

CEDRIC T. DE SILVA
v.
AZEEZ TEXTILE MILLS LTD.

COURT OF APPEAL

ISMAIL, J.

C.A. (REV. APPLICATION) NO. 936/90

M.C. COLOMBO NO. 81589/5

SEPTEMBER 01 AND 27, 1993.

Employees' Trust Fund – Institution of proceedings against defaulter employer in Magistrate's Court – Employees Trust Fund Act, Section 28(1), (2), (3) and (5). – Is order of conviction necessary?

A certificate was issued by the then Chairman of the Employees Trust Fund Board to the Magistrate's Court, Colombo stating that the employer had defaulted in the payment of E.T.F. in respect of its employees for the period of January 1982 to September 1985. On objections to the validity of the certificate –

Held:

(1) It was not necessary that the certificate was not issued in the name of the Company but on the Directors.

(2) Although the office of the defaulting Company was situated at 28, Minuwangoda Road, Ja-ela, outside the jurisdiction of the Magistrate's Court, Colombo, the registered office of the Company was at No. 254, Main Street, Colombo 11. Hence the objection on jurisdiction failed.

(3) Section 39 of the Employees' Trust Fund Act recognizes as an offence a contravention or a failure to comply with the provisions of the Act. Where the offence is committed by a body of persons, then if it is a corporate body, every director and officer of the corporate body is deemed to be guilty of such offences, unless he can prove that the offence was committed without his knowledge and that he exercised due diligence to prevent the commission of such offence. The procedure of the Magistrate issuing summons on the directors and warrant on the absent director was in order.

(4) The evidence showed that Mr. Cedric T. de Silva was chairman of the Employees' Trust Fund and authorised to sign certificates although his official designation was not stated in the certificate. The certificate has been issued in conformity with the provisions of s. 28(5) of the Act.

(5) It is not necessary for it to be stated in the certificate, the Board's opinion that it is impracticable or inexpedient to recover the sum the employer is liable to pay under subsection 1 or 2.

(6) Section 28(3) requires the Board to issue a certificate containing particulars of the sum due and the name and place of residence of the defaulting employer.

(7) It is not necessary to specify the number of the gazette containing the order made by the Minister by which the employer became liable to make the contributions to the fund.

(8) In default of sufficient cause being shown the sums in default shall be deemed to be a fine imposed by a sentence of the Magistrate on such employer. It is not necessary to pass an order of conviction. The imposition of a default term of imprisonment is not mandatory but may be imposed in the discretion of the Magistrate.

Cases referred to:

1. *Mallows v. Commissioner of Income Tax* 66 NLR 321.
2. *Commissioner of Income Tax v. De Vos* 35 NLR 279.
3. *De Jong v. The Commissioner of Income Tax* 57 NLR 279.
4. *Perera v. Commissioner of Inland Revenue* 70 C.L.W. 46.

APPLICATION for revision of the sentence imposed by the Magistrate of Colombo.

Isidore Fernando for petitioner.

Kumar Paut State Counsel for complainant-respondent.

Cur adv vult.

November 1st, 1993.

ISMAIL. J.

A certificate dated 20.07.87 was issued by the complainant-respondent who was then the Chairman of the Employees' Trust Fund Board to the Magistrate's Court, Colombo in terms of Section 28(3) of the Employees' Trust Fund Act, stating that the employer, Azeez Textile Mills Ltd. had defaulted in the payment of Rs. 81,859.65 being contributions in respect of its employees for the period January 1982 to September 1985. The Attorney-at-Law for the complainant furnished the names of the directors of the defaulting Company and moved for summons on them on 22.6.88. When the case was taken up on 29.8.90, two preliminary objections were raised on behalf of the Company and its directors. They were firstly that the certificate was invalid as it had not been issued in the name of the Company which was the defaulting party, and secondly that the Court lacked

jurisdiction to inquire into the matter as the office of the defaulting Company is situated at No. 28 Minuwangoda Road, Ja-Ela outside the jurisdiction of the Magistrate's Court, Colombo. The Magistrate overruled both objections holding that the certificate has been correctly filed and that its jurisdiction was not ousted as it was not established that the office of the Company was situated at Ja-Ela. The petitioner in this application seeks to have the said order of the Magistrate dated 29.8.90 revised and set aside.

Learned Counsel for the petitioner in his written submissions has sought to impugn the validity of the certificate on the additional grounds that it has been signed by one Cedric T. de Silva, a person without an official designation and without authority to issue the same and that the certificate has not been issued by the Employees' Trust Fund Board as provided for in Section 28(3) of the Act.

The certificate annexed to the petition as exhibit 'A' states, "I Cedric T. de Silva, Chairman of the Employees' Trust Fund Board by the authority vested in me by virtue of Section 28(5)..." and proceeds to give the name and the address of the defaulting employer as "Azeez Textiles Ltd." 254 Main Street, Colombo 11.

Section 28(5) of the Act provides as follows:

28(5). "Proceedings for the recovery of any moneys due to the Fund may be instituted by the Board or any officer, authorised in that behalf, of the Board and the Board or such officer may, not withstanding anything to the contrary in any other written law, conduct such proceedings".

The present Chairman of the Board in his affidavit has stated that the complainant-respondent Cedric T. de Silva was the Chairman of the Employees' Trust Fund Board for the period March '82 to February '89 and that he was authorised to issue the certificate. The employer Company was liable to pay in respect of each employee to the fund on or before the last day of the succeeding month, a contribution of an amount equal to 3% of the total earnings of such employees for the period January 1982 to September 1988 and the surcharge imposed on it. Thus it is evident that the certificate has been lawfully issued against the defaulting Company by the

complainant-respondent in his capacity as the Chairman of the Employees' Trust Fund Board in conformity with the provisions of Section 28(5) of the Act.

The petitioner sought to establish that his place of employment was at No. 28 Minuwangoda Road, Ekala, Ja-Ela and consequently that the Magistrate, Colombo had no jurisdiction over this place of work. It was contended on behalf of the Board that the factory of the Company was situated at Ja-Ela while its registered office was at No. 254 Main Street, Colombo 11. Section 103(1) of the Companies Act provides that a company must as from the date it commences business or as from the 14th day after its incorporation whichever is earlier have a registered office to which all communications and notices may be addressed. Section 28(3) of the Employees' Trust Fund Act provides that the Board may "issue a certificate containing the name and place of residence of the 'defaulting' employer to the Magistrate having jurisdiction over the place of work of such employer".

Abdul Azeez Ismail Silaat residing at St. Peter's Place Colombo 6, in his affidavit supporting the petition states,

- "2. I was the Managing Director of the business known as Azeez Textiles Ltd. situated at premises No. 28 Minuwangoda Road, Ekala, Ja-Ela, which was a private limited Company incorporated under the Companies Ordinance of Sri Lanka and having its registered office at premises No. 254 Main Street, Colombo 11."

The certificate has therefore been lawfully issued to the Magistrate, Colombo, against the defaulting Company whose registered address and principal place of business is admittedly within his jurisdiction. The learned Magistrate has therefore correctly overruled the two preliminary objections taken up in the Magistrate's Court.

The learned Counsel for the petitioner has in his written submissions before this Court taken up further objections to the certificate issued by the Chairman of the Board. Relying upon the judgment in *Mallows v. Commissioner of Income Tax*⁽¹⁾, he has stated that the "opinion" of the Employees' Trust Fund Board which would

have served as evidence in support of the certificate has not been expressly set out therein.

Section 28(3) of the Employees' Trust Fund Act provides that "Where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Board is of opinion that it is impracticable or inexpedient to recover that sum under Subsection 1 or Subsection 2 or where the total amount due has not been recovered by seizure or sale then the Board may issue a certificate...". Subsections 1 and 2 refer to the mode of recovery of sums of money due to the Fund by proceedings taken by way of summary procedure or by issuing a certificate to the District Court.

In the case cited of *Mallows v. Commissioner of Income Tax*, the Court dealt with a situation where an "opinion" should be expressed in terms of Section 6(2) (b) of the Income Tax Ordinance, that the assessment by the local authority does not accurately represent the annual value of the premises. This judgment has no relevance to the provisions of Section 28(3) of the Employees' Trust Fund Act relating to an "opinion" to be entertained according to its context. Learned State Counsel has pointed out that in the case of *Commissioner of Income Tax v. De Vos*²⁰, referring to the words in Section 80(1) of the Income Tax Ordinance (identical to the present Section 130(1) of the Inland Revenue Act No. 28 of 1979) to the effect that the Commissioner is of opinion that the "recovery of tax in default by seizure and sale is impracticable or inexpedient", Maartensz, J. observed, "that it is not a particular which the Commissioner is required to state by Section 80(1) ...". The opinion of the Employees' Trust Fund in deciding the mode of recovery of money due to it even if expressed in the certificate would not assist the employer to show cause why recovery proceedings should not be taken against it under the Act. I am of the view that the Board is not required to set out in the certificate issued under Section 28(3) of the Employees' Trust Fund Act, its opinion that it is impracticable or inexpedient to recover the sum the employer is liable to pay under Subsection 1 or 2. Section 28(3) requires the Board to issue a certificate, "containing particulars of the sum so due and the name and place of residence of the defaulting employer."

Another objection to the validity of the certificate is now taken up that the number of the particular gazette containing the order made by the Minister by which the employer became liable to make contributions to the Fund has not been specified in it. Learned Counsel for the petitioner has submitted that the Minister has made three orders relating to the recovery of contributions, published in the government Gazettes No. 127/3 dated 10.2.81, No. 154/8 dated 18.8.91 and No. 171/2 dated 14.12.81, in respect of private sector undertakings in which not less than 150 employees are employed, in which less than 150 and not less than 50 are employed and in respect of an undertaking in which even one employee is employed. None of these gazette notifications have been made available. The omission in the certificate in this regard was not pointed out in the proceedings before the Magistrate, nor has it been referred to in the petition filed in this Court.

Learned Counsel for the petitioner however, relied on the judgment in SC Appeal No. 7/91 (SC Minutes of 6.5.92) where the validity of a certificate filed in terms of Section 38(2) of the Employees' Provident Fund Act, No. 16 of 1958, as amended, was challenged on the ground that the particulars of the sum due were not stated in the certificate. It was observed upon a perusal of the certificate filed in that case that it contained no particulars of the sum claimed and the Court consequently held that there was no certificate filed before the Magistrate's Court in terms of Section 38(2) of the Employees' Provident Fund Act. On a perusal of the certificate filed in the present case under section 28(3) of the Employees' Trust Fund Act, particulars relating to the total contribution that the employer has failed to make, the amount of the surcharge payable under the Act and the period during which the employer became liable to pay these amounts have been specified. Thus there were sufficient particulars set out in the certificate enabling the petitioner to show cause, as envisaged in the Act, as to why the sum claimed is not payable. Thus the failure to set out the number of the particular gazette in the certificate by which the employer Company was categorised as a private sector undertaking dependent on the number of its employees, has not rendered the certificate invalid. There can be no doubt that the defaulting company is included as a private sector undertaking because Section 44 of the Act defines a

private sector undertaking to mean "any undertaking carried on by an employer in the private sector and includes any undertaking carried on by a self-employed person". Besides, admittedly, the petitioner was liable to make a contribution to the Employees' Trust Fund in respect of each of its employees in terms of the Act. For these reasons the petitioner has failed to show even on the additional grounds taken up in these proceedings that the certificate filed by the complainant-respondent was either defective or not in conformity with the provisions of Section 28(3) of the Employees' Trust Fund Act.

The learned Magistrate in his order dated 29.8.90 has held that Azeez Textiles Mills Ltd. is liable to pay the sum of Rs. 81,895.65 due on the certificate and has deemed that it is a fine which has to be recovered. He then proceeded to impose a default term of six months simple imprisonment on each of its directors, and issued a warrant on one of other directors who was not present at the inquiry.

Learned Counsel for the petitioner submitted that the learned Magistrate has misinterpreted the provisions of the Employees' Trust Fund Act by issuing summons on the directors of the Company, issuing a warrant on the absent director and by imposing a fine with a default sentence.

Section 45(3) of the Code of Criminal Procedure Act dealing with the manner of service of summons provides that in the case of a company summons may be issued on the Managing Director, Secretary or other like officer or the person in charge of the principal place of business and in terms of section 45(5), if summons cannot be served as above, such summons may be served by delivering it by registered post at the registered office of the company.

Section 39 of the Employees' Trust Fund Act recognises as an offence a contravention or a failure to comply with the provisions of the Act and by Section 40, where an offence is committed by a body of persons, then if it is a corporate body, every director and officer of that corporate body is deemed to be guilty of such offence. Such a director is however permitted to prove that such offence was committed without his knowledge and that he exercised due diligence to prevent the commission of such offence. The procedure

followed by the Magistrate in issuing summons on the directors and a warrant on the absent director does not appear to be in conflict with the provisions of the law referred to above. I am therefore of the view that the learned Magistrate acted in accordance with the provisions of the Employees' Trust Fund Act in imposing a default term of imprisonment on the directors in the event of the company defaulting in making payment.

However, learned State Counsel submitted that he was not seeking to support the order of the learned Magistrate imposing a default term of imprisonment on the directors, as there has been no conviction and that the imposition of a sentence can only follow upon a conviction.

In *De Jong v. the Commissioner of Income Tax*,⁽³⁾ the provisions of Section 80(i) of the Income Tax Ordinance were considered. It provided that if a person who has been summoned to show cause fails to do so, the amount of the tax in default shall be deemed to be a fine imposed by a sentence of a Magistrate on such defaulter for an offence punishable with fine only and the provisions of Section 312(1) of the Criminal Procedure Code become applicable, and the Magistrate is empowered to make any direction which by the provisions of that subsection he could have made at the time of imposing such sentence. Weerasooriya, J. observed that the tax due is deemed to be a fine only for the purpose of invoking the provisions of Section 312(1) of the Criminal Procedure Code relating to the imposition of a term of imprisonment in default of payment of the tax. He also went on to observe that the object of proceedings under Section 85(1) of the said Ordinance is to ensure recovery of the tax due from a defaulter and its object would be defeated if the Magistrate merely makes an order that the defaulter should pay the tax as a fine.

In *Perera v. Commissioner of Inland Revenue*,⁽⁴⁾ T. S. Fernando, J. while referring to the phraseology of Section 85(1) of the Income Tax Ordinance which states that the tax in default shall be deemed to be a fine, observed that it was in his opinion open to the Magistrate to decide whether or not any of the provisions of Section 312(1) of the Criminal Procedure Code should be made applicable to the fine, for

that Section states that the Magistrate "may" make any direction which by the provision of Section 312(1) he could have made at the time of the imposition of the sentence.

The provisions of Section 28(3) of the Employees' Trust Fund Act are similar to the provisions of the Income Tax Ordinance considered in the cases referred to above. It provides that in proceedings for the recovery of the sum due on a certificate, in default of sufficient cause being shown, such sums shall be "deemed" to be a fine imposed by a sentence of the Magistrate on such employer. The submission of State Counsel that a pre-condition for imposing a sentence is a conviction cannot therefore prevail. It is to be noted that the imposition of a default term of imprisonment is, however, not mandatory. It is open to the Magistrate to decide whether or not any of the provisions of Section 291 of the Code of Criminal Procedure Act, except paragraphs (A) (f) and (i) of subsection 1 should be made applicable to the fine, for Section 28(3) of the Employees' Trust Fund Act states that the Magistrate "may" make any direction which by the provision of Section 291 he could have made at the time of the imposition of the sentence. Another provision vesting a Magistrate with discretion in a matter of ordering imprisonment is Section 291(2) of the Code. It is clear that the object of the proceedings initiated by the filing of a certificate under Section 28(3) of the Employees' Provident Fund Act is to ensure the recovery of the sum of money stated to be due to the Fund from the employer. In the present case the Magistrate has in the exercise of his discretion decided to impose a term of imprisonment on the directors in the event of default by the Company in the payment of the sum due on the certificate which is now deemed to be a fine. I see no compelling reason to interfere with the exercise of his judicial discretion. The application for revision is, therefore, refused with costs fixed at Rs. 1,000/-.

Application refused.