

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

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

Court of Appeal case no. CA/PHC/APN/ 67/2015

H.C. Colombo case no. HCRA/51/2014

M.C. Colombo case no. 12553/6/12

Alliance Finance Company Limited,
No. 84, Ward Place, Colombo 07.

Plaintiff

Vs.

Yeshan Mark Harindra Samarakoon,
No. 30/2,
Colonel T.G. Jayawardena Mawatha,
Colombo 3.

Defendant/Accused.

AND

Yeshan Mark Harindra Samarakoon,
No. 30/2,
Colonel T.G. Jayawardena Mawatha,
Colombo 3.

Defendant/Accused - Petitioner.

Vs.

Alliance Finance Company Limited,
No. 84, Ward Place, Colombo 07.

Plaintiff – Respondent

AND NOW

Yeshan Mark Harindra Samarakoon,
No. 30/2,
Colonel T.G. Jayawardena Mawatha,
Colombo 3.

**Defendant/Accused - Petitioner -
Petitioner.**

Vs.

Alliance Finance Company Limited,
No. 84, Ward Place, Colombo 07.

Plaintiff – Respondent - Respondent

Before : H.C.J. Madawala J.
: L.T.B. Dehideniya J.

Counsel : Hiran de Alwis with Kapila Virajith for the
Defendant/Accused Petitioner Petitioner.
: Haritha Adikari with Narada Amarasinghe and Nadeeka
Dissanayaka for the Plaintiff Respondent Respondent.

Argued on : 17.11.2016

Decided on : 09.03.2017

L.T.B. Dehideniya J.

The plaintiff Respondent Respondent (the Respondent) being a finance company, instituted action in the Magistrate Court of Colombo as a private plaint against the Defendant/Accused Petitioner Petitioner (the Petitioner) for issuing a cheque knowingly that there is no funds in the account an offence punishable under section 25 (1) of the Debt Recovery (Special Provisions) Act No.2 of 1990 as amended. The Petitioner raised several preliminary objections on the maintainability of the action. The learned Magistrate dismissed the said objections. The Petitioner appealed to the High Court of Colombo was also dismissed. This revision application is from the said dismissal.

The first objection of the Petitioner is that the complaint made to the Magistrate Court is bad in law and the learned Magistrate should not have issued summons. His contention is that there is no Board resolution authorizing this private plaint. The plaint was filed in the Magistrate Court by one Mohamed Saleem Mohamed Wsmi but has failed to tender the Board resolution. He further argues that the copy of the Board resolution filed with the counter objections of the Respondent also does not empower the said Wasmi to file this action on the cheque but it is only to file action based on the lease agreement.

The Board of Directors of the Company has resolved that the "Company nominate Mr. Mohamed Saleem Mohamed Wasmi to represent the Company, to file action, give evidence on behalf of the company in Criminal Courts, with regard to the Contract No. HOLELE 0301323400 against Mr. Y.M.H. Samarakoon." The Petitioner argues that the said Wasmi was authorized to file action with regard to the contract entered in to by the Petitioner and the Respondent, but it does not authorize him to file action with regard to a cheque. The Board of Directors of the Company by the resolution dated 4th July 2012, has in

clear terms authorized the said Wasmi to “represent the Company and to file action on behalf of the Company in criminal courts.” The resolution has limited the action to matters “with regard to the agreement” that the parties had entered in to. The Petitioner’s contention is that this resolution limits the authority of the said Wasmi to file an action on the contract. If the Board of Directors intended to limit the action to a civil remedy on the contract, will not authorize him to file action and appear in a criminal Court. Authorizing him to file action and appear in criminal Court itself explain that the intention of the Board of Directors is to file action in the criminal Court against the Petitioner. The Respondent’s allegation is that the Petitioner had issued a cheque knowingly that there are no funds in his account to honour the cheque, which is an offence under the Debt Recovery (Special Provisions) Act. The cheque in question was issued in settlement of a part payment of the money due on the said agreement and it becomes a matter with regard to the agreement. The authorization of Wasmi by the Board of Directors includes the filing of the criminal action for issuing a cheque without funds.

The Petitioner argues that the failure to tender the said board resolution with the complaint should have been considered by the Magistrate Court as fatal and summons should not have been issued. The complainant made to the Magistrate Court contains the statement that a resolution has been passed by the Board of Directors authorizing him to file action. The learned Magistrate had enough material to issue summons, the rest is to be proved at the trial.

It was held in the case of Malinie Gunarathne Additional District Judge Galle v. Abeysinghe and another [1994] 3 Sri L R 196 that;

The proper test is to ascertain whether on the material before 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.

The Petitioner raised another objection that there is no consideration when filing the action in relation of the cheque. The consideration at the time of issuing the cheque was the part payment of the money due in the lease agreement. Therefore there cannot be said that there is no consideration for the cheque. The Petitioner's argument is that the matter has been referred to arbitration and an award has been granted and therefore there is no consideration at the time of filing the action. This argument is not tenable. The offence was committed at the time of issuing the cheque, not at the time of filing action.

Another issue is whether there is a double jeopardy. Civil liability and the criminal liability are to distinct liabilities. A person's civil liability does not relieve him from his criminal liability and vice versa. Simple example is the civil liability on *injuria* does not relieve him from the criminal liability of violating the traffic rules in a case of an accident. The Legislature has recognized this principal and the Evidence Ordinance was amended by act No. 33 of 1998 and made a conviction in a criminal court, a relevant fact. The arbitration award is for the civil liability and it does not take away the criminal liability of issuing a cheque knowingly that there are no funds.

The Legislature has enacted by the Debt Recovery (Special Provisions) Act section 25(1) (a) that any person who draws, a cheque knowing that there are no funds or not sufficient funds in the bank to honour such cheque shall be guilty of an offence under this Act and shall on conviction by a Magistrate after 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.

In the case of *The OIC CID and another v. A.C. Soris* [2005] BLR 100 it was held that;

Even if a cheque is drawn in favour of any person other than a lending institution, Section 25(1) of the Debt Recovery (Special Provisions) Act applies thereto and prosecution can be instituted under that section.

The Petitioner's argument on res judicata does not come in as the earlier arbitration award is on the civil liability and the present action is on the criminal liability.

Under these circumstances, I see no reason to interfere with the finding of the learned Magistrate as well as the learned High Court Judge.

I affirm the order of the learned High Court Judge and dismiss this application subject to costs fixed at Rs. 10,000/-

Judge of the Court of Appeal

H.C.J. Madawala J.

I agree.

Judge of the Court of Appeal