

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) 0002/21**

**High Court of Kurunegala
Case No. HCR 29/2017**

**Magistrate Court of
Galgamuwa
Case No. 7212/Employees
Trust Fund**

Employees Trust Fund Board,
19-23 Floors,
“MEHEWARA PIYASA”,
P O Box 807,
Kirula Road,
Narahenpita,
Colombo 05.

PLAINTIFF

Vs.

1. **Dileepa Nanda Weerasinghe,**
No: 17,
Mihiri place,
Katubedda,
Moratuwa.

1st DEFENDANT

2. **Ethige Rohitha Kusumsiri,**
No: 27/11,
Mukalangamuwa,
Seeduwa.

2ND DEFENDANT

AND BETWEEN

1. **Ethige Prasad Kumara de Silva,**
(Power of Attorney Holder of Ethige
Rohitha Kusumsiri)
No: 23/54,
Mukalangamuwa,
Seeduwa.

PETITIONER

Vs.

2. **Employees Trust Fund Board,**
19-23 Floors,
“MEHEWARA PIYASA”
P O box 807,
Kirula Road,
Narahenpita,
Colombo 05.

PLAINTIFF-RESPONDENT

3. **Dileepa Nanda Weerasinghe,**
No: 17,
Mihiri Place,
Katubedda,
Moratuwa.

1ST DEFENDANT-RESPONDENT

AND NOW BETWEEN

1. **Ethige Prasad Kumara de Silva,**
(Power of Attorney Holder of Athige
Rohitha Kusumsiri)
No: 23/54,
Mukalangamuwa,
Seeduwa.

PETITIONER-APPELLANT

Vs.

2. **Employees Trust Fund Board,**
19-23 Floors,
“MEHEWARA PIYASA”
P O box 807,
Kirula Road,
Narhenpita,
Colombo 05.

PLAINTIFF-RESPONDENT-RESPONDENT

3. **Dileepa Nanda Weerasinghe,**
No: 17,
Mihiri Place,
Katubedda,
Moratuwa.

1ST DEFENDANT-RESPONDENT-RESPONDENT.

Before

: **D. THOTAWATTA, J.**
K. M. S. DISSANAYAKE, J.

Counsel : Pulasthi Rupasinha with Nayanthi
Wanninayake for the Petitioner-
Appellant.

Jemiah Sourjah, SC for the Plaintiff-
Respondent-Respondent.

1st Defendant-Respondent-Respondent
is absent and unrepresented.

Argued on : 07.05.2026

Written Submissions
of the Petitioner-Appellant
tendered on : 09.01.2026 and 25.08.2026

Written Submissions
of the Plaintiff-Respondent
-Respondent tendered on : 06.05.2026, 17.08.2026 and
21.08.2026

Written Submissions
of the
the 1st Defendant-Respondent
-Respondent tendered on : Not tendered.
Decided on : 09.10.2026

K. M. S. DISSANAYAKE, J.

Instant appeal arises from an order dated 27.01.2021, made by the learned High Court Judge of the North Western Province holden in Kurunegala (hereinafter called and referred to as “the learned High Court Judge”) in the exercise of the revisionary jurisdiction vested in him under and in terms of Article 154P(3)(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter called and referred to as “the Constitution”) wherein,

the learned High Court Judge had dismissed an application in revision preferred to the High Court of the North Western Province holden in Kurunegala (hereinafter called and referred to as “the High Court”) from an order made by the learned Magistrate of Galgamuwa dated 07.06.2017 (hereinafter called and referred to as “the MC order”) in respect of a certificate issued to it by the Employees’ Trust Fund Board who being the Plaintiff-Respondent-Respondent to the instant appeal (hereinafter called and referred to as “the Plaintiff-Respondent”) under and in terms of section 28(3) of the Employees’ Trust Fund Act No. 46 of 1980 (hereinafter called and referred to as “the Act”) in an action bearing No. 7212/Employees Trust Fund.

The Petitioner-Appellant (hereinafter called and referred to as the “Appellant”) seeks to impugn the order of the learned High Court Judge dated 27.01.2021 (hereinafter called and referred to as “the HC order”) on the grounds of appeal as morefully, urged by him in paragraph 6(අ) to (උ) of the petition of appeal.

Upon a careful analysis of the grounds of appeal so urged by the Appellant, it clearly, appears that the instant Appeal is mainly, three-fold, namely;

- a) The learned High Court Judge had failed to appreciate that, the Appellant had been made a Defendant to the said action filed by the Plaintiff-Respondent in the Magistrate Court of Galgamuwa by reason of the fact that, his name had merely, been stated in the relevant documents as a Director of Echo Uniware (Pvt) Ltd;
- b) The learned High Court Judge had failed to appreciate that, the learned Magistrate of Galgamuwa had not afforded a reasonable opportunity to the Appellant to adduce evidence before it in order to establish his defence raised by him under the proviso to section 40 of the Act, to the certificate issued to the Magistrate Court of Galgamuwa by the Plaintiff-Respondent under section 28(3) thereof, thus, depriving him of his right to a fair trial;
- c) The learned High Court Judge as well as the learned Magistrate of Galgamuwa had failed to appreciate that, miscarriage of justice had caused to the Appellant by the Plaintiff Appellant by directly, filing a

certificate under section 28(3) of the Act without first resorting to a Civil Suit as provided for by the Act.

Let me now, examine the facts and the circumstances relevant to the instant appeal.

The Chairman/Chief Executive Officer of the Employees Trust Fund Board had issued a certificate under and in terms of section 28(3) of the Act against the 1st Defendant-Respondent-Respondent (hereinafter called and referred to as “the 1st Respondent”) and the Appellant being directors of the aforesaid company- Echo Uniware (Pvt) Ltd in the Magistrate Court of Galgamuwa for the recovery of a sum of Rs.858,281.57/- as contributions and surcharge against them; and that the learned Magistrate of Galgamuwa had summoned the Appellant before him to show cause why further proceedings the recovery of the sum due under the Act should not be taken against him; and that the Appellant had shown cause in writing as to why further proceedings for the recovery of the sum due under the Act should not be taken against him; and that the learned Magistrate of Galgamuwa had in the MC order, having rejected the cause shown by the Appellant, proceeded to recover the sum mentioned in the certificate from the Appellant as a fine as provided for by section 291 of the Code of Criminal Procedure Act No. 15 of 1979; and that being aggrieved thereby, the Appellant had preferred to the High Court an application in revision seeking to revise and set aside the order of the learned Magistrate of Galgamuwa (MC order); and that the learned High Court Judge had in the HC order, having inquired into the application in revision, rejected it; and that being aggrieved thereby, instant appeal has now, been preferred to this Court by the Appellant impugning the HC order and the MC order as well.

It is in this context, let me now, examine section 28(3) of the Act,

“(3) Where an employer makes default in the payment of any sum which he is liable to pay under this Act and the Board is of opinion that it is impracticable or inexpedient to recover that sum under subsection (1) or subsection (2) or where the total amount due has not been recovered by seizure and sale, then

the Board 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 the place of work of the employee in respect of whom the default is made, 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 for an offence punishable with imprisonment and the provisions of section 291 (except paragraphs (a), (f) and (i) of subsection (1) thereof) of the Code of Criminal Procedure Act relating to the default of payment of a fine imposed for such an offence shall thereupon apply and the Magistrate may make any directions which by the provisions of that section he could have made at the time of imposing such a sentence.

(4) The correctness of any statement in a certificate issued by the Board for the purpose 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 court to consider or decide the correctness of any statement in such certificate and the certificate of the Board 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.”

The plain wording of section 28(4) of the Act does not admit of any doubt and/or argument that the sum stated in the certificate issued under section 28(3) of the Act to be due, has to be accepted as correct by the learned Magistrate.

However, the only permissible defences to recovery proceedings initiated under section 28(3) of the Act would be;

- a) The Respondent has paid the amount due;
- b) The Respondent is not the defaulter;
- c) The certificate has been filed in a Court which has no jurisdiction to initiate recovery proceedings.

It is significant to observe that it had never been the defence raised by the Appellant to the recovery proceedings initiated by the Plaintiff-Respondent against him in the Magistrate Court of Galgamuwa under section 28(3) of the Act.

However, the defence raised by the Appellant to the recovery proceedings initiated by the Plaintiff-Respondent against him in the Magistrate Court of Galgamuwa under section 28(3) of the Act was based on the premise that, the learned High Court Judge had failed to appreciate that, the learned Magistrate of Galgamuwa had not afforded a reasonable opportunity to the Appellant to adduce evidence before it in order to establish his defence raised by him under the proviso to section 40 of the Act, to the certificate issued to the Magistrate Court of Galgamuwa by the Plaintiff-Respondent under section 28(3) thereof, thus, depriving him of his right to a fair trial.

It is in this context, let me now, examine the section 40 of the Act and the proviso thereto.

Section 40 of the Act reads thus;

“Where any offence under this Act is committed by a body of persons, then

(a) if that body of persons is a body corporate, every director and officer of that body corporate; or

(b) if that body of persons is a firm, every partner of that firm ; or

(c) if that body of persons is a trade union, every officer of that trade union; or

(d) if that body of persons is an unincorporated body, the President, Manager, Secretary and every other officer of that unincorporated body, shall be deemed to be guilty of such offence.”

The proviso to section 40 of the Act reads thus;

“Provided that no such person shall be deemed to be guilty of such offence if he proves that such offence was committed without his knowledge or that he exercised due diligence to prevent the commission of such offence.”

Now, the pertinent question is whether the matters stated in the proviso to section 40 of the Act can be used by a Respondent being a defaulter under section 28(3) of the Act, as a defence to the recovery proceedings initiated by the Plaintiff-Respondent against him in the Magistrate Court of Galgamuwa under section 28(3) of the Act.

It may now, be examined.

A careful analysis of the section 40 of the Act and its proviso makes it manifest that, the defence set out in the proviso to section 40 of the Act can only, be available only in case where a body of persons is charged with for having committed an offence under the Act. However, the proceedings initiated by the Petitioner-Respondent against the Appellant in the instant appeal under section 28(3) of the Act, are recovery proceedings simpliciter and not the criminal proceedings initiated under section 40 of the Act and therefore, the proceedings pertaining to the instant action does not in any manner, come within the ambit of section 40 of the Act and therefore, a defence set out in proviso to section 40 of the Act is not in any manner, available to the Appellant in the instant appeal in the proceedings which are initiated by the Petitioner-Respondent against the Appellant in the instant appeal under section 28(3) of the Act.

I would therefore hold, that the ground so urged by the Appellant in the instant appeal in support thereof, is totally, misconceived in law and as such it is not entitled to succeed both in fact and law and therefore, it ought to be rejected *in-limine*.

The next ground urged by the Appellant in support of the appeal being that the learned High Court Judge as well as the learned Magistrate of Galgamuwa had failed to appreciate that, miscarriage of justice had caused to the

Appellant by the Plaintiff Appellant by directly, filing a certificate under section 28(3) of the Act without first resorting to a Civil Suit as provided for by the Act.

It may now, be examined.

It is now, well settled law that, the Commissioner of Labour has a discretion in deciding between the procedure set out in section 28(1), 28(2) and 28(3) of the Act. This view taken by me is well supported and fortified by the decision of this Court in **CA(PHC) 140/2014-CAM-28.06.2018**.

I would therefore, hold that the next contention so advanced by the Appellant in support of the appeal too, is devoid of merit and therefore, it too, should be rejected *in limine*.

In view of all the above circumstances, I would hold that, the appeal is not entitled to succeed both in fact and law.

In the result, I would proceed to dismiss the appeal with costs fixed at Rs. 75,000/- payable by the Appellant to the Plaintiff-Respondent.

JUDGE OF THE COURT OF APPEAL

D. THOTAWATTA, J.

I agree.

JUDGE OF THE COURT OF APPEAL