

**COLOMBO APOTHECARIES LTD. AND OTHERS**  
**v.**  
**COMMISSIONER OF LABOUR**

COURT OF APPEAL  
DR. RANARAJA, J.  
C.A. NO. 659/90  
M.C. COLOMBO NO. 64031/5  
JULY 14, 1997.

*Industrial Dispute – Failure to pay Employees Provident Fund – Certificate under Employees Provident Fund Act S. 38 (2) – Jurisdiction – Validity of certificate – Liquidator not the employer during the relevant period is not liable.*

On receiving the certificate of the Commissioner of Labour under S. 38 (2) of the Employees Provident Fund Act, the Magistrate of Colombo issued notice on the petitioners and held that they had failed to show cause why the said sum should not be recovered from them and directed that the sum be deemed to be a fine imposed by a sentence on the employer.

The petitioners moved in revision to have the order set aside.

**Held:**

1. The power of revision vested in the court is discretionary. The power will be exercised when there is no other remedy available to a party. It is only in very rare instances where exceptional circumstances are present that courts would exercise powers of revision in cases where an alternative remedy has not been availed of by the applicant. Thus the general principle is that revision will not lie where an appeal or other statutory remedy is available. It is only if the aggrieved party can show exceptional circumstances, for seeking relief by way of revision, rather than by way of appeal, when such appeal is available to him as of right, that the court will exercise its revisionary jurisdiction in the interests of due administration of justice.
2. The petitioners had the right of appeal from the order passed by the Magistrate.
3. Under section 38 (2) of the Act as amended by Act No. 1 of 1985, the Commissioner had to issue a certificate to the Magistrate having jurisdiction in the division in which the place of work of the member or members

of the fund in respect of whom default is made is situate. The Magistrate who had jurisdiction within that division was bound to summon the employer to show cause. But here there was no evidence that the place of work of the relevant members of the Fund was not situated within the judicial division of the Magistrate's Court, Colombo.

Further the distinction to jurisdiction was taken for the first time only in the written submissions. Section 39 of the Judicature Act and Article 138 (1) of the Constitution operate as a bar to the objection.

4. There is a distinction between the class of cases where a court may lack jurisdiction over the cause or matter or parties and those when court lacks competence due to failure to comply with such procedural requirements as are necessary for the exercise of the power of the court. Where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure that want of jurisdiction because parties cannot confer jurisdiction on a tribunal which has none. In the other class of cases when the want of jurisdiction is contingent only, the judgment or order of court will be void only against the party on whom it operates, but acquiescence, waiver or inaction on the part of the person may estop him from making any attempt to establish that the court was lacking in contingent jurisdiction.

The lack of territorial jurisdiction of court is a latent lack of jurisdiction curable by waiver or conduct of the party seeking to attack the order of court on lack of jurisdiction.

5. Section 38 (2), of the EPF Act requires the certificate of the Commissioner to contain particulars of the sum due and the name and place of residence of the defaulting employer. Here the certificate had the required particulars and more – the period during which default in paying the contributions took place.

Section 38 (3) provides that the certificate shall be sufficient evidence that the amount due has been duly calculated and that the amount is in default.

Clearly a liquidator comes within the definition of an employer but the liquidator is not liable to be punished for the acts of the employer. The liquidation proceedings commenced long after the period of default. The employer during the relevant time is liable.

**Cases referred to:**

1. *Attorney-General v. Gunawardena* (1996) 2 Sri LR 149, 156.
2. *In Re Insolvency of Hayman Thornhill* 2 NLR 105.

3. *Rustom v. Hapangama & Co.* (1978-79-80) 1 Sri LR 352, 356.
4. *Gunawardena v. Orr* 2 ACR 172.
5. *Ameer v. Rasheed* 6 CLW 8.
6. *Perera v. Silva* 4 ACR 79.
7. *Alima Natchiya v. Marikar* 47 NLR 82.
8. *Fernando v. Fernando* 72 NLR 549.
9. *Perera v. Commissioner of National Housing* 77 NLR 361.
10. *City Carriers v. The AG* (1992) 2 Sri LR 257.
11. *Free Lanka Trading Co., Ltd. v. Commissioner of Labour* (1982) 1 Sri LR 97.
12. *Liquidators of the River Valleys Development Board v. Hendrick Appuhamy*, 1997 3 SLR 236.

APPLICATION in Revision of the order of the Magistrate of Colombo.

*D. S. Wijesinghe* P.C for the 1st petitioner.

*M. A. Bastianz* for 3rd petitioner.

*Hugo Anthony* with *Anura Ranawaka* for respondent.

*Cur. adv. vult.*

July 14, 1997.

**DR. RANARAJA, J.**

### **The Facts**

On 6.11.1985, the respondent Commissioner of Labour, instituted proceedings against Colombo Apothecaries Co., Ltd., in the Magistrate's Court, Colombo, for the recovery of a sum of Rs. 1,084,728/97 as arrears of Employees' Provident Fund contributions, for the months of August, September, October 1981, January 1982 to June 1985, as set out in the certificate (E1A) issued to the Magistrate in terms of the provisions of section 38 (2) of the Employees' Provident Fund Act. Summons issued on the employer company. As the company was not represented on the summons returnable date, court issued warrants on the Directors of the company. The three petitioners, as Directors of the company, surrendered to court on 4.10.86. They were released on bail. On an application made by the petitioners on 30. 9. 87, court allowed notice to issue on the liquidator of the

employer company. On 20. 01. 88, an application was made by the petitioners to terminate proceedings in the presence of the liquidator, who was present on notice. No order appears to have been made on that application. On 20. 7. 88, the liquidator's presence was dispensed with. On 31. 5. 89, the petitioners have filed "objections" to further proceedings for the recovery of the sum due. From the order of the Magistrate, it appears that the only objection taken at that stage was that the company was under liquidation and that similar proceedings instituted against the company in the Magistrate's Court, Fort, were stayed for that reason. However, a final order was deferred until the petitioners showed cause. Further submissions were made by the respective parties. On 27. 6. 90, the learned Magistrate held that the petitioners had failed to show sufficient cause why the said sum should not be recovered from the petitioners and directed that the sum be deemed to be a fine imposed by a sentence on the employer. This application in revision is for a declaration that the said order is null and void.

### Revisionary Relief

Article 138 of the Constitution confers on this court, subject to other provisions of the Constitution or of any law, sole and exclusive cognizance by way of revision of all actions of which a Magistrate's Court may have taken cognizance.

"Revision like an appeal, is directed towards the correction of errors, but it is supervisory in nature and its object is due administration of justice and not primarily or solely, the relieving of grievances of a party. An appeal is a remedy, which a party who is entitled to it, may claim to have as of right and its object is the grant of relief to a party aggrieved, by an order of court, which is tainted by error. Revision is so much regarded as designed for cases in which an appeal does not lie". – See : *Attorney-General v. Gunawardena*<sup>(1)</sup> at 156. *In Re the insolvency of Hayman Thornhill*,<sup>(2)</sup>. The power of revision vested in this court is discretionary. The power will be exercised when there is no other remedy available to a party. It is only in very rare instances where exceptional circumstances are present that courts would exercise powers of revision in cases where an alternative remedy has not been availed of by an applicant. –

See : *Rustom v. Hapangama & Co.*<sup>(3)</sup> at 356, *Gunawardena v. Orr*<sup>(4)</sup>, *Ameer v. Rasheed*<sup>(5)</sup>, *Perera v. Silva*<sup>(6)</sup>, *Alima Natchiya v. Marika*<sup>(7)</sup>, *Fernando v. Fernando*<sup>(8)</sup>.

Thus the general principle is that revision would not lie where an appeal or other statutory remedy is available. Where the law provides an effective remedy to any person aggrieved by an order of a Magistrate's Court, this court will not exercise its revisionary jurisdiction. It is only if the aggrieved party can show exceptional circumstances for seeking relief by way of revision, rather than by way of appeal, when such an appeal is available to him as of right, that court will exercise its revisionary jurisdiction in the interests of due administration of justice.

Section 31 of Judicature Act provides:

"Any party aggrieved by any conviction, sentence or order entered or imposed by a Magistrate's Court may subject to the provisions of any law appeal therefrom to the Court of Appeal in accordance with any law, regulation or rule governing the procedure and manner for so appealing".

The petitioners are aggrieved by the order of the Magistrate made under the provisions of section 38 (2) of the Employees' Provident Fund Act. That section empowers the Magistrate to recover from an employer who makes default in payment of any sum by way of provident fund contributions under section 10, on his failure to show cause why such sum should not be so recovered, as a fine imposed by a sentence passed on the employer for an offence punishable with imprisonment.

The Magistrate by his order sought to be revised has passed such a sentence on the petitioners. The petitioners had a right of appeal from that sentence to this court and also to the Provincial High Court after the 13th Amendment to the Constitution and Act No. 19 of 1990 were passed. The procedure to be followed in appealing was set out in chapter XXVIII of the Code of Criminal Procedure Act, ie by lodging with the Magistrate's Court a petition of appeal, within fourteen days from the date of the order.

The petitioners were not in immediate peril of being imprisoned in default of payment of the fine. Time was given till 1. 8. 90 for payment. Instead of appealing from the sentence, the petitioners moved this court by way of revision and on 23. 7. 1990 obtained a stay of proceedings in the Magistrate's Court till this application was disposed of. The ex-employees of the Colombo Apothecaries Co., Ltd. are still to receive their EPF contributions. Nowhere in their petition have the petitioners stated why they resorted to relief by way of revision, when they had a right of appeal from the impugned order. Nor have they shown any extraordinary circumstances why this court should exercise its revisionary jurisdiction. The application is therefore misconceived.

The application could have been disposed of on that preliminary matter alone. However counsel for the 3rd petitioner has filed written submissions on three matters in support of the application which are also dealt with.

## **Jurisdiction**

It is submitted that the order of the Magistrate is null and void, because he had no jurisdiction to make the order. The submission is based on the situation of the registered office of the defaulting company. Certificate E1A gives the address of the defaulting employer as No. 125, Glennie Street, Colombo. Counsel contends that Glennie Street is in Slave Island, within the judicial division of the Magistrate's Court, Fort, and accordingly the Magistrate's Court, Colombo, had no jurisdiction to entertain the application or to exercise punitive power provided under section 38 (2) of the EPF Act.

Section 38 (2) of the Act was amended by Act No. 1 of 1985. By that amendment, the Commissioner had to issue a certificate to the Magistrate having jurisdiction in the division in which the place of work of the member or members of the fund in respect of whom default is made is situated. The Magistrate who had jurisdiction within that division was bound to summon the employer to show cause. There was no evidence placed either before the Magistrate or this court by the petitioners, that the place of work of the relevant members of the

Fund was not situate within the judicial division of the Magistrate's Court, Colombo. The submission of counsel is made on a wrong premise.

As observed earlier, the petitioners appeared in court for the first time on 4. 10. 86. The objection to jurisdiction of the Magistrate's Court, Colombo, was taken for the first time when written submissions were filed on 29. 12. 89. Section 39 of the Judicature Act provides:

"Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any court of first instance, neither party shall afterwards be entitled to object to the jurisdiction of such court but such court shall be taken and held to have jurisdiction over such action, proceeding or matter".

The petitioners when called upon to show cause why proceedings should not be taken to recover the sum due by way of EPF contributions in the first instance, did not object to the jurisdiction of the Magistrate's Court of Colombo, but on 30. 9. 87 submitted to court that the company was under liquidation and sought notice on the liquidator. Once they submitted to the jurisdiction they had no right to challenge the power of the court to continue proceedings.

Counsel for the 3rd petitioner has sought to support his submission on jurisdiction by citing the judgment in *Perera v. Commissioner of National Housing*<sup>(9)</sup>. However Tennkoon, CJ. there drew a distinction between the class of cases where a court may lack jurisdiction over the cause or matter or parties and those when court lacks competence due to failure to comply with such procedural requirements necessary for the exercise of the power of court. Where the want of jurisdiction is patent no waiver of objection or acquiescence can cure want of jurisdiction, because parties cannot confer jurisdiction on a tribunal which has none. In other class of cases when the want of jurisdiction is contingent only, the judgment or order of court will be void only against the party on whom it operates, but 'acquiescence, waiver or inaction on the part of the person may estop him from making any attempt to establish that the court was lacking in contingent jurisdiction. His Lordship cited in support, *Spencer Bower—Estoppel by Represen-*

tation – 1966 (2nd ed) pg. 308, where it is stated: "So too when a party litigant, being in a position to object that the matter in difference is *outside the local, pecuniary or other limits of jurisdiction of the tribunal* to which his adversary has resorted, deliberately elects to waive the objection, and to proceed to the end as if no such objection existed, in the expectation of obtaining a decision in his favour, he cannot be allowed, when this expectation is not realized, to set up that the tribunal had no jurisdiction over the cause or parties".

The lack of territorial jurisdiction of court is a latent lack of jurisdiction curable by waiver or conduct of the party seeking to attack the order of court on lack of jurisdiction. The principle set out in *Perera (supra)* is not in conflict with section 39 of the Judicature Act.

It is also relevant to note that proviso to Article 138 (1) of the Constitution which grants this court revisionary jurisdiction, stipulates that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

Admittedly, it is the Magistrate who has the power to recover arrears of EPF contributions under the provisions of section 38 (2) of the Act by way of a fine. Even if the Magistrate's Court of Colombo had no territorial jurisdiction, as the petitioners have failed to show that the order made by that court prejudiced their substantial rights or occasioned a failure of justice, the petitioners will not, in any event, be entitled to relief on the ground of lack of jurisdiction.

### **Certificate under section 38 (2)**

The Commissioner of Labour filed certificate under section 38 (2) of the Act to recover the EPF contributions, which the employer had failed to pay to the Fund under the provisions of section 10 of the Act. The period of default was set out in the certificate and the total sum due was specified. Counsel submits that the certificate is not in terms of the provisions of section 38 (2). What that section requires is for a certificate containing particulars of the sum so due and the

name and place of residence of the defaulting employer. However it is submitted that such a certificate was declared bad and invalid in *City Carriers v. The AG*<sup>10)</sup>. The relevant part of the judgment Bandaranayake, J. states: "Upon a perusal of XI which contains no particulars of the sum claimed, we are of the opinion that there was no certificate filed before the Magistrate Court in terms of section 38 subsection 2 of the Employees' Provident Fund Act".

Learned counsel submitted that the passage cited establishes the principle that a certificate under section 38 (2) requires "particulars of the sum due" and a certificate which contains no particulars was bad in law. With respect, the dictum of the learned Judge is devoid of any detail or explanation as to what is meant by "no particulars of the sum claimed" and in what manner a lawful certificate under that section has to be prepared. For example, should such a certificate include details of the names of all the employees, contributions due from them and the employer, the period of time over which there has been default? A "certificate" to recover contributions in default from an "employer" having 2,000 workers would then run into several hundred pages, which would no doubt lead to much inconvenience of the Commissioner and court in preparation and filing.

The employer has in certificate E1A been given the necessary particulars required by section 38 (2) and more, namely the period during which it defaulted in paying the contributions. It is the employer, who, originally gave the information to the Labour Department of the number of employees, the EPF contributions due from them and the employer. It is the employer who is possessed of all the relevant particulars. The certificate issued to the Magistrate for recovery as a last resort, after all attempts to recover sums in default from the employer, is therefore based on information supplied by the employer. The employer who disputes the particulars in the certificate would have had ample opportunity to correct any errors regarding the sums in default both before the stage of issuing a certificate under 38 (2) and at the stage of showing cause. It is for that reason that the employer is given a final opportunity to show cause before the Magistrate. See: *Free Lanka Trading Co., Ltd. v. Commissioner of Labour*<sup>(11)</sup>. If sufficient cause is shown that the sum is not lawfully due or has been paid, the employer is discharged from further proceedings.

Besides, section 38 (3) provides that the Commissioner's certificate shall be sufficient evidence that the amount due under the Act from the employer has been duly calculated and that such amount is in default. The law casts the burden on the employer to show that the sum stated in the certificate is not due from him. In the circumstances, it cannot be disputed that the particulars that need be given in terms of section 38 (2) were not included in certificate E1A. It is relevant to note that section 39 of the Act provides that the burden of proving in proceedings under section 17, that the sum due was paid, lies on the employer. The duty cast on the Commissioner in proceedings under section 38 (2) is to issue a certificate stating the sum due as EPF contributions reckoned in terms of the provisions of sections 10 to 16 of the Act, the correctness of which cannot be questioned or examined by court.

### **Liquidator**

It is submitted that the Magistrate erred in holding that the liquidator was not liable to be brought in place of the employer to defend the action.

The journal entry dated 20. 7. 88 shows that the liquidator's presence has been dispensed with. The petitioners did not object to that order. It appears that the question of adding or substituting the liquidator in proceedings under section 38 (2) does not arise on a consideration of the provisions of the EPF Act.

The word "employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union), and any person who on behalf of any other person employs any workman, and includes the legal heir, successor in law, executor or administrator and liquidator of a company, and in the case of an incorporated body, the President or the Secretary of such body, and in the case of a partnership, the Managing partner or Manager; (section 47 (4)).

Clearly, a liquidator comes within the definition of an "employer". But what is of importance is whether in proceedings under section 38 (2), a liquidator is liable to be punished for the acts of the "employer" who at the time was not in fact the "liquidator". The employer who failed to comply with the provisions of section 10 of the Act by not paying the EPF contributions for the period set out in certificate E1A was the company whose directors were the petitioners. The liquidation proceedings commenced long after that period ie on 24. 2. 86.

Any person who contravenes any provision of the Act or of any regulation made under the Act would be guilty of an offence in terms of section 34 (a) of the Act. Where an offence under the Act is committed by any body of persons, and if that body of persons is a body corporate every director and officer of that body corporate would be guilty of that offence in terms of section 40 (a) of the Act, unless that offence was committed without his knowledge or that he exercised all due diligence to prevent the Commission of that offence.

A default in making payments due as EPF contributions, makes the 'employer' at the relevant time, liable for contravening the provisions of section 10 of the Act. As an alternative to prosecution for such an offence under section 41 of the Act or civil proceedings under section 17 of the Act, the Commissioner is empowered to institute proceedings against the defaulting employer for the recovery of contributions due under the provisions of section 38 (2). The petitioners are thus liable, qua directors of the offending company, to be summoned before court in proceedings under section 38 (2) of the Act and sentenced to pay the sum in default by way of fine and serve a term of imprisonment in lieu, if the fine remains unpaid.

It is relevant to note that section 21 of the Act provides that any sum due to be paid under the Act by an employer by way of EPF contributions, would be the first charge on his assets, notwithstanding anything to the contrary in any other written law. Thus as at the date on which the Commissioner issued the certificate, the sum due on it was a first charge on the company's assets. The petitioners were under a legal obligation to pay the sum specified in the certificate before liquidation proceedings commenced. As, once the liquidator was appointed, the administration of the company's affairs and property passed to him. The petitioners, as Directors of

the company, became *functus officio* and any property dispositions, from the date of filing for liquidation, by the petitioners became invalid. The liquidator's function was to secure the assets of the company and pay up the creditors. In this context, the liquidator could have been added as a party in proceedings under section 17 of the Act, but not in proceedings under section 38 (2) of the Act. The reason being that a sentence of fine imposed on the petitioner under section 38 (2) may be recovered by distress and sale of any movable property belonging to them alone under section 291 of the Code of Criminal Procedure Act. The decision in *Liquidators of the River Valleys Development Board v. Hendrick Appuhamy*,<sup>(12)</sup> is of no relevance to the facts of this case.

### Conclusion

The petitioners have, without seeking the remedy by way of appeal available to them as of right, sought revisionary relief, which this court considers misconceived in the circumstances. The petitioners have failed to satisfy this court that there has been a miscarriage of justice or any exceptional circumstances requiring this court to exercise its discretionary revisionary jurisdiction to interfere with the order of the Magistrate. The Magistrate had territorial jurisdiction, in the absence of any evidence to the contrary that the place of work of the employees was outside its jurisdiction, to entertain the certificate and proceed in terms of section 38 (2) of the Act. The petitioners have also failed to establish that the certificate E1A was not in terms of that section or that the Magistrate was in error in not adding the liquidator as a party to the proceedings. The application is accordingly dismissed with costs fixed at Rs. 5,000.

*Application dismissed.*