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

In the matter of an application under and in terms of section 25(1) of the Debt Recovery (Special Provisions) Act No. 02 of 1990 as amended by Debt Recovery (Special Provisions) (Amendment) Act No. 09 of 1994 read along with section 136(1)(a) of the Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:

CA (PHC) 0035/21

Provincial High Court Colombo

Case No. HCRA/51/2020

Magistrate's Court Colombo

Case No. 20086/01/19

TAIAN LANKA STEEL COMPANY PRIVATE LIMITED

Having its Registered Office and Principal place of Business

No. 333-1/16,

Old Moor Street,

Colombo 12.

COMPLAINANT

Vs.

EASTERN MARKETING AND HARDWARES

Carrying on business as partnership under the name and style of "EASTERN MARKETING AND HARDWARES"

1. Weerayya Raja
2. Sothirasa Nishanthani

Both at

No. 345, Nilaweli Road,

Uppuweli.

New Address

No. 25/2,

2nd Lane,

Kanya,

Uppuweli,

Trincomalee.

ACCUSED

AND

TAIAN LANKA STEEL COMPANY PRIVATE LIMITED

Having its Registered Office and Principal place of Business

No. 333-1/16,

Old Moor Street,

Colombo 12.

COMPLAINANT-PETITIONER

Vs.

EASTERN MARKETING AND HARDWARES

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ACCUSED-RESPONDENTS

AND NOW BETWEEN

TAIAN LANKA STEEL COMPANY PRIVATE LIMITED

Having its Registered Office and Principal place of Business

No. 333-1/16,

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COMPLAINANT-PETITIONER-APPELLANT

Vs.

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ACCUSED-RESPONDENTS-

RESPONDENTS

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : K. Wasantha S. Fernando with Ms. Dussharitha Subendran instructed by Hemantha Wickramaratne for the complainant-petitioner-appellant

Argued on : 04-10-2023

Decided on : 06-02-2024

Sampath B. Abayakoon, J.

This is an appeal by the complainant-petitioner-appellant (hereinafter referred to as the appellant) on being aggrieved by the order dated 21-04-2021 of the learned High Court Judge of Colombo where the revision application filed by the appellant was dismissed.

The appellant has filed the said revision application before the High Court of Colombo seeking to challenge the order made by the learned Chief Magistrate of Colombo on 29-10-2019 in the Chief Magistrate's Court of Colombo Case Number 20086/01/19.

The appellant has instituted this action before the Chief Magistrate's Court of Colombo as a private plaint filed in terms of section 136(1)(a) of the Code of Criminal Procedure Act No. 15 of 1979, read with section 25(1)(b) of the Debt Recovery (Special Provisions) Act No. 02 of 1990 as amended by Debt Recovery (Special Provisions) (Amendment) Act No. 09 of 1994.

When this matter was supported for summons by the learned Counsel who represented the appellant before the Chief Magistrate's Court of Colombo on 15-10-2019, the learned Chief Magistrate has recorded that a suitable order will be made upon scrutinizing the case record.

Accordingly, the learned Chief Magistrate of Colombo has pronounced the order dated 29-10-2019 refusing to issue summons as sought, and thereby dismissing the private plaint filed by the appellant.

It is quite apparent from the order of the learned Chief Magistrate that she was well aware of the requirements that a Judge should look before issuing summons based on a private plaint filed in terms of section 136(1)(a) of the Code of Criminal Procedure Act. It appears that the learned Chief Magistrate has considered the reported case of **Malani Gunaratne, Additional District Judge Galle Vs. Abeysinghe and Another (1994) 3 SLR 196** as guidance for her considerations, and has come to a correct finding that the requirement should be to look whether there are sufficient reasons to issue summons and not to go into deep consideration of the evidence that can be adduced in proving the charges mentioned in a private plaint.

The action instituted by the appellant has been on the basis that the two accused mentioned in the draft plaint and the charge sheet, issued two cheques as mentioned in the plaint for goods sold to them by the appellant, which were dishonoured by the relevant bank when presented for payment. It was on that basis the appellant has filed this private plaint seeking to punish the wrongdoers in terms of section 25(1)(b) of the Debt Recovery (Special Provisions) Act.

It is apparent from the order of the learned Chief Magistrate that the summons has been refused, on two grounds. It has been determined that since the cheques had been dishonoured by the bank due to the fact that the relevant account has been closed, it was necessary for the appellant to establish the date as to when the relevant account had been closed, and the Court cannot determine such a fact until a report from the relevant bank is called in order to determine whether the accused had committed an offence. Since no such report has been called and produced with the private plaint, it has been determined that there exists no basis for the Court to issue summons as requested.

The other factor considered by the learned Chief Magistrate to refuse summons had been the appellant's apparent failure to make a police complaint in that regard.

Having considered the above two factors, the learned Chief Magistrate has refused summons to the accused.

When the above order was challenged by way of a revision application before the Provincial High Court of the Western Province Holden in Colombo, the learned High Court Judge who considered the application has dismissed it on the basis that the order of the learned Chief Magistrate was justified. However, it appears that the learned High Court Judge has wrongly considered the section under which the appellant sought to institute an action under the Debt Recovery (Special Provisions) Act.

Although the learned High Court Judge has considered the relevant section under which the appellant has filed an action as section 25(1)(a) of the Act, in fact, the action filed by the appellant by way of a private plaint has been in terms of section 25(1)(b) of the Act.

In his submissions before this Court, the learned Counsel for the appellant submitted that the reasons given by the learned High Court Judge to justify the order of the learned Chief Magistrate and the reasons given by the learned Chief Magistrate to refuse to issue summons are not according to the law. It was his view that there was no necessity for the appellant to prove the charge before the summons being issued, but only to establish a sufficient basis before the Court to convince the Court in that regard.

He was of the view that the learned Chief Magistrate has gone beyond that requirement and had looked at matters that should have been considered after hearing evidence in the matter. He was also of the view that making a prior complaint to the police in a matter of this nature is not an essential prerequisite in filing a private plaint.

He moved for the setting aside of the two orders sought to be challenged, and for an order to issue summons to the relevant accused in the case.

This is an action filed by the appellant as a private plaint in terms of section 136(1)(a) of the Code of Criminal Procedure Act.

The relevant section 136(1)(a) reads as follows.

> **136. (1) Proceedings in a Magistrate's Court shall be instituted in one of the following ways: -**
>
> > **(a) on a complaint being made orally or in writing to a Magistrate of such Court that an offence has been committed which such Court has jurisdiction either to inquire into or try.**

The procedure as to the issue of summons has been defined in section 139 of the Code. It has been stated that before issuing summons in terms of 136(1)(a), the Magistrate may examine on oath the complainant or some material witness or witnesses and satisfy that there exist reasonable grounds to issue summons.

In the matter under appeal, when this private plaint was presented to the Court, the appellant who was the complainant, has tendered an affidavit as well, informing the facts and the circumstances which led to the issuing of the cheques and dishonouring of the same by the bank.

It appears that when this matter was supported for summons, the learned Chief Magistrate has not required the appellant to lead evidence but has decided to scrutinize the case record in order to make an order, most probably since the appellant has substantiated his case by way of an affidavit. The learned Chief Magistrate has determined that, to convict a person on the basis of issuing a cheque while the account was closed, it becomes necessary for the Court to know the date from which the said account has been closed. It has been determined that if the account was functioning on the day the cheque was issued and the account has been closed subsequently to it, a conviction cannot be entered and therefore, since the appellant has failed to submit a report from the bank along with the plaint, there exists no basis to justify issuing of summons.

I am in no position to agree with the above reasoning of the learned Chief Magistrate.

For matters of clarity, I will now reproduce the relevant 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.

25. (1) Any person who,

(a) knowingly draws a cheque which is dishonored 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 ingredient to prove a charge in terms of section 25 (1)(b) is to prove that the drawer of the cheque in relation to this case made an order to the banker to pay a sum of money, which payment is not made by reason of there being no obligation on the such banker to make payment.

It is apparent from the copy of the Magistrate's Court case record tendered along with this appeal, that the appellant has tendered along with the plaint, the draft charge sheet and the earlier mentioned affidavit, a list of witnesses and a list of documents, which the appellant would be relying on to prove the charges. He has also tendered to the Court the two cheque return notifications relating to the two cheques issued by the accused.

In the said notifications, the relevant bank has informed the reasons for not honouring the cheques as the relevant account had been closed at the time the cheques were presented. This goes on to show that there had been no obligation to the banker to honour the cheques due to the said fact.

I am of the view that this has provided enough information to the learned Chief Magistrate to satisfy herself as to the necessary consideration that should be looked into in issuing summons to an accused in a case filed as a private plaint. Since the appellant has tendered a list of witnesses that he intends to call at the trial, which includes an official from the relevant bank to prove the details as to the account through which the cheques have been issued, I am of the view that the appellant has provided sufficient information as to the way he intends to prove the charges against the accused.

The other reason the learned Chief Magistrate has decided to refuse notice had been on the basis that the appellant has failed to make a complaint to a Peace Officer, in other words, to police, to enable such Peace Officer to conduct a criminal investigation in this regard. I am in no position to agree with the said determination of the learned Chief Magistrate either.

There is no requirement in the Code of Criminal Procedure Act that when a private plaint is instituted, in terms of section 136(1)(a) of the Code of Criminal Procedure Act, such a plaint should be after making a complaint with regard to the same to a Peace Officer, although such a complaint may have an added advantage under certain circumstances.

The Debt Recovery (Special Provisions) Act is a statute enacted by the legislature in its wisdom to facilitate financial transactions which are essentially civil matters in nature. However, it is quite apparent that in order to facilitate smooth functioning of the purposes of the Act, the legislature by its wisdom has introduced sections where wrongdoers can be punished in criminal proceedings.

Section 25 is one such section. It is my considered view that to initiate actions under section 25 and similar sections in other similar statutes, making a prior complaint to a Peace Officer is not a requirement that should be considered essential in instituting actions under such provisions.

There are several other statutes, which are essentially statutes that had been provided for transactions civil in nature, but has provisions where criminal actions can be instituted. For example, section 41 of the Finance Leasing Act No. 56 of 2000, sections 20 (2), 64 and 65 of the Finance Business Act No. 42 of 2011, section 38 of the Finance Companies Act No. 78 of 1988, sections 42, 177 and 382 of the Companies Act No. 07 of 2007.

For the reasons considered as above, I am of the view that the learned Chief Magistrate of Colombo was misdirected when it was decided to refuse issuing of summons to the accused mentioned in the private plaint.

I am of the view that there were sufficient reasons provided by the appellant to justify issuing of summons. I find that the learned High Court Judge was misdirected when the revision application filed by the appellant was dismissed.

Accordingly, I set aside the order dated 21-04-2021 by the learned High Court Judge of Colombo, and the order dated 29-10-2019 by the learned Chief Magistrate of Colombo, as both the orders cannot be allowed to stand.

I direct that the summons shall be issued to the accused mentioned in the plaint, proceed therefrom, and conclude this matter.

The appeal is allowed.

The Registrar of the Court is directed to communicate this judgement to the learned Chief Magistrate of Colombo for necessary compliance and to the High Court of Colombo along with the original case record for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal