IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under and in terms of Article 154P (6) read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CA (PHC) 149/2019

High Court of Kurunegala Case No:
HCR 05/2018
Magistrate Court of Galgamuwa
Case No: 6458/EPF

Labour Department,
1st Floor, Labour Secretariat,
Colombo 05.

Plaintiff

Vs.

01. Dileepa Nandana Weerasinghe
No: 17, Mihiri Pedesa,
Katubedda, Moratuwa.

1st Defendant

02. Athige Rohitha Kusumsiri,
No: 27/11, Mukalangamuwa,
Seeduwa.

2nd Defendant

And between

Athige Prasad Kumara De Silva
(Athige Rohitha Kusumsiri's Power of Attorney Holder),
No: 23/54, Mukalangamuwa,
Seeduwa.

Petitioner

Vs.

01. Labour Department,
1st Floor,
Labour Secretariat,
Colombo 05.

Plaintiff- Respondent

02. Dileepa Nandana Weerasinghe,
No: 17, Mihiri Pedesa,
Katubedda, Moratuwa.

1st Defendant- Respondent

And Now Between

Athige Prasad Kumara De Silva
(Athige Rohitha Kusumsiri's Power of Attorney Holder),
No: 23/54, Mukalangamuwa,
Seeduwa.

Petitioner- Appellant

Vs.

01. Labour Department,
1st Floor,
Labour Secretariat,
Colombo 05.

Plaintiff – Respondent- Respondent

02. Dileepa Nandana Weerasinghe,
No: 17, Mihiri Pedesa,
Katubedda, Moratuwa.

1st Defendant – Respondent- Respondent

Before: Damith Thotawatte, J.

K.M.S. Dissanayake, J.

Counsels: Pulasthi Rupasinghe with Nayanthi Wanninayake for the Petitioner- Appellant.

Dilantha Sampath, S.C. for the Plaintiff–Respondent-Respondent.

Argued: 15.09.2025

Written submissions tendered on:	11.09.2025 and 23.10.2025 by the Petitioner-Appellant. 29.04.2025 by the Plaintiff-Respondent-Respondent.
Judgement Delivered:	19.12.2025

Thotawatte, J.

This appeal is preferred against the order of the Provincial High Court of Wayamba holden in Kurunegala dated 23.09.2019, whereby the learned High Court Judge dismissed the revision application and thereby affirmed the order of the Magistrate's Court of Galgamuwa dated 10.01.2018 made under Section 38(2) of the Employees' Provident Fund Act No. 15 of 1958 (as amended).

The said revision application had been filed on behalf of Athige Rohitha Kusumsiri by the Petitioner-Appellant, Athige Prasad Kumara De Silva, acting in his capacity as the duly appointed power of attorney holder of Athige Rohitha Kusumsiri (hereinafter sometimes referred to as the "Principal Appellant" for the sake of clarity).

It is not in dispute that proceedings were instituted in the Magistrate's Court of Galgamuwa upon a certificate issued by the Commissioner of Labour under Section 38(2) of the Employees' Provident Fund Act for the recovery of a sum of Rs. 1,883,648/-, being EPF contributions and surcharge due from Eco Uniware (Pvt) Ltd.

It is not in dispute that the Principal Appellant was a director of Eco Uniware (Pvt) Ltd during the period in which the company was operational and that he appeared before the Magistrate's Court of Galgamuwa pursuant to a summons issued in relation to the proceedings under Section 38(2) of the Employees' Provident Fund Act (hereinafter sometimes referred to as the EPF Act).

The proceedings before the Magistrate's Court of Galgamuwa were initiated by the filing of a statutory certificate under Section 38(2) of the EPF Act by the Assistant Commissioner of Labour, Mahawa, identifying Eco Uniware (Pvt) Ltd as the defaulting employer.

A perusal of the journal entries in the Magistrate's Court record (transmitted to this Court together with the High Court record) reveals that, throughout the proceedings conducted under Section 38(2), in the Magistrate's Court of Galgamuwa, the defaulting employer is consistently identified as Eco Uniware (Pvt) Ltd. However, in the caption of the order dated 10.01.2018, Eco Uniware (Pvt) Ltd is not named; instead, an individual,

Athige Rohitha Kusumsiri, is mentioned and described as the Defendant. Further compounding this inconsistency, the learned Magistrate, in the body of the same order, appears to refer to Athige Rohitha Kusumsiri as the 2nd Respondent.

I am unable to ascertain the origin of the designation "2nd Respondent" as applied to Athige Rohitha Kusumsiri. The certificate upon which the proceedings before the Magistrate's Court are founded does not name or refer to Athige Rohitha Kusumsiri. However, in the written submissions tendered by the parties, Athige Rohitha Kusumsiri has been described as the "2nd Respondent" and it appears that the learned Magistrate has adopted that description in the impugned order dated 10.01.2018.

The learned Magistrate, by order dated 10.01.2018, found that the 2nd Respondent had failed to place before the court any grounds sufficient to relieve him of liability in his capacity as a director of the company and, accordingly, ordered that the full amount specified in the certificate be recovered from the 2nd Respondent personally as a fine.

It appears that the Principal Appellant had, on summons, appeared before the court in the proceedings under Section 38(2) of the EPF Act with regard to the defaulting employer company Eco Uniware (Pvt) Ltd as a director of the said company.

Proceedings under Section 38(2) of the EPF Act are statutory recovery proceedings, adopted where the Commissioner of Labour is of opinion that recovery of sums due is impracticable or inexpedient under Section 17 or Section 38(1), proceedings are commenced by the filing of a certificate specifying the default, upon which the Magistrate's Court summons the employer solely to show cause why recovery should not proceed, and, in absence of sufficient cause, enforces recovery by deeming the amount due to be a fine.

The defaulting employer in this instant case is a company, a juristic person. It is apparent from the order of the learned Magistrate that the Principal Appellant has been held personally liable solely by reason of his status as a director of the said company. It appears that, in arriving at this determination, the learned Magistrate has relied upon the provisions of Section 40 of the EPF Act.

Section 40 provides that where an offence under the Act is committed by a body corporate, every director, manager, secretary, or other similar officer of that body corporate shall be deemed to be guilty of that offence, unless such person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission.

The learned Magistrate appears to have failed to appreciate that personal liability of directors under Section 40 arises only in criminal prosecutions instituted under offence-creating provisions, and cannot be invoked or enforced through recovery proceedings under Section 38(2), which are confined to the recovery of sums due from the employer as such.

Section 40 of the Employees' Provident Fund Act is expressly framed as a criminal liability provision and is triggered only where:

> *"An offence under this Act is committed by a body of persons or by a body corporate …"*

Section 40 does not impose automatic liability on directors; its operation is conditional upon the prior commission of an offence under the Act. The existence of such an offence is therefore foundational, and in the absence of an underlying offence duly established in law, Section 40 has no application and cannot be invoked to attribute personal liability to directors or officers.

As expressly recognised by the Supreme Court in ***Mohamed Ameer and Another*** v. ***Yapa, Assistant Commissioner of Labour***[1], proceedings under Section 38(2) of the EPF Act are not criminal in the strict sense, the court's role being confined to facilitating recovery. A criminal liability arises only when a criminal prosecution is initiated for an offence under Section 34, and if the offender is a body corporate, Section 40 may operate to deem directors or officers guilty of the offence.

In "**Mohamed Ameer"** it is stated;

> *"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."*

This characterises proceedings under Section 38(2) as proceedings for recovery, and not as a prosecution, trial, or punitive process. The description further distinguishes such proceedings from criminal proceedings by emphasising that they are "not criminal in the strict sense," and by expressly contrasting them with a criminal charge or indictment."

[1] (1998) 1 Sri.LR 156

Section 38(2) of the EPF Act stipulates as follows:

> "… such sum shall be deemed to be a fine imposed by a sentence of the Magistrate on such employer for an **offence punishable with imprisonment**, and the provisions of section 291 (except paragraphs (a), (d), and (i) of subsection (1) thereof of the Code of Criminal Procedure Act, relating to default of payment, shall apply …"

(emphasis is mine)

However, the phrase "an offence punishable with imprisonment" does not mean "an offence has been committed and proved." It means that "for the limited purpose of recovery, the law will treat the sum as though it were a fine imposed for an offence that carries imprisonment in default."

The appearance of the Principal Appellant before the Magistrate's Court in response to summons issued in proceedings instituted under Section 38(2) of the EPF Act is purely procedural and representative in character, arising solely from his position as a director of the defaulting employer company. Such appearance does not, in law, convert the proceedings into one against him personally, nor does it operate to substitute or displace the defaulting employer named in the statutory certificate. Mere appearance before the court cannot create personal liability where none is contemplated by Section 38(2) of the Act.

The liability should be imposed on the employer company and not on the representative personally. At a Section 38(2) recovery process, a representative of the employer company has no obligation to defend himself by establishing that the default had happened without his knowledge or that he exercised all due diligence to prevent such occurrence.

The learned Magistrate at the conclusion of his order has stated as thus:

> ''ඉහත සඳහන් හේතු මත දෙවන වග උත්තරකරු විසින් මෙම නඩුවට අදාළ සේවක අර්ථසාධක අරමුදලට අයවිය යුතු මුදල් සම්බන්ධයෙන් අධ්‍යක්ෂකවරයෙකු වශයෙන් ඔහු සතු වගකීමෙන් නිදහස් වීමට ප්‍රමාණවත් කරුණු අධිකරණය ඉදිරියේ ඔප්පු කිරීමට සමත්ව නොමැති බව තීරණය කරමි. එබැවින් මෙම නඩුවට ගොනු කර ඇති සහතිකය ප්‍රකාරව සේවක අර්ථ සාධක අරමුදලට අයවිය යුතු රුපියල් 18,83648/- ක මුදල දෙවන වග උත්තරකරුගෙන් දඩයක් ලෙස අය කර ගැනීමට නියෝග කරමි. එකී දඩ මුදල නොගෙවන්නේ නම් මාස හයක ලිහිල් වැඩ සහිත සිර දඬුවම් නියම කරමි.''

It appears that the learned magistrate has misdirected himself as to the nature and purpose of Section 38(2) of the EPF Act. By treating a recovery proceeding under Section 38(2) as a means of imposing personal liability on a director on the footing of deemed

criminal responsibility, the learned Magistrate had exceeded the jurisdiction conferred by the statute. The error is not one of mere appreciation of evidence or exercise of discretion, but a jurisdictional error going to the root of the proceedings, warranting appellate intervention. By failing to intervene and by affirming the Magistrate's order despite this clear misdirection, the Provincial High Court itself erred in law and failed to properly exercise its revisionary jurisdiction. The impugned order of the High Court is therefore unsustainable and warrants appellate intervention.

For the foregoing reasons, the appeal is allowed. The order of the Provincial High Court of Wayamba dated 23.09.2019 in HCR 05/2018 and the order of the Magistrate's Court of Galgamuwa dated 10.01.2018 in MC No. 6458/EPF are hereby set aside. The learned Magistrate of the Magistrate's Court of Galgamuwa is directed to reconsider the matter and to make a fresh order in accordance with law.

Judge of the Court of Appeal

K.M.S. Dissanayake, J.

I agree

Judge of the Court of Appeal