

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

In the matter of an Application for a mandate  
in the nature of a Writ of *Certiorari* under  
and in terms of Article 140 of the  
Constitution.

**Foundation for Environment, Climate &  
Technology,**

No. 76/2, Matale Road,  
Akurana, Kandy.

**CA (Writ) Application  
No. 511/2019**

**Petitioner**

**1. The Commissioner of Labour**

Labour Secretariat,  
Department of Labour,  
Kirula Road,  
Colombo 05.

**2. J.M.P. Karunaratne**

Assistant Commissioner of Labour,  
District Labour Office,  
Yatinuwara Veediya,  
Kandy.

**2A. D.M.D.M.K. Dissanayake**

Assistant Commissioner of Labour,  
District Labour Office,  
Yatinuwara Veediya,  
Kandy.

**3. Samsudeen Zeenas Yahiya,**

29/28, Dharmashoka Mawatha,  
Aruppola,  
Kandy.

**4. Honourable Additional Magistrate,**

Labour Tribunal No. 3/ Additional  
Magistrate's Court,  
Courts Complex,  
William Gopallawa Mawatha,  
Kandy.

**Respondents**

Before: **M. T. MOHAMMED LAFFAR, J.**  
**WICKUM. A. KALUARACHCHI, J.**

Counsel: Ms. Faisza Markar with Zainab Markar instructed by Dilini  
Gamage for the Petitioner.  
Ms. Chaya Sri Nammuni, D. S. G. for the 1<sup>st</sup> and 2<sup>nd</sup>  
Respondents.

Argued on: Parties consented to dispose the matter by way of written  
submissions

Written Submissions on: 01.12.2023 (by 1<sup>st</sup> and 2A Respondents)  
12.12.2023 (by Petitioner)

Decided on: 23.01.2024

**MOHAMMED LAFFAR, J.**

The Petitioner in this application is seeking orders, *inter alia*, for:

- a) a mandate in the nature of a Writ of *Certiorari*, quashing the decision of the 2<sup>nd</sup> Respondent and/or his servants or agents to register the Petitioner for EPF as communicated by the Certificate of Employer Registration' dated 22.01.2018 produced marked P-7.
- b) a mandate in the nature of a Writ of *Certiorari*, quashing the determination of the 2<sup>nd</sup> Respondent and/or his servants or agents, and that the Petitioner organization is liable to pay Rs 1,860,060/- as purported arrears and surcharges levied on the said arrears payable as outstanding EPF contributions as communicated by the letter dated 13.03.2018 produced marked P-8.
- c) a mandate in the nature of a Writ of *Certiorari* quashing the determination of the 1<sup>st</sup> and / or any one or more of them and/or their servants or agents, that the Petitioner organization is liable to pay Rs. 1,860,060/- as purported arrears and surcharges levied on the said arrears payable as outstanding EPF contributions as communicated by

letter dated 21.08.2018 to the Petitioner titled "Final Notice Prior to Instituting Legal Action" produced marked P-12:

- d) Grant and issue a mandate in the nature of a Writ of *Certiorari* quashing the certificate of the 2<sup>nd</sup> Respondent produced marked P-16 opining that action should be instituted against the Petitioner under Section 38(2) of the EPF Act in the Labour Tribunal/Additional Magistrate's Court in Kandy in order to recover a sum of Rs. 1,860,060.00/- being the purported arrears and the surcharges levied on such arrears payable as outstanding EPF contributions:

This application was supported for interim relief sought, on 09.06.2020 and this Court was satisfied, *inter alia*, to issue notices and made an interim order in terms of prayer (f) to the Petition against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from taking any steps in pursuance of the documents marked P-7, P-8, P-12, and P-16, until the final determination of this application. A stay order in terms of prayer (g) to the Petition was also issued staying further proceedings which are due in the case bearing No. LT/210/2019/EPF-N at the Labour Tribunal of Kandy until the final determination of this application.

The Petitioner through his application dated 22.11.2019 has sought to challenge the decisions contained in documents marked P8, P12 and P16 made to recover arrears of contributions to the Employees' Provident Fund (EPF) in relation to the 3<sup>rd</sup> Respondent who claims to have been employed under the Petitioner. Further, the Petitioner alleges that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision that the Petitioner as an employer is liable to pay EPF as per document marked P-7 to the Petition, is illegal and ultra vires of the power of the said Respondents in terms of the Employees Provident Fund Act.

The Petitioner claims to be a "non-profit charitable organization" incorporated on 31.12.2003, under and in terms of Section 21 of the Companies Act No. 17 of 1982 and thereafter re-registered under the Companies Act No. 7 of 2007 as a Company Limited by Guarantee. The Petitioner was allowed to dispense with the word 'Limited' since the Registrar of Companies was

satisfied that the objectives of the Petitioner were in accordance with Section 34 of the said Act No.7 of 2007 (*which provides that where a company limited by guarantee is to be formed for promoting commerce, art, science, religion, charity, sport, or any other useful object, and intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members, it shall dispense with the use of the word 'Limited'*). The Petitioner also registered as a Voluntary Service Organization on 26.05.2017 under and in terms of Voluntary Social Service Organizations (Registration and Supervision) Act No 31 of 1980.

The Petitioner submits that it operates through volunteers, research personnel and scientists who render their services on a voluntary basis. The Petitioner Company does not have more than 10 employees. In this context, The Petitioner had obtained the services of the 3<sup>rd</sup> Respondent on an *ad hoc* basis wherein she had rendered her services for certain projects and her commitment towards such projects ended with the closure of such projects. The Principal Scientist of the Petitioner addressed a letter dated 11.05.2017 to the 3<sup>rd</sup> Respondent stating that the 3<sup>rd</sup> Respondent had vacated her post in respect of the project that was assigned to her at that time purportedly due to her failure to complete the project work and for being absent from office during review meetings of the said project.

The 3<sup>rd</sup> Respondent subsequently had instituted action against the Petitioner organization and two others at the Labour Tribunal No 3 of Kandy by her application bearing no. LT/03/49/49/2017 dated 26.05.2017 claiming that she was employed as a Document Assistant under the Petitioner since 01.02.2002 and that she was unjustly terminated from service. The Petitioner filed its amended answer dated 05.01.2018 (marked 'P-4') stating, *inter alia*, that there is no contract of employment between the 3<sup>rd</sup> Respondent and the Petitioner. In terms of documents marked 'P-7', 'P-8', 'P-12' and 'P-16', it is contended that the period that the Petitioner is liable to contribute to EPF is with effect from 01.02.2002 whereas the Petitioner submits that it was

incorporated only on 31.12.2003 and as such, the said notices are null and void.

The Petitioner had informed the Additional Commissioner of Labour by letter dated 06.09.2019 (marked 'P-6(i)'), *inter alia*, that the 3<sup>rd</sup> Respondent had been employed by Natural Resources Management Services (Pvt) Ltd from the 24.01.2002 and that the said Natural Resources Management Services operates under the ownership of the Mahaweli Authority, and therefore is in no way connected or affiliated with the Petitioner (documents marked 'P-6 (ii)' to 'P-6 (v)'). Further, the Petitioner alleges that certain documents produced by the 3<sup>rd</sup> Respondent as contract of employment are forged/fraudulent documents.

The Petitioner's fundamental position is that it is a small, non-profit, charitable organization with less than 10 employees and thus, the Petitioner is not liable to contribute to the EPF in accordance with Section 10(3) of the EPF Act and Gazette notification marked 'P-11' to the Petition. Further, it is submitted that the Certificate marked 'P-16' to the Petition had been filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents without considering the provisions of Section 17 of the EPF Act. The Petitioner further alleges that there is no contract of employment between the 3<sup>rd</sup> Respondent and the Petitioner, and that the 3<sup>rd</sup> Respondent provided her services to the Petitioner on an *ad hoc* basis and her claim that she has been in continuous employment under the Petitioner is false. The Petitioner further contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents issued 'P-7' without affording the Petitioner to be heard which is contrary to the Principles of Natural justice. And further arbitrarily registering the Petitioner for the purpose of EPF when the same had a legitimate expectation that it would be excluded from paying EPF due to it being a charitable organization.

The position of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is that the Petitioner has failed to name the necessary parties as Respondents, the Petitioner is guilty of laches and is not entitled to seek any discretionary remedy, the Petitioner has not engaged in any welfare or public activities as a charitable organization and

that the Petitioner is an organization which generates an income and is liable to make payment of statutory dues to its employees. The 3<sup>rd</sup> Respondent also claims that the Petitioner is not a non-profit charitable organization and is therefore liable to pay EPF.

The crux of this application is to determine whether the Petitioner is liable to be registered as an employer to pay EPF.

Section 8 of the EPF Act (as amended) provides as follows:

*“(1) Any employment, including any employment in the service of a corporation whose capital or a part of whose capital is provided by the Government, may by regulation be declared to be a covered employment.”*

*“(2) Regulations may be made*

*(b) to treat as not being a covered employment or to disregard*

*(i) employment under a person who employs less than a prescribed minimum number of employees;*

*(ii) employment of a person in the service or for the purposes of the trade or business, or as a partner, of that person's spouse.”*

Section 10 of the EPF Act (as amended) provides as follows:

*“(1) Subject to the provisions of subsection (3) of this section and of section 27, an employee to whom this Act applies shall, in respect of each month during which he works in a covered employment, be liable to pay to the Fund a contribution of an amount equal to eight per centum of his total earnings from that employment during that month.*

*(2) Subject to the provisions of subsection (3) of this section and of section 27, the employer of every employee to whom this Act applies and who is liable to pay contributions to the Fund shall, in respect of each month during which such employee is in a covered employment under such*

*employer, be liable to pay to the Fund on or before the last day of the succeeding month, a contribution of an amount equal to twelve per centum of such employee's total earnings from that employment during that month.*

*(3) The liability of an employee in a covered employment and his employer to pay contributions under this section shall commence on the day immediately after the date fixed in relation to such employment by the Minister by Order published in the Gazette. Different dates may be fixed under this subsection for different classes of employees in the same covered employment."*

Attention of Court is drawn towards Gazette Notification bearing No. 653/16 dated 03.03.1991 containing an order by the Minister published under Section 10 (3) of the Act which provides that any charitable organization for religious observances or social services employing 10 or more employees, fall under a covered employment.

In *British Council v. Commissioner of Labour* (2003 (3) SLR 184), Shiranee Tilakawardena J refers to the Amending Act No. 44 of 1958 to Income Law Ordinance which defines a 'Charitable institution' as follows:

*"..a corporation established for a charitable purpose only or engaged solely in carrying out a charitable purpose. Charitable purpose is defined as a purpose for the benefit of the public or any section of the public in or outside Ceylon or any of the following categories:*

- 1. The relief of poverty*
- 2. The advancement of education or knowledge*
- 3. The advancement of religion or maintenance of religious rites and practices*
- 4. Any other purpose beneficial or of interest to mankind not falling within any of the preceding categories."*

In the said context, while the Petitioner does not directly engage in acts of charity per se, this Court observes that the Petitioner is in compliance with the 2<sup>nd</sup> and 4<sup>th</sup> limb referred to above. Furthermore, this Court is mindful of the Objectives of the Petitioner Organization as provided for by its articles which stipulates that its primary aim is to provide technical guidance, environmental monitoring, climate and environmental impact assessment, and adaptation, with a focus on social, economic livelihood, and sustainability aspects. The Petitioner is also a company limited by guarantee where no profits are transferred to members as dividends or bonuses. It is also noted that the Petitioner has been actively involved in various charitable and public welfare activities. It has collaborated with government organizations, contributed to poverty relief, promoted education, engaged in environmental protection, and participated in societally relevant research. While the Petitioner emphasizes its status as a non-profit organization, it has also been registered as a Voluntary Service Organization under the Voluntary Social Service Organizations (Registration) Act No. 31 of 1980.

Therefore, this Court is inclined to accept the Petitioner's position that it is not engaged in any covered employment as provided for by the EPF Act and is not liable for payment of EPF.

The 2<sup>nd</sup> Respondent's office received a complaint dated 2017.04.24 (marked '1R11') from the 3<sup>rd</sup> Respondent for non-payment of statutory dues by the Petitioner (Statement of the Respondent dated 2017.06.22 marked '1R12', Affidavit of the 3<sup>rd</sup> Respondent marked '1R13'). Upon such complaint being received, an inquiry was held on 2017.07.13 with the participation of the representatives of the Petitioner and the 3<sup>rd</sup> Respondent. It is submitted by the Respondents that based on the available material tendered by the 3<sup>rd</sup> Respondent and with the findings of the inquiry, the inquiry officer determined that there was no evidence to hold that the Petitioner was a charitable organisation and that it is evident that an employer-employee relationship exists. It concluded that the statutory dues payable to the 3<sup>rd</sup>



Respondent has to be recovered (Inquiry report dated 2017.12.07 marked '1R18').

Further to the above, while there had not been a contract of employment between the Petitioner and the 3<sup>rd</sup> Respondent, the EQD report tendered to Court suggests that documents marked 'R3', 'R4' and 'R7' do not carry original signatures.

However, as the Petitioner has satisfied that it is not an employer in covered employment within the provisions of the EPF Act, the need to comply with such provisions does not arise.

With regard to the position of the Respondents, the attention of this Court is drawn to the *Sisilamba case* (CA Writ Application No. 71/2015- CA Minutes 09.05.2017) wherein Justice Padman Surasena has stated in his judgment inter alia that:

*“This would be an appropriate juncture to turn to the legal submission made on behalf of the 1st and 2nd Respondents. The position taken up by the learned Deputy Solicitor General on behalf of them is that a writ cannot lie since the issue of whether this organization is a welfare organization or not is a disputed fact.*

*It is the view of this Court, in the light of the above material, that the 1st and the 2nd Respondents do not appear to have or are in a position to controvert any of the above facts leading to the negation of the proposition that the 3rd Respondent is an employee of the 1st Petitioner. All that the 1st and 2nd Respondents have done is to have made a bare statement that a writ cannot lie since the issue whether the 1st Petitioner is a welfare organization or not is a disputed fact.*

*It must be stressed by this Court that mere denial of a fact by a party or a mere statement that a fact is a disputed fact would not be sufficient to push such a fact under the umbrella of disputed facts. If this Court is to consider such mere denial to be sufficient, this Court would be compelled to refuse the issuance of writs whenever any such statement in the form of 'I deny,' 'I am unaware,' 'I place the burden on the other party to prove,'*

*etc., has been averred by the opposite party, as has been the case more often than not.*

*It is the view of this Court, in the light of the above material, that the 1st and the 2nd Respondents do not appear to have or are in a position to controvert any of the above facts leading to the negation of the proposition that the 3rd Respondent is an employee of the 1st Petitioner. All that the 1st and 2nd Respondents have done is to have made a bare statement that a writ cannot lie since the issue whether the 1st Petitioner is a welfare organization or not is a disputed fact.*

*Another significant observation that this Court could make with regard to the liability of the 1st Petitioner to contribute to EPF is that the 1st and the 2nd Respondents at no time had even attempted to state that the Petitioner is a commercial organization. The material available in this case points strongly to the opposite of it. Thus, the irresistible conclusion that this Court could arrive at from the above material is that the Petitioners are not liable to contribute to EPF in respect of the services of the 3rd Respondent, as the 3rd Respondent has not been engaged in a covered employment within the meaning of the EPF Act.”*

For the above reasons, I allow the Application of the Petitioner and grant and issue Writs of Certiorari quashing the decisions in documents marked ‘P-7’, ‘P-8’, ‘P-12’ and ‘P-16’ as prayed for in prayers (b), (c), (d) and (e) of the petition.

*Application allowed. No costs.*

JUDGE OF THE COURT OF APPEAL

**WICKUM. A. KALUARACHCHI, J.**

I agree.

JUDGE OF THE COURT OF APPEAL