

**EMPLOYEES TRUST FUND BC
v
SUBASINGHE**

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CA (MC) 1/2007
M.C. CHILAW 94331
SEPTEMBER 25, 2007
OCTOBER 12, 2007

Employees Trust Fund Act – 46 of 1980 – section 28 (1), section 28 (2), section 28 (3) – section 39, section 41 – Recovery in Magistrate's Court – Written sanction of the ETF Board necessary? When?

The question arose as to whether written sanction of the ETF Board is required when section 28 (3) is resorted to.

Held:

- (1) Section 28 lays down three methods of recovery. First method is by way of summary procedure section 28(1). The Second method is to file a certificate in the District Court to get a writ executed – section 28(2). The Third method is to file a certificate in the Magistrate's Court – section 28(3).

- (2) Written sanction of the Board is required only in the event of instituting proceedings under section 39. section 39 attracts prosecution and punishment. It deals with convictions. Sanction is required only in the event of prosecution. Section 28(3) is not with regard to prosecutions and convictions, therefore sanction of the Board is not required.

In the matter of an application in Revision from an order of the Magistrate's Court of Chilaw.

Dulinda Weerasuriya with H.M.A. Jayantha Kumar for appellant-petitioner.
Respondent absent and unrepresented.

Cur.adv.vult

October 23, 2007

ERIC BASNAYAKE, J.

The applicant petitioner (applicant) filed a certificate in the Magistrate's Court of Chilaw under section 28(3) of the Employees Trust Fund Act No. 46 of 1980 (the Act) to recover a sum of Rs. 8726.25 from the respondent-respondent (respondent). This sum was on account of contributions payable to the Employees Trust Fund (ETF) in respect of employees. At the inquiry a preliminary objection was taken on behalf of the respondent that this action cannot proceed without the written sanction of the ETF Board. The learned Magistrate on 14.11.2006 upheld the preliminary objection and stayed the case to enable the applicant to file the sanction within a period of one month. The applicant is seeking to have this order revised.

Section 41 of the Act is as follows: - "*No prosecution for an offence under this Act shall be instituted except by or with the written sanction of the Board*".

Section 39 of the Act identifies 3 offences. Section 39 is as follows:-

Every person who-

- (a) *contravenes or fails to comply with any of the provisions of this Act or any regulations made there under; or*
- (b) *makes defaults in complying with any direction or order made or given under this Act; or*

(c) knowingly furnishes or causes to be furnished any false return, or information required to be furnished under section 37 of this Act,

shall be guilty of an offence and shall on conviction before a Magistrate be liable to a fine not exceeding one thousands rupees or to imprisonment of either description for a term not exceeding six months, or to both such fine and imprisonment.

The question that has to be decided is whether the present application, filed in terms of section 28(3) of the Act, is in respect of an offence committed and that the proceedings thus amounts to a prosecution (criminal). Section 28 deals with recoveries. Section 28 lay down three methods of such recoveries. One method is by way of summary procedure (section 28(1)). The second method is to file a certificate in the District Court to get a writ executed (28 (2)). The third method is to file a certificate in the Magistrate's Court (28 (3)). In that case the Magistrate shall issue notice on the employer to show cause as to why he should not pay the amount appearing in the certificate. On failure to show cause the amount shall be deemed to be a fine imposed by a sentence for an offence punishable with imprisonment.

The learned Counsel appearing for the applicant submitted that steps could be taken to recover money due to the Fund from the defaulters under Section 28 or 39 of the Act.

Written sanction of the Board is required only in the event of instituting proceedings under Section 39. When proceedings are instituted under Section 28(3) of the Act, no sanction is needed. The learned Counsel submitted that the object of section 28 is to recover dues and in the event the procedure followed in the District Court is insufficient, a certificate could be filed in the Magistrate's Court which shall impose a default sentence. The learned Counsel submitted that the default payment is not a fine but deemed to be a fine for the purpose of attracting the provisions of the Criminal Procedure Code. The purpose is to recover payment effectively.

The procedure laid down under section 39 appears to be more stringent. The procedure under section 28(3) is simple. It appears that the sole purpose of section 28(3) is effective recovery

of dues. Section 28(3) is resorted to not for the purpose of punishing offenders. Section 28(3) does not deal with offences. It is Section 39 that deals with offences. Section 39 attracts prosecution and punishment. It deals with convictions. Sanction is required only in the event of prosecution. Section 28(3) is not with regard to prosecutions and convictions. Therefore sanction of the Board is not required when proceedings are instituted under Section 28(3) of the Act. The learned Magistrate has therefore erred in upholding the objection on the question of sanctions. The order of the learned Magistrate dated 14.11.2006 is therefore set aside and the learned Magistrate is directed to proceed with the inquiry. The application is allowed without costs.

WIMALACHANDRA, J. – I agree.

Application allowed.

Magistrate directed to proceed with inquiry.