

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

*In the matter of an Appeal from the  
Provincial High Court of Kandy in  
terms of section 331 of the Criminal  
Procedure Code.*

**Court of Appeal Case No.**

CA (PHC) 83/2018

Segusahib Mohamed Aswar,

No. 01, Habarana Road,

Ganewalpola,

Kekirawa.

**Provincial High Court Case No.**

Rev - 10/2018

**COMPLAINANT**

**Vs.**

**Magistrate Court Case No.**

77176

Thajudeen Mohamed Hameem,

Elamalpotha, Vahakotte,

Matale.

**AND BETWEEN**

Segusahib Mohamed Aswar,

No. 01, Habarana Road,

Ganewalpola,

Kekirawa.

**PETITIONER**

**Vs.**

1. Thajudeen Mohamed Hameem,  
Elamalpotha, Vahakotte,  
Matale.

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

**RESPONDENTS**

**AND NOW BETWEEN**

Segusahib Mohamed Aswar,  
No. 01, Habarana Road,  
Ganewalpola,  
Kekirawa.

**COMPLAINANT-PETITIONER-  
APPELLANT**

**Vs.**

1. Thajudeen Mohamed Hameem,  
Elamalpotha, Vahakotte,  
Matale.

**ACCUSED-RESPONDENT-  
RESPONDENT**

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

**RESPONDENT**

**Before** : Sampath B. Abayakoon, J.  
: P. Kumararatnam, J.

**Counsel** : A. L. M. Farook with Rudane Zahir for the appellant  
: Randeniya instructed by Salman Ameen for the  
Respondent  
: Kanishka Rajakaruna, SC for the Attorney General

**Argued on** : 04-07-2023

**Written Submissions** : 22-02-2023 (By the Respondent)  
: 06-04-2022 (By the Appellant)

**Decided on** : 21-09-2023

**Sampath B. Abayakoon, J.**

This is an appeal preferred by the petitioner-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved by the order dated 02-05-2018 by the Provincial High Court Judge of the Central Province Holden in Kandy, wherein the learned High Court Judge refused to issue notice on application made by the appellant seeking to invoke the revisionary jurisdiction of the Court. The said application has been made in order to challenge an order made by the learned Magistrate of Dambulla On 22-11-2022 in the Magistrate's Court of Dambulla case No 77176.

At the hearing of this appeal, it was the contention of the learned Counsel for the appellant that the learned High Court Judge was misdirected as to the relevant law when his application for notice was refused. He urged this Court to quash the above-mentioned order.

This is a matter where the appellant has filed a private plaint in terms of section 136 (1) (a) of the Code of Criminal Procedure Act before the Magistrate's Court of Dambulla. In his draft plaint and charge sheet, the appellant has sought to charge the accused mentioned in the draft charge namely, Thajudeen Mohammad Hameem for an alleged offence of cheating punishable in terms of section 400 and 389 of the Penal Code. It appears that the charge was based on a lease agreement as well as 2 cheques handed over by the appellant to the accused mentioned.

When this private plaint was preferred, the learned Magistrate of Dambulla has very correctly considered whether the appellant has established sufficient grounds for him to proceed with this private plaint. In that regard the appellant has given evidence before the Court. The learned Magistrate of Dambulla after well considering whether the appellant has established sufficient grounds for him to get the summons issued to the accused mentioned in the charge, has concluded that the appellant has failed to establish such a ground. Accordingly, the learned Magistrate has refused to issue summons as requested.

It is against this order the appellant had preferred an application in revision to the Provincial High Court of the Central Province Holden in Kandy.

When the matter was supported before the learned High Court Judge of Kandy, the learned High Court Judge being not satisfied that the appellant has a basis to invoke the revisionary jurisdiction of the Court has refused to issue notice in that regard by his order dated 02-05-2018.

The appellant giving evidence before the learned Magistrate of Dambulla has stated that he has a fuel station business and wanted to give that business on

rent to the accused mentioned. In that regard, went to an office of a lawyer, discussed the conditions, and instructed the lawyer to prepare an agreement.

He has claimed that he signed several blank papers and after several reminders and several dates after the signing, he was given the copy of the agreement, but the conditions he wanted to be in the agreement was not there. It was his contention that the said agreement referred to a power of attorney alleged to have been given by him to the accused, which was not in accordance with his instructions to the lawyer. He has also referred to two cheques given by him to the value of One Million rupees and the accused's failure to deposit the said cheques given by the appellant to the appellant's account and the losses suffered by him as a result.

The learned Magistrate in his order has well considered the evidence and has rightly noted that although the appellant speaks about a rent agreement given to him by his lawyer, which should be the basis of the allegations against the accused had not been tendered in evidence and therefore, he is not in a position to consider the alleged conditions that contain in the document.

The learned Magistrate has well considered the appellant's evidence with regard to two cheques allegedly given by him and has determined that the evidence in that regard does not fall under the offence of cheating or criminal misappropriation in terms of the Penal Code.

He has found that the documents tendered by the appellant to Court are contradictory to each other. In the complaint alleged to have been made to Kekirawa Police on 12-08-2016, the appellant has referred to the same 2 cheques he has claimed that was given by him to the accused has been stolen from one of the files he had with him and he is unaware who took the cheques from his files.

As correctly considered by the learned Magistrate, this is a statement made contradictory to the stand taken up by the appellant before the Magistrate's Court. The learned Magistrate of Dambulla having well considered all these facts

and other incidental matters has decided not to issue summons to the accused mentioned in the draft charge filed before the Court.

When this matter was considered by the learned High Court Judge of Kandy, the learned High Court Judge too had drawn his attention to the order made by the learned Magistrate of Dambulla and has correctly concluded that he has no basis to issue notice of the revision application filed before him, which in my view is the only conclusion that would have been reached by the learned High Court Judge.

Accordingly, the appeal is dismissed for want of any merit.

The Registrar of the Court is directed to forward a copy of the judgement to the Provincial High Court of the Central Province Holden in Kandy and to the Magistrate's Court of Dambulla for information.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal