter, substitute or rescind the order or decision under appeal.

In judicial review the Court is concerned with the legality and cannot vary, modify, alter or substitute the order under review.

On appeal the question is right or wrong on review, the question is lawful or wrongful.

(4) It is not for the Court of Appeal to decide whether the 3rd respondent was an employee or not, it was for the 1-2 respondents to decide that issue.The supervisory jurisdiction does not entitle it to usurp this responsibility and to substitute its own view for his

APPLICATION for a *Writ of Certiorari.*

Cases referred to:

1. *Brook Bond (Ceylon) Ltd.* v *Tea, Rubber, Coconut and General Produce Workers Union* – 77 NLR at 6
2. *Unique Gemstones Ltd.* v *W. Karunadasa* – 1995 – 2 Sri LR 357 at 360-361.
3. *Kegalle Plantations Ltd.* v *Silva and others* – 1996 – 2 Sri LR 180.
4. *Karunadasa* v *Unique Gemstones Ltd.* – 1997 – 1 Sri LR 256.
5. *Kusumawathie and others* v *Aitken Spence & Co. Ltd* – 1996 – 2 Sri LR 18
6. *Suranganie Marapana* v *Bank of Ceylon and others* – 1997 3 SLR 156.
7. *Bandara* v *Premachandra* – 1994 – 1 Sri LR 301.
8. *Tennekoon* v *De Silva* – 1997 – 1 Sri LR 16.
9. *Guneratne* v *Ceylon Petroleum Corporation* – 1996 – 1 Sri LR 315.
10. *Wickrematunga* v *Ratwatte* – 1998 – 1Sri LR 201.
11. *Wijepala* v *Jayawardene* – SC 89/95 SCM 30.6.1995.
12. *Footwear (Pvt) Ltd. and two others* v *Aboosally - former Minister of Labour and Vocational Training and others* – 1997 – 2 Sri LR 137.
13. *R.* v *Deputy Industrial Injuries Commissioner – ex parte Moore* – 1965 1 All ER 81 at 84.

14. *Chulasubadra* v *The University of Colombo and others* – 1986 – 2 Sri LR 288.

A.P. Niles for petitioner.

Milinda Gunetilake for respondents.

Cur.adv.vult

June 25, 2008

RANJITH SILVA , J.

The petitioner one Mr. Mohamadally I. Jafferjee, a partner of the firm "Jafferjee Brothers" filed this application in this Court invoking the writ jurisdiction of this Court under article 140 of the Constitution of the Republic of Sri Lanka challenging the propriety of the order dated 29.06.2006 made by the 2nd respondent, the Assistant Commissioner of Labour Colombo North, directing the petitioner to pay a sum of Rs. 3,69,825/- to the 3rd respondent being the amount due to the 3rd respondent from the petitioner by way of contributions to the provident fund under and in terms of the provisions of Se. 12 read with Se. 10 of the Employees Provident Fund Act No. 15 of 1958 as amended by Acts No. 26 of 1981, No. 42 of 1988 and No.14 of 1992. (Hereinafter referred to as the EPF Act).

The business registration of the said partnership is annexed to the petition marked as P2. Admittedly the firm known as Jafferjee Brothers (hereinafter referred to as the "firm") had entered into a contract on 20.06.1994 by which the 3rd respondent was appointed a consultant to the wood work project of the said firm. The initial monthly consultancy fee paid to the 3rd respondent was Rs. 5000/- which over the years had been increased to Rs.15750 by the said firm until the services of the 3rd respondent were terminated in the year 2003.

The 3rd respondent complained to the 2nd respondent of the failure on the part of the petitioner to contribute to the employees' provident fund in favour of the 3rd respondent as stipulated under the EPF Act. Consequently, an inquiry was held and at the inquiry it was contended on behalf of the firm that the 3rd respondent was

an independent contractor and not an employee. Hence, the firm denied its liability to contribute to the EPF. Having inquired into the complaint of the 3rd respondent the 2nd respondent decided that the work done by the 3rd respondent was in fact that of an employee and therefore payments received by the 3rd respondent for the services rendered by the 3rd respondent to the "firm" attracted the provisions of the EPF Act and hence ordered the "firm" to pay a sum of Rs. 3,69,825/- to the 3rd respondent as contributions for the Employees Provident Fund in respect of the 3rd respondent (Vide P-1 and R-1).

Upon the failure of the "firm" to comply with the aforesaid order, the 1st and 2nd respondents filed a certificate in the Magistrate's Court of Colombo in proceedings bearing No. 967/2007, under section 38(2) of the EPS Act to recover the monies due to the 3rd respondent.

The case for the Petitioner in a nut shell:

1) The 2nd respondent did not give reasons for his decision marked P1, and thereby failed to observe the principles of natural justice in arriving at the aid impugned decision.

2) Since the 1st and the 2nd respondents failed to assign reasons for there decision dated 29.06.2006 which is marked as P1, it is open to this court to review all the material presented by all parties in this case and to arrive at a decision thereon.

3) The 1st and the 2nd respondents misinterpreted the documents submitted to the said respondents by the petitioner, in deciding the question, whether the 3rd respondent was an independent contractor or an employee.

4) The 3rd respondent being a consultant, was a skilled person and the partners of the firm were not in a position to tell him how to do his work and therefore, the application of the control test to the facts and circumstances of the instant case, would lead to the inevitable conclusion that the 3rd respondent was not an employee.

5) The application of the organization/integration test to the facts and circumstances of the instant case would lead to the

inevitable conclusion that the 3rd respondent was not an employee.

6) The application of the economic reality test is not appropriate in the present case because the present case is a matter of a consultancy where the ownership of assets does not come into play.

Failure to assign reasons as ground to avoid liability

It is trite law that when a statute confers a right of appeal against a decision, the decision making authority is obliged to disclose the reasons for its decision. In *Brook Bond (Ceylon) Ltd.* v *Tea, Rubber, Coconut and General Produce Workers' Union*(1) at 06. It was held that where an appeal lies from the order of a tribunal to a higher Court though the appeal may be on a question of law, it is the duty of the tribunal to set down its findings on all disputed questions of fact and to give reasons for its order. Questions of law must necessarily be considered in relation to the facts and it would be impossible for a Court of Appeal to discharge its functions properly unless it has before it the findings of the original tribunal on the facts as well as its reasons for the order.

In the instant case the decision of the Commissioner is not subject to an appeal. Therefore the question is whether the duty to give reasons extends to non-appealable decisions as well. This needs a critical evaluation and an in-depth analysis of the current law on this topic. Does Natural Justice require that reasons be provided by the decision maker? The right to receive reasons flows by implication from the rules of natural justice, the relevant rule is the right to be heard. (*audi alterem partem*). If a person is entitled to be heard before a decision is reached against him, then it follows that the person is entitled to a reasoned consideration of what he or she says.

Reasons can become a powerful tool to prevent the arbitrary exercise of power and to ensure public accountability. Reasons facilitate open government and transparency. Secrecy with regard to any decision generates suspicion and speculation. Reasons will help in ensuring that public decision making is not *ad hoc*, capricious or arbitrary but closely thought out and rational.

Undoubtedly it will enhance the confidence of the public reposed in the decision making authority and will enhance significantly the integrity of the public decision making.

In this regard I would like to quote a paragraph from the book *"Administrative Law" by Wade and Forsythn 9th edition, page 522.* I quote, "The principles of natural justice do not; as yet, include any general rule that reasons should be given for decisions. Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply expressed by the expanding law of judicial review, now that so many decisions as *liable to be quashed* (emphasis is mine) or appealed against on grounds of improper purpose, irrelevant considerations and errors of law various kinds. Unless the citizen can discover the reasons behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. *The right to reasons is therefore an indispensable part of a sound system of judicial review.* (emphasis added.)"

From the above quotation it is quite clear that even in the case of non appealable decisions reasons should be given by the decision making authority, for various reasons stated therein especially so where the person is given the right to be heard, as in the instant case.

It was held by Senanayake, J. in *Unique Gemstones Ltd.* v *W. Karunadasa*(2) 360-361; I quote, "I am of the view the Commissioner should give reasons for his decision. The present trend which is a rubric running throughout the public law is that those who give administrative decisions where it involves the public, whose rights are affected; especially when proprietary rights are affected should give reasons for its decisions. The action of the public officers should be 'transparent' and they cannot make blank orders. The giving of reasons is one of the fundamentals of good administration. In my view it is implicit in the requirement of a fair hearing to give reasons for a decision. The standards of fairness are not immutable, they may change with the passage of time both in the general and in there application to decisions of a particular type. The principles of fairness are not to be applied identically in every situation. But the fairness demanded is dependent on the

context of the decision. The present trend is to give reasons and a failure to do so amounts to a failure to be manifestly seen to be doing injustice. I am of the view that it is only in special circumstances, the reasons should be withheld, i.e. where the security of the state is affected, and otherwise a statutory body or a domestic tribunal should give reasons for its decision. Though the T.E. Act is silent on this matter, the Commissioner being a creature of a statute performing a public function, it is not only only desirable but also necessary to give reasons for its decision".

Per Senanayake, J.

"The common law as understood by us has now been battered down. Reasoned orders are the *sine qua non* of administrative justice even if the statute is silent" *Kegalle Plantations Ltd.*, v *Silva and others.*(3)

When this matter came up in appeal in the Supreme Court in *Karunadasa* v *Unique Gemstones Ltd.*(4) at 256. The Supreme Court observed that the matter did not end there; that the legal position was not clearly appreciated and that the parties have not realized the need to invite the Court of Appeal to call for an examine the record and the recommendation. Thus the Supreme Court has taken the view that in cases where there is no right of appeal the decision making authority must either give the decision with the reasons for its decision or should make the reasons available to the Court of Appeal for examination by the Court when required to do so. On an examination of the reasons if the Court of Appeal finds that reasons were given and the decision is not wholly unreasonable, illegal or *ultra virus*, *writ of certiorari* will not lie.

But a somewhat deferent view was expressed in the following case which appears to be the better view and in keeping with the world trend.

In *Kusumawathie and others* v *Aitken Spence and Co. Ltd*(5) 18 (C.A.) (as he then was) held "The finding that there is no requirement in law to give reasons should not be construed as a gateway to arbitrary decisions and orders. If a decision that is challenged is not a speaking order, when notice is issued by a Court exercising judicial review, reasons to support it have to be disclosed. Rule 52 of the Supreme Court Rules 1978 is intended to

afford an opportunity to the respondents for this purpose. The reasons thus disclosed form part of the record and are in themselves subject to review. Thus if the Commissioner fails to disclose his reasons to Court exercising judicial review, an inference may well be drawn that the impugned decision is *ultra virus* and relief granted on that basis."

Reasons means not just the evidence recorded and the documents filed but an evaluation of the evidence and whenever possible, an interpretation of the documents.

Reasons in the context of Article12 of the Constitution

In *Suranganie Marapana* v *the Bank of Ceylon and others*(6) at 156 the Chairman of the Bank stated in his affidavit submitted to the Supreme Court that the refusal to extend the services of the petitioner was done *bona fide* and unanimously after a careful evaluation of her application and the need of the Bank to increase the efficiency of the legal department.

The Court held in that case; I quote "The Board failed to show the Court that valid reasons did exit for the refusal to grant the extension which was recommended by the corporate management. Instead, a veiled suggestion was made that the efficiency of the Legal Department was not up to expectations. This insinuation was baseless and unwarranted. Hence, the refusal to grant the extension of services sought was arbitrary, capricious and unfair. It was also discriminatory and violative of the petitioner's right to equal protection of the law under article 12(1) of the constitution" *Bandara* v *Premachandra*(7),*Tennakoon* v *De Silva*(8),*Gunaratne* v *Ceylon Petroleum Corporation*(9), *Wickramatunge* v *Ratwatte*(10), and *Wijepala* v *Jayawardena*.(11)

In *Bandara* v *Premachandra (supra)* Fernando, J. held: "... In the Establishment Code "without assigning any reasons' only means that no reason need be stated to the officer but that a reason, which in terms of the code justifies dismissal, must exist; and, if not disclosed legal presumptions will be drawn ..."

Held further *per* Fernando, J. "The state must, in the public interest, expect high standards of efficiency and services from

public officers in there dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the judiciary must endeavour to ensure that this expectations is realized."

Therefore except in the case of an appealable decision, not giving reasons for a decision does not *ipso facto* vitiate that decision. Yet valid reasons that justify the decision should be disclosed. In the instant case the 1st and 2nd respondents in their objections filed in this Court and in their submissions both written and oral, have drawn our attention to numerous documents and in fact have given there own interpretation to the said documents filed by them and the petitioner, but failed to show us any reason given by the said respondents in arriving at their decision. The 1st and the 2nd respondents completely failed to invite this Court to call for the record for the examination of this Court.

The decisions in *Karunadasa* v *Unique Gemstone Ltd., (supra)* apply with equal force to the facts and circumstance of the instant case. According to the *ratio desidendi* in the above case, the Assistant Commissioner (2nd respondent) being a public servant, was under a public duty to give reasons for his decision as it was a decision, made under the provisions of a statute, affecting the proprietary rights of the petitioner. As the impugned decision of the 2nd respondent was not an appealable order his failure to give reasons in the decision itself or along with the decision would not render the decision a nullity as long as there were good reasons for the decision. The Court of Appeal may call for the record and examine the record on application made in that behalf to ascertain whether there were valid reasons disclosed, for the decision. If it is found thereafter, that there were justifiable reasons for the decision then *certiorari* would not lie.

In the instant case we find that the purported decision dated 29.06.2006 marked as P1 does not contain any reasons. Let alone reasons the impugned order for the payment of EPF does not even contain determination on the crucial issue whether the 3rd respondent was an independent contractor or an employee. The 1st and the 2nd respondents have not thought it fit to produce the record or any document which contained the reasons for the decision although they ought to have known that they could invite

the Court of Appeal to call for an examine the record. We have perused the objections filed by the 1st and the 2nd respondents on 30.10.2007 but failed to see that they have produced such record or document for the examination of this Court or at least have invited this Court to call for the record to be examined by this Court. The 1st and the 2nd respondents were represented by a lawyer but opted not to invite this Court to call for the record, may be for reasons best known to them. For the reasons stated I do not intend to invoke the jurisdiction of this court *ex mero môtu* to call for the record for the examination of this Court. If I do so that would only encourage public officials performing public duties wielding powers under draconian laws to disregard the sacred duty of observing the principles of natural justice and thus flout the law unscrupulously. Every order or decision is not challenged and it is only in a very few cases, those who are aggrieved enter litigation which is very arduous, tedious and unbearably expensive. Decision making bodies are fully aware of this fact and they might even attempt to give reasons belatedly for their decisions once they realize that their decisions are being challenged. Such a practice can lead to corruption and to a negation of the principles of natural justice.

2nd ground urged by the petitioner is: since the 1st and the 2nd respondents failed to assign reasons for their decision dated 29.06.2006 which is marked as P1, it is open for this Court to review all the material presented by all parties in this case and to arrive at a decision thereon.

The remedy by way of *certiorari* cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically deferent from appeals when hearing an appeal the Court is concerned with the merits of the decision under appeal. In appeal the appellate Court can modify, alter, substitute or rescind th order or decision under appeal. (Vide Article 138 of the Constitution that gives the forum jurisdiction to the Court of Appeal for the correction of all errors in fact, or in law, committed by Courts of first instance, tribunal or other institution.) In Judicial review the Court is concerned with its legality and cannot vary, modify, alter or substitute the order under review. On appeal the question is right or wrong, on review, the question is lawful or unlawful. Instead of substituting its own decision for that of some other body as

happens when an appeal is allowed, a Court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not. *Footwear (Pvt.) Ltd., and two others* v *Aboosally, former Minister of Labour and Vocational Training and others.*(12)

Diplock, L.J. in *R.* v *Deputy Industrial Inquiries Commissioner ex parte Moore*(13) at 84 opined as follows I quote; "the requirement that a person exercising quasi-judicial functions must base his decision on evidence means that it must be based on material which tends logically to show the existence or non existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which could be relevant. It means that he must not spin a coin or consult an astrologer; but he may take into account any material which, as a matter of reason, has some probative value; the weight to be attached to it is a matter for the person to whom parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the Court does not entitle it to usurp this responsibility and to substitute its own view for his".

Sharvananda, C.J. quoted this statement of law with approval in *Chulasubadra* v *The University of Colombo and others* (14) at 288.

Therefore it is my view that it is not for us to decide whether the 3rd respondent was an employee or an independent contractor. It was for the 1st and 2nd respondents to decide that issue. The issue is a mixed question of fact and law and this Court could intervene if that decision was illegal or *ultra virus.* But it is not for this Court or the Counsel who appeared for the said respondents to try and justify the decision, by belatedly assigning reasons for the impugned decision if the decision was made without assigning reasons or at least if the record does not show that the 2nd respondent had even his reasons for his decision.

For the reasons adumbrated I find that; dealing with the rest of the grounds urged by the petitioner would be futile. It would be redundant to attempt to go into the correctness of the impugned decision which is not a reasoned out decision as the said decision is *ultra virus* the enabling statute namely the EPF Act.

Accordingly we issue a *writ of certiorari* to quash the impugned decision / notice dated 29.06.2006 made by the 2nd respondent and a writ of prohibition prohibiting the 1st and 2nd respondents from initiating or maintaining any proceedings for the enforcement of the said decision.

Application for mandate in the nature of *writs of Certiorari* and Prohibition is hereby allowed. In all the circumstances of the case we do not order costs.

SALAM, J. - I agree.

Appeal allowed.