

MOHAMED AMEER AND ANOTHER
v.
YAPA, ASSISTANT COMMISSIONER OF LABOUR

SUPREME COURT
FERNANDO, J.,
WIJETUNGA, J. AND
ANANDACOOMARASWAMY, J.
S.C. APPEAL NO. 121/97
C.A. APPLICATION NO. 3/97
H.C. NWP NO. 70/95
M.C. KURUNEGALA NO. 91382
DECEMBER 2ND, 1997.

Employees' Provident Fund Act, No. 15 of 1958 – Default by the employer – Recovery of sums due – Particulars required to be set out in certificate under S. 38 (2).

Held:

Section 38 (2) of the Employees' Provident Fund Act, No. 15 of 1958 requires that the employees in respect of whom default is alleged must be named or otherwise adequately identified; and that (at least) where default is alleged in respect of a period during which there has been changes in remuneration and/or rates of contributions, the remuneration in relation to which the contributions and default has been computed must also be disclosed.

Cases referred to:

1. *Vaz v. Commissioner of Income Tax* 46 NLR 200, 202.
2. *Ekanayake v. Prince of Wales Co-operative Society* 50 NLR 297.
3. *De Silva v. Commissioner of Income Tax* 53 NLR 280, 282, 283.
4. *Barnes de Silva v. Galkissa-Wattarapola Co-operative Stores Society* 54 NLR 326, 329.

5. *Nilaweera v. Commissioner of Inland Revenue* 63 NLR 486.
6. *Free Lanka Trading Limited v. Commissioner of Labour* (1982) 1 Sri LR 97.
7. *Ramlin v. Commissioner of Inland Revenue* (1988) 2 Sri LR 259.
8. *Philip v. Commissioner of Inland Revenue* 1 Sriskantha 133, 134.
9. *Mendis v. Commissioner of Income Tax* 61 NLR 95, 96.
10. *City Carriers Ltd. v. Attorney-General* (1992) 2 Sri LR 257.

APPEAL from the judgment of the Court of Appeal.

A. P. Niles with *Shilan Nagoor* for the appellants.

Adrian Pereira, SSC for the respondent.

Cur. adv. vult.

December 16, 1977.

FERNANDO, J.

In this appeal we have to interpret section 38 (2) of the Employees' Provident Fund Act, No. 15 of 1958, as amended by Act No. 8 of 1971, which provides:

"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 section 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 containing particulars of the sum so due and the name and place of residence of the defaulting employer, to the Magistrate having jurisdiction in the division in which such place is situate. 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 and in default of sufficient cause being shown, such sum shall be deemed to be a fine imposed by a sentence of the Magistrate on such employer . . ."

Section 38 (3) further provides:

"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 authorize 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".

A certificate under section 38 (2) was issued to the Magistrate's Court of Kurunegala alleging default by the respondents-petitioners-petitioners-appellants ("the Appellants") in a sum of Rs. 150,992; the following details were given:

(1) Number of employees in respect of whom there was a default in contributions	TWO
(2) Period of default	MAY 1971 to JULY 1991
(3) Employees' contributions under section 10 (1)	Rs. 40,264
(4) Employer's contributions under section 10 (2)	Rs. 60,398
(5) Total amount of contributions in default	Rs. 100,662
(6) Surcharge added under section 16	Rs. 50,330

TOTAL	Rs. 150,992
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The Magistrate's Court, the High Court in revision, and the Court of Appeal, held that the certificate was in order.

The question is whether the above details constitute "particulars of the sum so due" within the meaning of section 38 (2). Counsel agreed that the appeal must be dismissed if they did; but allowed if they did not.

The principal grievance of learned Counsel for the Appellants was that the certificate did not set out the names and emoluments of the employees in respect of whom default was alleged. He cited *Vaz v. Commissioner of Income Tax*,⁽¹⁾ *Ekanayake v. Prince of Wales Co-operative Society*,⁽²⁾ *De Silva v. Commissioner of Income Tax*,⁽³⁾ *Barnes de Silva v. Galkissa-Wattarapola Co-operative Stores Society*,⁽⁴⁾ *Nilaweera v. Commissioner of Inland Revenue*,⁽⁵⁾ *Free Lanka Trading Limited v. Commissioner of Labour*,⁽⁶⁾ *Ramlin v. Commissioner of Inland Revenue*,⁽⁷⁾ *Philip v. Commissioner of Inland Revenue*,⁽⁸⁾ and *Mendis v. Commissioner of Income Tax*,⁽⁹⁾ in support of the proposition

that a certificate issued under provisions similar to section 38 (2) could be challenged, notwithstanding preclusive clauses similar to section 38 (3). He also cited *City Carriers Ltd. v. Attorney-General*,⁽¹⁰⁾ which quashed proceedings before the Magistrate's Court, where the certificate contained no particulars of the sum claimed. Since there were no particulars at all, it was unnecessary in that case to decide what details must be furnished; however, Counsel referred to the submission made in that case that:

" . . . the document X1 contains only the total sum alleged to be due but does not set out any particulars whatsoever in regard to e.g. the computation of that sum, the period within which that sum became due, the number of employees concerned in making the computation or their names and emoluments, etc. . . . "

He contended that names and emoluments should be stated, while learned Senior State Counsel argued that it was sufficient to state either the number of employees or their names and emoluments.

The Court of Appeal considered that the details given were sufficient – seemingly on the basis that because the number of employees was stated, their names and emoluments were unnecessary.

It seems to me that two distinct questions arise in relation to enforcement proceedings commenced by means of a certificate issued under section 38 (2). The first is whether the certificate sets out the particulars of the sum due, in the manner and to the extent required by section 38 (2). If it does not, the certificate does not satisfy section 38 (2), and no further proceedings can be had. That is a requirement as to **form**. The issue that arises is as to the **sufficiency** of particulars, and not as to their **truth**. The second question only arises where the necessary particulars have been given – which will be in the form of "statements" in the certificate, as to persons, periods, amounts, etc. In that event, in the course of the proceedings, section 38 (3) comes into operation to restrict the extent to which the **truth** of such statements may be disputed or disproved by the alleged defaulter.

To put it in another way, the first question is whether **omissions** in the certificate result in its **formal** invalidity; the second relates to the **proof** – or, rather, **disproof** – of statements contained in the certificate.

It is unnecessary to consider the first group of decisions cited, because section 38 (3) deals with the extent of immunity from challenge of a statement which is **contained** in a valid certificate. We are concerned here not with the disproof of statements **contained** in a certificate, but with the alleged invalidity of the certificate itself on account of what has been **omitted** therein; not with burden of proof or sufficiency of evidence, but with validity and jurisdiction.

A certificate can be issued under section 38 (2) only where an employer makes default in the payment of any sum which he is liable to pay under the Act. The issue of a certificate does not compel the Magistrate's Court to proceed, automatically, to recover the sum stated: the Court must first give the alleged defaulter an opportunity to show cause why further proceedings for the recovery of the sum claimed should not be taken. The law thus expressly incorporates the **audi alteram partem rule**. Fairness requires that when a certificate mentions a sum allegedly due, it must also give adequate details of how it was made up to enable the alleged defaulter to show cause. It is true that the certificate does give some details: but to say that the number of employees involved was two is in my opinion quite insufficient. An employer may have ten, or a hundred, or a thousand, employees; if it is alleged that he has not paid the dues of two employees – or even one – without naming or otherwise identifying them, how can he satisfy the Court that no further proceedings should be taken? His position may be that he has regularly made contributions for all his employees, and even that he has receipts and other documentary proof: and accordingly that the persons to whom the certificate relates **either** were not his employees, **or** were employees in respect of whom all dues had been paid. If the names are withheld, the alleged defaulter will be denied a meaningful opportunity of showing cause; he may be put to the trouble and expense of proving who his employees were, and that all their dues were paid during a long period of time. On the other hand, the Commissioner must necessarily have in his possession full details of the names of the employees in respect of whom there has been a default, and – in respect of each employee separately – the period of the default, his emoluments during that period (on the basis of which would be calculated the contributions due from employer and employee), the contributions actually remitted, and the amount of the default; and the sum claimed would be the aggregate of those amounts. I see no reason why the relevant particulars cannot be disclosed to the alleged defaulter

in the certificate. There is neither prejudice to the Commissioner, nor any breach of confidentiality.

There is another aspect. Proceedings for recovery may not be criminal in the strict sense, but they may result in fines and even imprisonment. While particulars need not be given with the same strictness as in a criminal charge or indictment, yet enough details must be disclosed so as to enable the alleged defaulter to know what he is being accused of. To tell the alleged defaulter "You have not paid the dues in respect of two of your employees, but I am not telling you who they are" is grossly unfair. If he is told "You have not paid the dues in respect of X and Y", he can produce receipts, or other books and documents, to prove that X and Y were paid, or that they were not his employees. But if it is permissible to withhold the names, what would ensue is a game of hide-and-seek, for – as I have pointed out earlier – there would be an undue and unfair burden placed on him to prove payment in respect of a large number of persons, even though the Commissioner does not allege default in respect of them.

A certificate is issued by the Commissioner in the context of an alleged default "in the payment of any sum which [the alleged defaulter] is liable to pay under [the] Act"; the law allows the alleged defaulter an opportunity to show cause: and it must follow that the certificate must contain the particulars known to the Commissioner in relation to which he must show cause, i.e. that he is not in default, or that the default is less than what is alleged. The opportunity that he is entitled to is to show cause in respect of the alleged default; not an opportunity to prove payment of dues in other cases, in which the Commissioner has not alleged any default.

I have therefore no hesitation in holding that section 38 (2) requires that the employees in respect of whom default is alleged must be named or otherwise adequately identified; and that (at least) where default is alleged in respect of a period during which there have been changes in remuneration and/or rates of contributions, the remuneration in relation to which the contributions and default has been computed must also be disclosed. Learned State Counsel submitted that it would be difficult to include all that information in a single certificate. Since the certificate is not to be equated to a charge in a criminal case, I hold that the required particulars can be furnished in a duly authenticated schedule, referred to in, and annexed to, the formal certificate.

I therefore set aside the orders of the Magistrate's Court, the High Court, and the Court of Appeal, and quash the proceedings in the Magistrate's Court, without prejudice to the right of the Commissioner to issue a fresh certificate. The appellants will be entitled to a sum of Rs 15,000 as costs in this Court and in the Courts below.

WIJETUNGA, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

Order set aside.
