COURT OF APPEAL

Free Lanka Trading Co. Ltd.
V
Commissioner of Labour

C.A. No. 179/81 — M.C. Colombo 77102/4

Employees' Provident Fund Act Section 38 — Finality of Certificate. Defaulter allowed to show cause.

The Commissioner of Labour filed a certificate with the Magistrate in proceedings instituted by the Commissioner of Labour for the recovery of certain sums of money due to the Provident Fund from the Petitioner on the grounds that such sums were in default.

The petitioner on being asked to show cause in terms of Section 38 sought to make certain objections on points of law. The Magistrate disallowed these objections on the grounds that the correctness of the certificate filed by the Commissioner of Labour could not be called in question or examined by any court. The Petitioner appealed against this order.

Held. Section 38 (3) of the Employees' Provident Fund Act as amended by No.8 of 1971 did not preclude the Magistrate from inquiring into the grounds urged by the Petitioner that nothing was due from him.

APPLICATION for revision of the order of the Magistrate of Colombo.

Before: Atukorale J and H.A.G. de Silva J.
Counsel: Isidore Fernando for the Petitioner
C.M.B. Bogollagama, Senior State Counsel, for the Respondent
Argued on: 19.10.1981 and 11.12.1981
Decided on: 28.1.1982.

Cur. adv. vult.

ATUKORALE J.

This is an application to set aside, by way of revision, the order of the learned Magistrate of Colombo dated 27.1.1981 refusing to inquire into certain objections raised by the petitioner on being asked to show cause why further proceedings for the recovery of a sum of Rs. 48,251/98 cts. which, in a certificate issued by the Deputy

Commissioner of Labour, was stated to be due from it as contributions to the Employees' Provident Fund. The certificate which was issued to the learned Magistrate by the Deputy Commissioner (a certified copy of which was tendered to us by learned Counsel for the petitioner after the conclusion of the hearing) was in terms of S.38 (2) of the Employees' Provident Fund Act, No. 15 of 1958, (hereinafter referred to as the principal Act) as amended by the Employees' Provident Fund (Amendment) Act, No. 8 of 1971, stated, inter alia, that the petitioner has defaulted in the payment of the said sum being contributions due from it in respect of certain workmen employed by it for the period 1968 to 1974. It was signed by one Pragnaratne Kariyawasam, Deputy Commissioner of Labour. On the certificate being issued to court the learned Magistrate summoned the petitioner to show cause why further proceedings for the recovery of the sum due under the Act should not be taken against him. The petitioner appeared in court in response to the summons and on its counsel intimating to court that there was cause to show, the matter was fixed for inquiry. After certain oral and written submissions had been made by both parties on several dates of inquiry, the learned Magistrate inquired whether it was open to him to inquire into the objections raised by the petitioner. Counsel for the petitioner then made further oral and written submissions to show that petitioner could establish the following matters by way of showing sufficent cause:

(1) that the petitioner is not a defaulter,
(2) that employment of commission agents by the petitioner has not by regulation been declared to be a covered employment,
(3) that no Order under S. 10 (3) of Employees' Provident Fund Act has been made by the Minister of Labour making the payment of contributions to the Fund obligatory by the employer and the employee as from a specified date and
(4) that the certificate issued by the Commissioner of Labour was invalid, - vide paragraph 4 of the petition.

The learned Magistrate then made the order of refusal which is now sought to be revised in these proceedings. He held that as S.38 (3) of the Act as amended, provided that the correctness of any statement in the certificate issued to court cannot be called in question or examined by court. In proceedings under S.38. he could not inquire into the matters urged before him and he imposed a fine of Rs. 48,251/98 cts. on the petitioner to be paid in instalments.

A perusal of the present application and the objections filed thereto and also the written submissions of the parties to the learned Magistrate (copies of which have been annexed to the present application) show that the grounds on which the petitioner desired to show cause before the learned Magistrate were as follows:

(a) that he is not a defaulter for the reason that he was not liable to contribute to the Fund because (i) employment with the petitioner has not, by regulation, been declared a covered employment and (ii) there is no Order in terms of S. 10(3) of the said Act made by the Minister in respect of the petitioner fixing the date from which he had to contribute to the Fund

(b) that the certificate issued to the Magistrate by the Deputy Commissioner is invalid.

The question that arises for our consideration is whether it was in law open to the learned Magistrate to inquire into the above grounds in view of the provisions of S.38 (3) of the said Act as amended. This subsection reads thus:

"(3) The correctness of any statement in a certificate issued by the Commissioner for the purposes of this section shall not be called in question or examined by the court in any proceedings under this section, and accordingly nothing in this section shall authorise the court to consider or decide the correctness of any statement in such certificate, and the Commissioner's certificate shall be sufficient evidence that the amount due under this Act from the defaulting employer has been duly calculated and that such amount is in default."

Learned counsel for the petitioner cited several decisions of the Supreme Court in support of his contention that the above provision will not preclude the Magistrate from inquiring into the grounds urged before him and set out by me above. Learned Senior State Counsel maintained the contrary and relied on some of the cases cited by learned counsel for the petitioner and also a decision of this court in case C.A. (S.C.) No. 954/77 - Application for Revision in M.C. Panadura case No. 73003/A - C.A. minutes of 27.2.1979.

The Employees' Provident Fund (Amendment) Act, No. 8 of 1971, which came into operation on 1.1.1971, repealed, inter alia, the old S. 38 of the principal Act, and inserted a new S.38 in place thereof, which by the Employees' Provident Fund (Special Provisions) Act, No.24 of 1971, was deemed to have come into operation on the date of commencement of the prinicipal Act itself. I shall briefly refer to the types of procedure for the recovery of contributions that were prescribed in the principal Act prior to the amendment. S. 17 (which is still in force) provided that any moneys due to the Fund shall be recoverable as a debt due to the Crown by an action in which proceedings may be taken by way of summary procedure. The provisions of the Civil Procedure Code relating to summary procedure applied to such an action. S.12 required the Commissioner, where he was satisfied that the employer has reduced the earnings of an employee for the purpose of reducing the amount of the contributions, to direct by written notice the employer to pay to the Fund in such instalments and before such dates as may be specified therein the difference between the sum he should have paid and the sum actually paid by him as contributions. The section made it obligatory on the employer to comply with such a direction. An employer who contravened any provision of the Act was guilty of an offence. On conviction after summary trial before a Magistrate he was liable to be sentenced to a fine not exceeding Rs. 1000/- or to imprisonment to a term not exceeding 6 months or to both and was further liable to pay a continuing fine of Rs.50/- per day - vide S. 37(1). Upon such conviction the court was also empowered under S 37(2) to order the employer to pay such sum for the failure to pay which he was convicted and the same was recoverable as a fine. S 38 made provision for the recovery of arrears of contributions due from an employer upon his conviction by a Magistrate for failing to pay any sum which he was liable to pay under the Act if a notice in the prescribed form had been sent to the employer before the date of commencement of his trial. If such notice had been so sent, on conviction of the employer the court could order the employer to pay the arrears as were found by court to be due from him. This sum was also recoverable as a fine. Hence prior to the enactment of the amending Act, No. 8 of 1971, section 12, 17, 37(2) and 38 of the principal Act set out the procedure that had to be followed for the recovery of contributions from a defaulting employer. In each case it had to be by resort to a court of law, whether by way of a civil action or a criminal prosecution, in which it had to be established to the

satisfaction of court that the sum claimed was one which the employer was liable to pay under the Act. The liability of the employer to make payment had first to be proved in court. It was the court that determined whether the employer was liable to pay the amount that was claimed to be due from the employer. There was, and still is, no provision for the Commissioner of Labour or any of his officers to initiate or hold an inquiry into the liability of a defaulting employer to pay any sum. It is as against this background that the new S. 38 was enacted repealing the old S. 38. The amending Act. No.8 of 1971 which enacted the new S.38 also repealed S.7(2) of the principal Act. The new S. 38 prescribes two modes of recovery. Subsection (1) states that "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 S.17 of the Act is impracticable or inexpedient, he may issue a certificate to the District Court" and the court is then required to issue a writ of execution to the Fiscal to seize and sell the property, both movable and immovable, of the defaulting employer. Subsection (2) provides that "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 S. 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.....to the Magistrate.....The Magistrate shall, thereupon, summon such employer before him to show cause why further proceedings for the recovery of the sum due under this Act should not be taken against him....." Next follows subsection (3) which I have quoted above. The certificate issued by the Commissioner must contain particulars of the sum due and name and place of residence of the defaulting employer. The correctness of such particulars, in terms of subsection (3), "shall not be called in question or examined by court in any proceedings under this section, and accordingly nothing in this section shall authorise the court to consider or decide the correctness of any statement in such certificate, and the Commissioner's certificate shall be sufficient evidence that the amount due under this Act from the defaulting employer has been duly calculated and that such amount is in default." In my view the word 'accordingly' in this subsection seems to indicate that the legislature intended that the opening words 'shall not be called in question or examined by court' to be qualified by and to have the limited meaning and effect set out in the rest of the subsection.

Under the old Income Tax Ordinance (Chap.88, L.E., 1938 Edition) there was similar provision for the institution of recovery proceedings in court by the issue of a certificate by the Commissioner of Income Tax to a Magistrate – vide S.80 of the Ordinance. Where any tax was in default the Commissioner could seek to recover the same under that section. The tax was deemed to be in default when the assessee failed to pay it as prescribed in the earlier sections of the Ordinance. The Ordinance itself provided for the machinery by which the liability of an assessee to pay tax could be inquired into and decided upon. The proviso to S.80 of the Ordinance is as follows:

> "Provided that nothing in this section shall authorise or require the Magistrate in any proceeding thereunder to consider, examine or decide the correctness of any statement in the certificate of the Commissioner."

S.80(2) enacted that the Commissioner's certificate shall be sufficient evidence that the tax has been duly assessed and is in default, and any plea that the tax is excessive, incorrect, or under appeal shall not be entertained, except in the case where an assessee had not appealed within the proper time against the assessment when the court could grant an adjournment. It will thus be seen that there is strong resemblance in the language used in the two sections (S.80 of the old Income Tax Ordinance and the new S.38 of the Employees' Provident Fund Act) in describing and defining the effect of a certificate that is issued to a Magistrate.

The effect of a certificate issued by the Commissioner to a Magistrate in terms of S.80 of the Income Tax Ordinance has been the subject of several decisions of the Supreme Court. In *Vaz v, The Commissioner of Income Tax* (46 NLR. 200) Wijeyewardene J. held that such a certificate is conclusive against the plea that the tax is 'excessive, incorrect or under appeal' subject to the right of the assessee to the limited relief by way of an adjournment. "On the other hand," he observed, "the Commissioner's certificate is only' sufficient evidence' that the tax is in default."

In *M.E. de Silva v. The Commissioner of Income Tax* (53 NLR. 280) a certificate was issued to the Magistrate by the Commissioner stating that the appellant, as the principal officer of the Company, was the defaulter chargeable with tax for the relevant years of

assessment. The notices of assessment, however, had been made out on the basis that the Company was the assessee. Before the Magistrate the appellant took up the objection that he was not the 'defaulter' in so far as his personal liability was alleged to be affected. This objection was overruled on two grounds, one being that the proviso to S.80(1) precluded the court from 'considering, examining or deciding the correctness of any statement in the certificate of the Commissioner'. In appeal Gratiaen J.; in the course of his judgment, said:

> "The real purpose of the proviso to S.80(1) is to prevent a defaulter who has been duly assessed to income tax for which he is properly chargeable from re-agitating in the course of proceedings taken under S.80(1) for the recovery of such tax, the correctness of the assessments served on him. The reason is obvious. A magistrate's jurisdiction in matters of this kind is the jurisdiction of a Court of execution simpliciter, and not that of an appellate tribunal. An assessee who disputed the correctness of an assessment made on him has already had access to other machinery prescribed by the Ordinance.....So much is clear enough, but I am not prepared to accede to the further proposition that the combined effect of the proviso to S.80(1) and of S.80(2) is to prevent an alleged defaulter against whom proceedings have been initiated from satisfying the Magistrate that he was not duly assessed, or that he was not a defaulter in respect of any tax for which he was properly chargeable under the provisions of the Ordinance.....Indeed, S.80(2) makes the Commissioner's certificate in such proceedings only 'sufficient evidence that the tax has been duly assessed and is in default'. I am content in this connection to adopt, with respect, the observations of Bennett J. *In re Duce and Neets Cash Chemists (Southern) Limited's Contract* (1937) Ch. 642 at page 647:-
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> > 'It is a truism that the word 'sufficient' is not the same word as and has not the same meaning as 'conclusive'...I think one must find some context of a compelling kind before one can decide that the word sufficient has the same meaning as conclusive.' "

In *Nilaweera v. The Commissioner of Inland Revenue* (63 NLR. 486) a certificate was issued to the Magistrate and the petitioner on being asked to show cause maintained before him that the assessment of tax was time-barred. The Magistrate held that it was not open to him to investigate this defence. Gunasekera J. held in appeal that the petitioner is entitled to show that he was not duly assessed. In the course of his judgment he stated:

> " The learned Magistrate's view that it was not open to him to consider whether the assessment was time-barred is based on the proviso to S.80(1), where it is enacted that nothing in that section shall authorise or require the Magistrate in any proceedings thereunder to consider, examine or decide the correctness of any statement in the certificate. The matters that are required to be stated in the certificate are the particulars of the tax in default that is sought to be recovered and the name and last known place of business or residence of the defaulter. These statements would assume that the alleged defaulter has been duly assessed to income tax, but there is nothing in the proviso to prevent him from proving that the assumption is incorrect... Subsection (2) of the section provides that in any proceedings under subsection (1) the Commissioner's certificate shall be sufficient evidence that the tax has been duly assessed and is in default. It must be noted that the certificate is to be merely sufficient, and not conclusive, evidence of these facts. Moreover, the provision that it shall be evidence connotes that an issue as to whether the tax has been duly assessed can arise for decision in such a proceeding."

A consideration of the above decisions seems to indicate that even under the old Income Tax Ordinance, which contained elaborate statutory provisions for an assessee aggrieved by an assessment issued on him to appeal in succession to the Commissioner, then to the Board of Review and finally to the Supreme Court on a question of law, our courts have placed a very broad and liberal construction on the relevant provisions contained in the proviso to S.80(1) and S.80(2) of the Income Tax Ordinance. As pointed out by me earlier there is no statutory provision in the Employees' Provident Fund Act for the Commissioner of Labour to hold an inquiry into the liability of an employer to pay contributions claimed to be due from him. There is no provision to enable the employer to dispute the

legality or the accuracy of any sum alleged to be due from him under the Act. Learned Senior State Counsel drew our attention to S. 28 of the Act, which enables the Commissioner to make a determination which is subject to an appeal under S.29.. But it is clear that these sections deal only with claims to benefits referred to in S.23 and do not empower the Commissioner to inquire into the employer's liability to pay the sum claimed to be due from him. In the instant case the grounds urged by the petitioner were mainly legal issues and not matters relating to the factual correctness of the amount claimed.

Learned Senior State Counsel also cited the decision of this court in C.A. (S.C.) 954 (77-Revision in M.C. Panadura No. 73003/A-decided on 27.2.1979. The ground sought to be urged before the Magistrate in that case was that the employer was not liable to pay the contribution because the workman was only a casual employee. There was evidence in that case that the employer had participated in an inquiry into this question. In the circumstances this court held that the learned Magistrate was correct in refusing to hear the employer on the same ground. The decision in that case has no application to the facts of this case.

On a consideration of all the above matters I am of the opinion that S.38(5) of the Employees' Provident Fund Act as amended by Act No.8 of 1971 did not preclude the learned Magistrate from inquiring into the grounds urged by the petitioner. The order of the learned Magistrate is therefore set aside and the case is remitted to the Magistrate's Court to enable the petitioner to show cause on the grounds enumerated by me above. The petitioner will not be entitled to urge any other grounds before the Magistrate.

H.A.G. DE SILVA J. — I agree.

Order set aside. Case remitted for re-hearing as directed.