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

In the matter of an application for Revision under and in terms of Article 138 of The Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal

Revision Application No:

CPA/100/23

B.W. Kamesh Malwana,

No. 526/21, Nawala Road,

Rajagiriya.

PLAINTIFF

Vs.

Provincial High Court of Colombo

Case No: HCRA 59/2021

Warnakulasuriya Wijesinghe Chatura Manaram Perera Gunethileke,

Faith And Hope (Private) Limited,

No. L 149, Riyalit Plaza,

Ja-Ela.

Magistrate's Court of Colombo

Case No: 41575/04/20

ACCUSED

AND

B.W. Kamesh Malwana,

No. 526/21, Nawala Road,

Rajagiriya.

PLAINTIFF-PETITIONER

Vs.

1. Warnakulasuriya Wijesinghe Chatura Manaram Perera Gunethileke,

Faith And Hope (Private) Limited,

No. L 149, Riyalit Plaza,

Ja-Ela.

ACCUSED-RESPONDENT

2. The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND BETWEEN

B.W. Kamesh Malwana,

No. 526/21, Nawala Road,

Rajagiriya.

PLAINTIFF-PETITIONER-PETITIONER

Vs.

1. Warnakulasuriya Wijesinghe Chatura Manaram Perera Gunethileke,
Faith And Hope (Private) Limited,
No. L 149, Riyalit Plaza,
Ja-Ela.

ACCUSED-RESPONDENT-RESPONDENT

2. The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: Amal Ranaraja, J.

Counsel : Haritha Adikary with Manoj Nanayakkara, Madhavi Kiriella instructed by Dhanushika Dissanayaka for the Plaintiff-Petitioner-Petitioner.

: Praveen de Silva instructed by W.M.W.K.M.B. Weerasekara for the Accused-Respondent-Respondent.

: Jayalakshi de Silva, S.S.C. for the 2nd Respondent.

Argued on : 07-10-2024

Decided on : 19-12-2024

Sampath B. Abayakoon, J.

This is an application by the plaintiff-petitioner-petitioner (hereinafter referred to as the petitioner) seeking to invoke the revisionary jurisdiction granted to this Court in terms of Article 138 of The Constitution.

This is a matter where the petitioner has instituted an action before the Magistrate's Court of Colombo by way of a private plaint filed in terms of section 136(1)(a) of the Code of Criminal Procedure Act, naming the accused-respondent-respondent (hereinafter referred to as the respondent) as the accused of the action.

The said action has been filed on the basis that the respondent committed an offence punishable in terms of section 25(1)(b) of the Debt Recovery (Special Provisions) Act (hereinafter referred to as the Act).

The complaint had been to the effect that the cheque issued by the company where the respondent was a director was dishonoured by the relevant bank and it amounts to an offence as stated above. The petitioner has filed an affidavit as well as several documents, including the cheque clearing information issued by the relevant bank, and a document to show that the respondent is a director of the company, which issued the cheque to substantiate the private plaint filed by him.

When this matter was supported for summons on the respondent, the learned Magistrate of Colombo by the order dated 03-03-2021 has refused to issue summons to the respondent.

Being aggrieved by the said order, the petitioner has filed an application in revision in terms of Article 154P of The Constitution before the High Court of the Western Province Holden in Colombo.

After notice being issued in that regard to the respondent, the matter has been set for argument. It had been later agreed to conclude the matter by way of written submissions filed by the parties.

The learned High Court Judge of his order dated 11-07-2023 has dismissed the revision application on the basis that he has no reason to interfere with the order of the learned Magistrate of Colombo.

The petitioner being aggrieved of the said judgment preferred this application in revision seeking redress. This Court after having considered the relevant facts and the circumstances, decided to issue notice on the respondents mentioned, and the parties were allowed to file their objections and counter objections in that regard.

At the hearing of this application, this Court heard the submissions of the learned Counsel for the petitioner as well as that of the learned Counsel for the accused-respondent. Although this was a matter where the dispute had been between two private parties, since the Hon. Attorney General has been named as the respondent-respondent before this Court, the Hon. Attorney General was also represented at the hearing of this matter.

It was the submission of the learned Counsel for the petitioner that the action under the Debt Recovery (Special Provisions) Act law was correctly filed before the Magistrate's Court of Colombo. It was his complaint that when this matter was supported for notice, submissions were made justifying the issue of summons. However, the learned Magistrate of Colombo by her impugned order has refused to issue summons on a wrong premise by looking for evidence that should have been considered at a properly conducted trial.

It was his position that the learned High Court Judge of the Provincial High Court of the Western Province Holden in Colombo too was erred when the learned High Court Judge went on to consider the required standard of proof and the evidence that should have been led in a properly conducted trial to determine that the petitioner has failed to adduce sufficient evidence for the learned Magistrate to

issue summons to the respondent. He moved for the setting aside of both the impugned judgment and the order on the basis that they are contrary to law and that there are exceptional circumstances before the Court to exercise the revisionary jurisdiction of the Court.

The learned Counsel for the respondent raised a preliminary objection on the basis that the petitioner has failed to provide sufficient exceptional grounds, which necessitate the intervention of this Court by exercising the discretionary power of revision, which is a special jurisdiction granted to this Court by The Constitution.

He submitted that the learned Magistrate has correctly refused to issue summons and the learned High Court Judge also has determined the matter after considering the relevant law exhaustively. It was his view that there cannot be any reason to interfere with the said orders.

He submitted that the petitioner is attempting to take out of context what the learned Magistrate has stated in her order at page 3 (page 121 of the brief) where it has been stated that the Court needs to be satisfied of not only the issuing of the cheque, but also whether the cheque has been issued with the intention of not honouring the same before issuing summons. He urged the Court to dismiss the revision application on the basis that it has no merit.

It was the view of the learned Senior State Counsel who represented the Hon. Attorney General that section 25(1) of the Debt Recovery (Special Provisions) Act envisages three situations under which a person can be held criminally liable. It was pointed out that since the plaint has been filed as a private plaint, the learned Magistrate should have resorted to the provisions of section 139 of the Code of Criminal Procedure Act, and if need arises, should take evidence under oath before issuing summons. She invited the Court to pronounce a suitable judgment in relation to the application before the Court.

It appears from the impugned order of the learned Additional Magistrate of Colombo, pronounced on 03-03-2021, that the issuing of summons has been

refused on the basis that there are insufficient grounds to come to a conclusion that the accused mentioned in the draft plaint has committed an offence under the Act.

It appears that the learned Magistrate has taken guidance from the judgment in the case of **Malinie Gunaratne, Additional District Judge Galle Vs. Abeysinghe and Another (1994) 3 SLR 196**, where it was held;

> "*When a private plaint is filed, section 139(1) requires a Magistrate to from an opinion as to whether there is 'sufficient ground for proceeding against some person who is not in custody'. The opinion to be formed should related to the offence, the commission of which, is alleged in the complaint or plaint filed under section 136(1). The words 'sufficient ground' embraces both the ingredients of the offence and the evidence of its commission. Since the opinion relates to the existence of sufficient ground for proceeding against the person accused, the material acted upon by the Magistrate should withstand an objective assessment. The proper test is to ascertain whether on the material before the Court, prima facie, there is sufficient ground on which it may be reasonably inferred that the offence alleged in the complaint or plaint has been committed by the person who is accused of it.*"

As correctly viewed by the learned Magistrate in her order, the procedure that should be adopted in determining whether there is a 'sufficient ground' has been set out in section 139 of the Code of Criminal Procedure Act. It provides for a Magistrate to call for evidence if it becomes necessary, before issuing summons on an accused person.

In the instant matter, the learned Magistrate has relied on the plaint and the supporting documents filed by the petitioner before the Court and also the submissions made on behalf of the petitioner by his Counsel. In her determination, it has been determined that to impose a criminal liability on the accused in terms of section 25 of the Act, a criminal act and a criminal intention should be established. Therefore, it is necessary for her to consider whether the

cheque, which has been dishonoured, has been issued with the intention of not honouring the same.

In determining so, the learned Magistrate has held that although the petitioner has stated that the cheque for Rs. 500,000/- was issued for a business purpose, the petitioner has failed to produce a valid contract or other document to establish the matter, and it is difficult for the Court to believe that a businessman would enter into a financial transaction of this nature without entering into a written agreement. It has also been determined that the cheque relating to the cheque clearance notice attached to the plaint is a cash cheque, and there is no proof to show whether it was a cheque given to the petitioner. It has also been determined that although the petitioner has filed a document to show that the accused is a director of the company that issued the cheque, the petitioner has failed to produce a document to show, in fact, whether the accused was a director of the company at the time the cheque has been allegedly issued.

On the above-mentioned basis, the learned Magistrate has determined that since framing a charge against an accused person is the prerogative of the Magistrate in terms of section 182 of the Code of Criminal Procedure Act, she is not in a position to determine that there are reasonable grounds to justify filing action against the accused. It is on the above-mentioned basis; the learned Magistrate has determined that there are insufficient grounds to issue summons.

With due respect to the manner in which the learned Magistrate has determined not to issue summons, I have no basis to agree with the reasoning given in that regard. There cannot be any argument that when a private plaint is filed, a Magistrate needs to be satisfied that there are sufficient grounds to issue summons to an accused person mentioned. However, it is my view that when determining whether sufficient grounds exist, the Court must look into that in relation to the charge preferred against the accused mentioned.

In the instant matter, the charge has been framed in terms of section 25 of the Debt Recovery (Special Provisions) Act No. 02 of 1990 as amended by Debt

Recovery (Special Provisions) (Amendment) Act No. 09 of 1994, which reads as follows.

25. (1) Any person who,

(a) knowingly draws a cheque which is dishonoured by a bank for want of funds; or

(b) gives an order to a banker to pay a sum of money, which payment is not made by reason of there being no obligation on such banker to make payment or the order given being subsequently countermanded with a dishonest intention, or; and

(c) gives an authority to an institution to pay a sum of money to itself, in payment of a debt or loan or any part thereof owed to such institution, from, and out of an account maintained or funds deposited, by such person with such institution and such institution is unable to make such payment to itself by reason of such person not placing adequate funds in such account or by reason of the funds deposited having been withdrawn by reason of such person countermanding the authority given or by reason of any one or more of such reasons ; or

(d) having accepted an inland bill refuses payment dishonestly; shall be guilty of an offence under this Act and shall on conviction by a Magistrate alter summary trial be liable to punishment with imprisonment of either description for a term which may extend to one year or with fine of ten thousand rupees or ten per centum of the full value of the cheque, order, authority or inland bill in respect of which the offence is committed, whichever is higher, or with both such fine and imprisonment.

It is clear that the necessary ingredients to prove a charge in terms of section 25(1)(b) of the Act would be to prove that the drawer of the cheque made an order to the banker to pay a sum of money for which payment was not made by reason of there being no obligation on the banker to make payment.

It is quite apparent from the copy of the Magistrate's Court case record tendered along with this application that the petitioner has tendered along with the plaint, a draft charge sheet, an affidavit, list of witnesses and documents, and documents marked X-1 to X-4 in order to support the application. The supporting documents include a letter sent on behalf of the petitioner to the accused company informing them that the petitioner would take steps to initiate proceedings in terms of the Act, the cheque clearing information provided by the bank where the bank has returned the cheque without honouring it for the reason that the account relating to the cheque has been closed, and a document issued by the Registrar of Companies to show that the accused is a director of the relevant company.

The said documents clearly establish the fact that the company in which the accused is a director has issued a cheque which has been dishonoured by the relevant bank because the account has been closed, which clearly establishes a *prima facie* ground to justify filing action in terms of section 25(1)(b) of the Act.

Although this section is not a section where strict liability can be imposed, and a section which requires to prove the dishonest intention as well, it is a matter that has to be proved by way of evidence placed before the Court. I am of the view that the matters considered by the learned Magistrate in refusing to issue summons are matters that should have been determined after a proper trial held in that regard, and not matters that can be determined at the stage of considering whether to issue summons or not. The question whether the accused was a director or not at the time the cheque was issued and whether a liability can be imposed upon him are matters that need to be considered if there is any objection

in that regard, which can be raised only after the relevant accused is present before the Court.

In the case of **S.C. Appeal No. 182/2017 decided on 12-01-2023, Aluvihare, P.C., J.** expressed the following view.

> "*At this juncture, it would be pertinent to consider the liability under the penal provision referred to above. It is clear that the provision is not a strict liability provision and a mental element is part of the offence.*
>
> *In an instance where a cheque is dishonoured due to lack of sufficient funds, the requisite mental element is knowledge on the part of the accused, whereas when the reason for a cheque to be dishonoured is either the same being countermanded or closure of the account after the cheque was issued, when the mental element that has to be established is one of dishonesty.*
>
> *It is my view, that in a prosecution under section 25 of the Act, the reason or the reasons as to the issuance of the cheque is not relevant, as the nature of the transaction is immaterial as far as the offence is concerned*."

For the reasons as considered above, I am of the view that the learned Additional Magistrate of Colombo was wrong when she refused to issue summons to the accused mentioned in the draft charge.

When the said decision was challenged before the Provincial High Court of the Western Province Holden in Colombo, I find that the learned High Court Judge has also determined the matter by failing to look into the question at hand. It appears that the learned High Court Judge has gone into the merits of the case by considering the necessary ingredients that needs to be proved in a case of this nature, which are matters that should be considered after a properly conducted trial, and not at the stage of issuing summons where the requirement is to consider whether there is a sufficient ground to issue summons.

I am unable to agree with the learned High Court Judge's view that the petitioner has failed to adduce sufficient exceptional grounds which needs the intervention

of the Court, which in my view, was a determination made without properly considering the legal principles that govern an application of this nature.

I am of the view that the petitioner has adduced sufficient exceptional grounds for this Court to intervene and set aside the order dated 03-03-2021 pronounced by the learned Additional Magistrate of Colombo and also the judgment dated 11-07-2023 pronounced by the learned High Court Judge of the Provincial High Court of the Western Province Holden in Colombo.

Accordingly, I set aside both the said order and the judgment as both cannot be allowed to stand.

I direct the learned Additional Magistrate of Colombo to issue summons to the accused mentioned in the plaint and the draft charge, and proceed therefrom to conclude the matter as expeditiously as possible.

The Registrar of the Court is directed to communicate this judgment to the High Court of the Western Province Holden in Colombo for information and to the Magistrate's Court of Colombo for necessary compliance.

Judge of the Court of Appeal

Amal Ranaraja, J.

I agree.

Judge of the Court of Appeal