

1967

Present : H. N. G. Fernando, C.J.

A. W. P. SELLAYAH, Petitioner, *and*
E. E. J. SABAPATHY (Labour Officer), Respondent

S. C. 40/67—Application for Revision in M. C. Colombo, 32692/A

*Employees' Provident Fund Act, No. 15 of 1958, ss. 34, 37, 46 (1) (k), 46 (1) (o)—
Employees' Provident Fund Regulations, 1958—Validity of Regulation 65—
Money overpaid to an employee—Failure to refund it after notice—Such failure
is not punishable as an offence.*

¹ (1954) 56 N. L. R. 243.

² (1950) 52 N. L. R. 137.

An employee to whom the Employees' Provident Fund Regulations of 1958 is applicable is not liable to be prosecuted and punished if he fails, after due notice, to refund any sum overpaid to him by the Commissioner as money lying to his credit in the Provident Fund. Paragraph 2 of regulation 65 of the Employees' Fund Regulations, in so far as it purports to make him so liable, is *ultra vires* of the powers conferred on the Minister to make regulations.

APPPLICATION to revise an order of the Magistrate's Court, Colombo.

G. E. Chitty, Q.C., with *A. M. Coomaraswamy*, for the Accused-Petitioner.

S. W. B. Wadugodapitiya, Crown Counsel, for the Complainant-Respondent.

Cur. adv. vult.

May 18, 1967. H. N. G. FERNANDO, C.J.—

Section 34 of The Employees' Provident Fund Act, No. 15 of 1958, provides that any person who contravenes any regulation made under the Act is guilty of an offence under the Act. Section 37 provides that a person who is guilty of an offence under the Act is liable on conviction to a fine not exceeding one thousand rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment.

The accused pleaded guilty to the charge framed against him of failing to comply with the requirements of a notice served on him under regulation 65 of The Employees' Provident Fund Regulations, 1958, published in a Supplement to the *Gazette* of October 31, 1958.

In this application in revision Counsel has taken the point of law that regulation 65 in so far as it has the effect of rendering a person liable to prosecution and punishment for an offence, is *ultra vires* of the powers conferred on the Minister to make Regulations. Regulation 65 reads as follows :—

“(1) Where any sum is paid to any person under a determination made under the Act or by virtue of any provision of any regulation made thereunder and it is subsequently decided that such sum was not payable to such person, or where any payment has been made under the Act or under any regulations made thereunder to any person in error, then, the Commissioner may by written notice served on such person require such person to refund such sum within such time as may be specified in the notice.

(2) No person on whom a notice under paragraph (1) of this regulation has been served shall fail to comply with the requirements of such notice."

This particular Regulation was made under the power conferred by paragraph (o) of s. 46 (1) of the Act to make regulations :—

"for treating any sum paid to any person under a determination made under this Act or by virtue of any provision of any regulation, which it is subsequently decided was not payable, as properly paid, *or for the repayment by him and for the recovery from him of that sum ;*"

In this particular case (according to uncontradicted statements in the affidavit of the accused) the accused had in November 1963 been paid a sum of Rs. 1,176·89, which sum had then been determined by the Commissioner to be the amount lying to the credit of the accused in the Provident Fund. However, in December, 1965, a notice was served on the accused calling upon him to refund a sum of Rs. 664·81 on the ground that there had been earlier an over-payment of this latter amount. Having regard to the fact that what is paid out to an employee is a sum determined by the Administrators of the Fund themselves to be due to the employee and that the payment is made on cessation of employment, it is alarming to find that an employee can be called upon after the lapse of two years (or indeed after the lapse of even a much longer period) to repay to the Fund moneys which he had been led to believe were his own and expendable at his pleasure. It is surprising to find that the regulation ignores the ordinary law of limitation, and that it fails to take account of an employee's capacity to meet a quite unexpected liability. Fortunately the conclusion of law which I reach is that a failure to make repayment will not in addition render a person liable to a fine and imprisonment.

It is quite usual to find in our Statutes and in subsidiary legislation provisions which enable a Public Authority to recover in a summary manner debts due from private citizens to the Government, but it is most unusual that the failure to pay such a debt can give rise to a prosecution in a criminal Court.

The power given by s. 46 (1) (o) of the Act is to make regulations for the repayment by a person, *and* for the recovery from him, of a sum not properly paid. I have italicized the word 'and' because it seems to me that in conferring this power the Legislature did have in contemplation the usual provision which is made in a case where a sum is due to a Public Authority, viz., provision that the sum must be paid *and that if it is not paid it will be recovered in a specified manner*. The usual manner of recovery is by the production of a Certificate to Court stating the amount due, whereupon the Court will enforce payment either in the same manner as a sum due under a decree or in the same manner as a fine imposed by Court.

Had the regulation which was made in this case included, as the Legislature contemplated, not only provision for repayment but also provision for the mode of recovery in case of default, the provision for recovery would by implication have excluded the possibility of a prosecution in case of default. The argument, based upon paragraph (2) of the Regulation, that there was a breach punishable by prosecution would have been negatived if the Minister had in fact prescribed a mode of recovery. I cannot agree that by omitting to provide a mode of recovery it was open to the Minister to secure that default in repayment would be punishable as an offence.

I would refer in this context to paragraph (k) of s. 46 (1) of the same Act, under which Regulations may be made :—

“ in respect of the circumstances in which costs may be awarded by such Tribunal against any party to an appeal made to the Tribunal and the manner of recovery of such costs ; ”

I would hold in regard to paragraph (k) that the intention of the Legislature is that if Regulations do authorise the award of costs *they must also provide* a mode of recovery of the costs. The Minister cannot by omitting to provide a mode of recovery render a failure to pay costs a matter for a criminal prosecution. Similarly in a regulation made under paragraph (o) it is obligatory on the Minister to prescribe a mode of recovery in the event of non-payment. Paragraph 2 of regulation 65 is *ultra vires* in so far as it purports to render a failure to make the payment a contravention of a regulation made under the Act and therefore an offence.

For these reasons I would set aside the conviction and sentence.

Conviction and sentence set aside.
