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

In the matter of an application for Restitutio in Integrum and/or Revision in terms of Article 138 of the Constitution.

CA Case No: RII/16/2023-RII/28/2023
MC Mount Lavinia
Case No. 8052/S

Deputy Commissioner of Labour,
Western Zonal Office,
Labour Department,
Colombo 05**.**

Complainant

Vs.

Tristar Apparel Exports (Pvt) Ltd,
No. 30, Maligawa Road,
Rathmalana.

Presently against:

1. Sampath Waduge Leel Chandima,
   No. 6/24, Wekada Road, Rukmale,
   Pannipitiya.

2. Chandrasena Priyanka Gihan,
   No. 49, 33rd Lane,
   Wellawatte.

3. Dewapura Shion Chaminda Kumara,
   No. 6, Medamawatha,
   Jayanthipura, Battaramulla.

Respondents

AND NOW BETWEEN

Dewapura Shion Chaminda Kumara,
No. 6, Medamawatha,
Jayanthipura, Battaramulla.

Respondent- Petitioner

Vs.

Deputy Commissioner of Labour,
Western Zonal Office,
Labour Department,
Colombo 05**.**

Complainant- Respondent

1. Sampath Waduge Leel Chandima,
   No. 6/24, Wekada Road, Rukmale,
   Pannipitiya.

2. Chandrasena Priyanka Gihan
   No. 49, 33rd Lane,
   Wellawatte.

3. Tristar Apparel Exports (Pvt) Ltd,
   No. 30, Maligawa Road,
   Rathmalana.

Respondent- Respondents

Before: **R. Gurusinghe J.**

&

M.C.B.S. Morais J.

Counsel:	Eraj de Silva, PC, with Hafeel Farisz and Damith Wijeratne for the Respondent- Petitioner instructed by T. Gunathilake. Hashini De Silva for the 2nd Respondent- Respondent. Kanishka De Silva, DSG with Mihiri De Alwis, SSC for the Complainant- Respondent.
Written Submissions:	By the Respondent- Petitioner – on 19.05.2025 By the Complainant- Respondent – on 25.04.2025
Inquired on:	12.03.2025
Decided On:	**05.06.2025**

ORDER

M.C.B.S. Morais J.

This is an application for restitutio in integrum/ revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka. The case bearing nos. RII 16-23, RII 17-23, RII 18-23, RII 19-23, RII 20-23, RII 21-23, RII 22-23, RII 23-23, RII 24-23, RII 25-23, RII 26-23, RII 27-23, RII 28-23 are taken together as they emanate from the same order and involve the same question of law. Therefore, as agreed by the parties, the cases mentioned above will be addressed together, and a single order will be delivered.

The Respondent-Petitioner (herein after sometimes will be referred to as the Petitioner) is challenging the order dated 25th of November 2022 by the learned Magistrate of Mount Lavinia in the case bearing No. 8052/S. When the matter was supported on 27th of June 2023, being satisfied under *prima facie* basis, the court has granted interim order staying the operations of the said

Magistrate Court order until the further date. Accordingly, the Petitioner has prayed for the following,

" I. Issue Notice:

II. Exercise Your Lordships power restitutio in integrum and/or revision and make order setting aside the aforesaid Order of the learned Magistrate dated 25th November 2022 filed herewith marked "X6"

III. Exercise Your Lordships' power in restitutio in integrum and/or revision to make orders which your Lordships shalt deem fit in the circumstances of this case, including orders directing and/or preventing the Respondents and/or any one or more of them from taking any further steps against the Petitioner in relation to and/or in consequence of the aforesaid Order of the learned Magistrate dated 25th November 2022 filed herewith marked "X6":

IV. Grant an interim order, pending the hearing and determination of this application or for such other duration as deemed fit by Your Lordships' court:

a. Staying the effect of the aforesaid Order of the learned Magistrate dated 25th November 2022 filed herewith marked "X6": and/or

b. directing and/or preventing the Respondents and/or any one or more of them from taking any further steps against the Petitioner, in relation to and/or consequence of the aforesaid Order of the learned Magistrate 25th November 2022 filed herewith marked "X6'.

V. Call for and inspect the record including minute Books and other documents maintained with the Complainant Respondent and/or the any other Respondents;

VI. Issue an order for Costs; and

VII. Issue such other and further relief Your Lordships' Court shall seem meet."

The following preliminary Objections were raised by the Respondent against the Petitioner's application.

"(a) The Petition is misconceived in Law and is contrary to the Constitution and should therefore should be dismissed in limine;

(b) This Court does not possess jurisdiction to hear and determine this application;

(c) The Petitioner has not come before Your Lordships Court with clean hands;

(d) the Petitioner is guilty of suppression and misrepresentation;

(e) the Petitioner is guilty of laches:

(f) the Petitioner has misdirected court regarding Judicial Precedents of Your Lordships Court and those of the Supreme Court:

(g) The Petitioner has failed to make a full and fair disclosure of all material facts;"

It is the contention of the Complainant-Respondent (hereinafter sometimes will be referred to as the Respondent) that the Petitioner has not approached this Court with clean hands, as the application against the Petitioner in the Magistrate Court Case bearing No. 8052/S concerns a statutory default payment amounting to Rs. 37,475,650.73. This unresolved liability significantly undermines the Petitioner's position.

The original order issued by the learned Magistrate of Mount Lavinia in 25th of November 2022, is based on a certificate made by the Respondent in 2013. Furthermore, the Petitioner has invoked the extraordinary jurisdiction of this Court after a year, and without exercising the alternative remedies available to the Petitioner by law.

It is further contended that the Petitioner's argument is founded on the precedent established in ***Dayawathi V. Edirisinghe and 4 Others (S.C. (FR) No. 241/2008),*** a legal position that has since been overruled by subsequent judicial decisions. Even though the Petitioner contends that the order of the learned Magistrate has caused injury and is disadvantageous to the Petitioner, this has not been proven.

The Petitioner states that the company is a part of "Tristar Groups," which was once an empire of Apparel manufacturers in the country and was established by Mr. Kumar Dewapura in 1979. However, by the end of 2009, the company was experiencing significant financial losses, and following the passing of Mr. Dewapura in 2014, the company faced considerable operational and financial challenges. The Petitioner further states, that he is the only son of Mr. Dewapura and was originally appointed as the Director of the aforesaid company in the year 2007 and resigned the

position in 2013. However, due to the ill-health of his father, he became the alternate Director in 2014.

The Petitioner states that several cases were filed against the company by the Respondent and the Commissioner General of Labor to recover statutory payment of default. Further in the backdrop, a creditor had filed an application to wind up the company in 2016 at the Commercial High Court of Colombo in the case bearing No. HC(Civil) 52/16/CO.

Accordingly, the Respondent has filed a certificate dated 7th of November 2013 in terms of section 38(2) of the Employee Provident Fund (EPF) Act No. 15 of 1958 against the Company, Tristar Apparel Exports, to recover statutory dues (covering Employee Provident Fund, Employee Trust Fund and the Payment of Gratuity) of the employees of the said company. On this basis, the company was made a party to the action.

However, when the winding up order was made on 11th August 2017, the Directors of the aforesaid company were made as Respondents to the above application. The learned Magistrate had given directions to the Directors to show cause as to why the EPF dues have not been settled to the employees. Accordingly, the learned Magistrate had made the order dated 25th of November 2022, directing the sum claimed in the certificate to be recovered from the Directors.

Being aggrieved by the said order, the Petitioner has made an application under *restitutio in integrum*, claiming that the order dated 25th of November 2022 is bad in law.

Section 38(2) of the EPF Act reads as follows,

> *"(2) 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 the place of work of the member or members of the Fund in respect of whom 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), (d) 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 direction which, by the provisions of that subsection, he could have made at the time of imposing such sentence."

Under the above provision of law, the Respondent has the authority to issue a certificate to the Magistrate having Jurisdiction when the employer has defaulted in the statutory payments to their employees. However, the issue arises as to whether the Commissioner has the authority to resort to section 38(2) without/prior acting under section 17 and 38(1) of the EPF Act.

Furthermore, it is the contention of the Petitioner that the action taken up by the Respondent under section 38(2) of the EPF Act in the Magistrate Court of Mount Lavinia is bad in law as the required procedure has not been followed. The Petitioner states that the Respondent cannot make an application under section 38(2) of the EPF Act without exhausting the remedy provided under section 17 and 38(1), and the recovery of the due against the Director has to be challenged under section 40 of the Act, as established in the case of ***Dayawathi V. Edirisinghe and 4 others (S.C. (FR) No. 241/2008)*** Shiranee Thilakawardene J had held that;

"The 3rd Respondent (the Assistant Commissioner of Labour Colombo) had no jurisdiction or power under the said statute to file a certificate in the Magistrate's Court in terms of Section 38(2) of the E.P.F. Act without first proceeding under Section 17 and thereafter under Section 38(1) of the said Act"

However, it has to be noted that the above position in law has been overruled in the case of ***Stiches Private Limited V. Assistant Commissioner of Labour SC Appeal 03/2019***, Justice Malalgoda held that;

"In Jewelarts Limited v. The Land Acquiring Officer and others[3] Sriskandarajah J. held that the Commissioner of Labour has discretion in deciding between the procedures set out in sections 17, 38(1) and 38(2) of the Act. Similarly, in Messrs Narthupana Tea & Rubber Co Ltd v. The Commissioner of Labour Wimalaratne J. and Colin Thome J. held that there is no necessity for the Commissioner to have first resorted to the other two remedies

provided in sections 17 and 38(1) before he instituted the proceedings in the Magistrates Court.

In Dayawathie's case, the Supreme Court did not consider the provisions in section 38(4) of the Act which states that the provisions of that section shall have effect notwithstanding anything in section 17 of the Act. Sub-section 4 to Section 38 was introduced by Act No. 24 of 1971. In amending section 38, as referred to above the legislature quite clearly states that the new section takes effect notwithstanding the provisions in section 17."

Therefore, it is evident that the commissioner has the discretion to decide upon the most appropriate action when an employer has defaulted on their payments. Hence, the argument of the Petitioner does not stand.

Further, it is the contention of the Petitioner that the fine cannot be imposed on the Director in terms of section 38(2) of the EPF Act, as the Director does not fall within the scope of an 'Employer' and therefore the action needs to be taken against the liquidator. This issue is related to the certificate made to the Magistrate Court by the Respondent in 2013, and the Petitioner has failed to challenge this issue in the Magistrate Court or by any other means. However, the action to wind up the company was initiated in the Colombo High Court under section 279(1) of the Companies Act, and the order dated 25th of November 2022, entered by the learned Magistrate of Mount Lavinia, is based on the directions of the learned High Court Judge.

In the case of Colombo ***Apothecaries Ltd. and others V. Commissioner of Labour (1998) 3 Sri LR. 320***, Ranaraja J held that,

"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."

Therefore, it is established that when a winding-up order is passed against the company, it is the directors who are responsible for the settlement of the amount due to their employees. Therefore, I am of the view that the learned Magistrate Court Judge has not erred in law.

In light of these circumstances, it is evident to this Court that the Petitioner has failed to satisfy the requisite legal threshold for establishing exceptional circumstances under Article 138 of the Constitution. Furthermore, the Petitioner has other alternative remedies which he has not attempted to pursue before approaching this Court.

Having considered the materials presented to this court, I am of the view that the restitution/revisionary jurisdiction of this court under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka need not be invoked as there are no exceptional circumstances established by the Petitioner.

Therefore, the interim order issued by this court is dissolved, and the application of the Petitioner is dismissed, upholding the Preliminary Objections raised by the Respondent.

Each case is dismissed subject to a cost of Rs. 50,000.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree

Judge of the Court of Appeal