

COEME  
v.  
KULARATNE AND OTHERS

COURT OF APPEAL.  
SENANAYAKE, J.  
C.A. NO. 583/93  
OCTOBER 31, 1994.

*Industrial Dispute – Employees Provident Fund – Sections 8, 46 and 47 of the Employees Provident Fund Act, No. 15 of 1978 – Covered employment – Regulation 2(2)(c) made under the regulation making power of Minister – Is such regulation ultra vires? – Liability of employer to pay E.P.F. to foreign nationals employed in Sri Lanka.*

The petitioner (Coeme) claimed he was employed by Blanka Diamonds (Pvt) Ltd., (4th respondent). The 4th respondent claimed petitioner was employed by Vanden Eynde & Zenen of Antwerp, Belgium and was assigned to work as Managing Director in Sri Lanka. Petitioner had vacated or abandoned his post.

Contributions were made to a Social Security Scheme in Belgium. Under Regulations 2(2)(c) made under Section 46 of the Employees Provident Fund Act, No. 15 of 1958 a person who is employed in a managerial, executive or technical employment and for whom superannuation benefits or benefits on termination of employment are provided for under any provident fund or pension scheme or any other schemes established or administered outside Ceylon are not entitled to E.P.F.

**Held:**

(1) The documents established that the petitioner was employed as Managing Director of Blanka Diamonds (Pvt) Ltd.

(2) The powers vested on the Minister of Labour by Section 46 of the Employees Provident Fund Act, No. 15 of 1958 to make regulations are limited to making regulations pertaining to the heads mentioned as 'a' to 'q' (covered employment). Covered employment is defined in section 47 as meaning an employment declared by the regulations as a covered employment. Section 8 of the Act envisages what is covered employment and the employees to whom the Act applies and contributions.

In terms of Section 46(1) the powers of the Minister were limited to items (a) to (q). He has no unlimited discretionary powers. The interpretation Section 47 defines the term 'covered employment'. Section 8 defines the categories of those that come under the definition of covered employment and any regulations may be made in terms of the provisions of that section but not to derogate from the intention of the specific provisions of Section 8. Section 8(4) empowers the making of regulations complying with the intention of the Legislature as clearly stated by the statute and not in derogation thereof. Regulation 2(2)(c) is therefore *ultra vires*. Hence the petitioner was entitled to E.P.F.

**APPLICATION** for certiorari to quash orders of Labour Commissioners (Assistant and Deputy) disallowing petitioner's claim for E.P.F.

*E. D. Wickremanayake with V. Alagaratnam, S. Vimalarajah, P. Vimalarajah and Ananda Cooray* for petitioner.

*Adrian Perera, S.C.* for 1st and 2nd respondents.

*Gomin Dayasiri* for 4th respondent.

*Cur. adv. vult.*

January 12, 1995.

**SENANAYAKE, J.**

This is an application filed by the petitioner to grant a mandate in the nature of a Writ of Certiorari to quash the order of the 1st respondent dated 4.1.93 and the 2nd respondent dated 9.3.93 and

of the 3rd respondent, for a declaration that regulation 2(2)(c) of the E.P.F. Regulations 1958 is *ultra vires* the Employees' Provident Fund Act and to issue a *Writ of Mandamus* on the 3rd respondent to recover the E.P.F. dues of the petitioner from the 4th respondent.

The relevant facts briefly are as follows: The petitioner was employed as Managing Director from 7.2.91 till his services were terminated on 3.6.92 by Blanka Diamonds (Pvt) Ltd. by the 4th respondent. The petitioner made a written complaint to the 1st respondent on 13.8.92 stating that he was not paid E.P.F. during his period of employment under the 4th respondent. He averred that the 1st respondent conducted an inquiry on a number of days and the petitioner too gave a statement and the contention of the 4th respondent was that the petitioner was not entitled to E.P.F. in view of contributions made by the 4th respondent on behalf of the petitioner to a Social Security Scheme in Belgium.

It was the petitioner's position that the Belgian Social Security Scheme has no relevance to his entitlement under the E.P.F. Act. He further averred that the Social Security Scheme in Belgium was a voluntary insurance cover for medical costs, loss of employment due to sickness or due to becoming an invalid and life insurance to family members in the case of death of the employee. The voluntary contribution to this scheme was a paltry sum of Rs. 5,200/- a month against the sum of Rs. 33,785/- a month which would be due to E.P.F. contributions under the E.P.F. Law. The petitioner stated that he received a letter dated 4.4.93 stating that the petitioner was not entitled to the E.P.F. benefits because the petitioner had admitted that a pension allowance was available when an employee reaches the pensionable age according to the Belgian Social Security Scheme. The petitioner protested by writing to the 3rd respondent with a copy to the respondent on 3.2.93 marked as P6. The petitioner averred that thereafter he wrote a letter marked P8 a copy of the letter was marked P8 but he did not receive an acknowledgement from the 3rd respondent. His position was that the decision of the 1st respondent was *ultra vires* in that it was contrary to the purpose and the policy in relation to the Employees Provident Fund Act, No. 15 of 1958 and its subsequent amendments.

The regulations upon which the respondent's decision was based was *ultra vires* the E.P.F. Act for unreasonableness or ambiguity.

The regulations upon which the Commissioner of Labour relied were contrary to the E.P.F. law and neither necessary nor authorised under the E.P.F. law.

The 1st, 2nd and 3rd respondents did not file any statement of objections.

The 4th respondent in his statement of objections averred that the petitioner was employed by Vanden Eynde & Zenen situated in Antwerp, Belgium and was assigned to work as Managing Director in the Sri Lankan operations and that the petitioner vacated or abandoned his post.

The 4th respondent's position was that the petitioner was not entitled to E.P.F. in view of the provisions in the regulations under the E.P.F. Act which states a person who is employed in a managerial, executive or technical employment and for whom superannuation benefits or benefits on termination of employment are provided for under any provident fund or pension scheme or any other schemes established or administered outside Ceylon was exempted and in any event the petitioner was an employee of Vanden Eynde & Zenen and not of the 4th respondent. The 4th respondent averred that the contributions to the Social Security Scheme were administered in Belgium. The said Social Security Scheme was administered by Belgium as a public sector institution for the benefit of its overseas employees. The 4th respondent produced a copy of the letter marked Y1 letter dated 4th November, 1992 by the Consul of Belgium in Sri Lanka and Y2 as the Overseas Social Security Scheme and its certified translation.

The 4th respondent's position was that P4 and P7 were according to law and prayed that the application be dismissed. It was an admitted fact that the petitioner was employed by the 4th respondent and his document X filed with the counter objections confirms this position. The document X was issued on 5.2.91 by Patrick Vanden Eynde and states that the petitioner will be employed as Managing Director of Blanka Diamonds (Pvt) Ltd. commencing from 7.2.91 and also confirmed by X1 dated 8.6.92.

The submission of the Learned Counsel for the petitioner was that the regulations made by the Minister of Labour by virtue of the powers vested in him by Section 46 of the Employees Provident Fund Act, No. 15 of 1958, the Minister could make regulations only pertaining to the items mentioned in "a to q" and nothing more. He further submitted in terms of the interpretation Section 47 "Covered employment" means an employment declared by regulations to be a covered employment."

His submission was that Section 8 of the Act envisages what is covered employment and employees to whom this Act applies and contributions. Section 8(1) reads as follows "any employment, including any employment in the service of a corporation whose capital or of whose capital is provided by the Government may be declared to be a covered employment.

2. Regulations may be made –

- (a) to treat as a covered employment any employment outside Sri Lanka which is for the purpose of a trade or business carried on in Sri Lanka and which be a covered employment if it were in Sri Lanka; and
- (b) "to treat as not being covered employment or to disregard –
  - (i) "employment of a person who employs less than a prescribed minimum number of employees.
  - (ii) "employment of a person in the service or for the purpose of the trade or business or as a partner, of that person's spouse."

Section 8(3) reads as follows –

"subject to the other provisions of this Act, every person over a prescribed age who is employed by any other person in any covered employment shall be an employee to whom this Act applies. For the purpose of the subsection different ages may be prescribed for different covered employment."

Section 8(4) reads as follows –

"Any regulation declaring any employment may provide that such persons only earn less than the prescribed amount in that employment or as are of a prescribed class or description and not other persons in that employment, shall be employees to whom this Act applies."

His submission was considering the totality of the provisions of Section 8, that there are no provisions to take away the rights of the employee preserved by the Act. His submission was that regulations must flow from the E.P.F. Act. In terms of the provisions of Section 8 regulations may be made to cover the provisions and for the easy administration of the provisions of this Section 8 and its subsections but not to deviate from the purpose for which the statute was enacted.

The submission of the Learned Counsel for the petitioner was that Regulation 2(2)(c) is *ultra vires* to the Act. His submission was that the regulations made under the E.P.F. Act could never be intended to override the specific provisions of the Act.

It was well known that the purpose of the regulations was to provide for procedural matters which are definitely subsidiary to the provisions of the Act. The critical question that the Court has to examine is whether the Minister has acted within the limits of delegated power. In terms of subsection 46(1) the powers of the Minister were limited to "a to q". He has no unlimited discretionary powers. The interpretation Section 47 defines the term "Covered employment". Section 8 defines the categories of those that come under the definition of "Covered employment" and any regulation may be made in terms of the provisions of that Section and not to derogate from the intention of the specific provisions of Section 8.

It was the submission of the Learned Counsel for the 4th respondent that the regulation "2(2) were" any superannuation benefits on termination of employment are provided under any Provident Fund or Pension Scheme or any other Fund or Scheme established or administered outside Ceylon, are exempted from the provisions of the Act. The learned Counsel for the 4th respondent

relied on the provisions of Section 8(4) of the Act. I am unable to accept the interpretation of the Learned Counsel. In my view Section (4) empowers to make regulations to comply with the intention of the legislation as clearly stated by the statute and not make regulations to derogate from the intention of the statute. I am therefore unable to agree with the submission of the learned Counsel for the respondent when he submitted that the regulations were *intra vires*. Even if one were to examine Section 46 which empowers to make regulations he has been limited by the subsections and it was confined to the limited powers of making regulations only to those matters specified in that section. His powers of making regulations are not discretionary.

I agree with the submission of the Learned Counsel for the petitioner that regulation 2(2)(c) is *ultra vires* to the specific provisions of the Act.

The regulations that were envisaged under Section 8 of the E.P.F. Act were to facilitate the administration of the employees who fall within the concept of "covered employment". Any other regulations were confined to the specific subsection (b)(i) and (ii). The Minister has no discretion to make regulations to derogate from the specific provisions of the statute nor could he intend to override the specific provisions of the Act. The Act did not intend to exempt the contribution of the employers to the E.P.F. because there was pensionable relief available elsewhere outside the country. The contributions to the Fund were very large in view of the high salary paid to the petitioner. The legislature had no intention of depriving the employee the benefit that he was legally entitled to under the Act. If the intention of the legislature was to do so this could have been covered by making provisions in the E.P.F. Act and by insertion of a relevant section.

In the circumstances I allow the application of the petitioner. I grant a mandate in the nature of a *writ of certiorari* to quash the order of the 1st respondent dated 4.1.93 and the 2nd respondent's order dated 9.3.93. I further grant the prayer (b) and prayer (c) of the petition. I allow the application of the petitioner with costs fixed at Rs. 2,500/- to be paid by the respondent.

*Writ of certiorari issued.*