

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

In the matter of an application under Article
140 of the Constitution for mandates in the
nature of writs of certiorari and prohibition.

CA-WRT-229-23

Gowri Somasundaram

No. 244/2

Havelock Road

Colombo 05.

Petitioner

Vs.

1. Officer In Charge

Financial and commercial

Crimes Investigations Unit

Unit-1

Criminal Investigation Department

Colombo 01.

2. Suranjani Wickramaratne

No. 206/08

Lake Drive

Colombo 08

Respondents

Before : N. Bandula Karunarathna, P/CA, J.
B. Sasi Mahendran, J.

Counsels: Faisz Musthapha PC with Keerthi Thilekerathna, Bishran Iqbal for the
Petitioner
Jehan Gunasekara for the 1st Respondent
Senany Dayaratne with Nishadi Wickremasinghe and Maheshika Bandara
for the 2nd Respondent

Argued On: 10.10.2024 and 28.10.2024

Written 10.12.2024 (by the 1st Respondent)

Submissions: 06.12.2024 (by the 2nd Respondent)

On 16.12.2024 (by the petitioner)

Judgment On: 18.12.2024

B. Sasi Mahendran, J.

The Petitioner instituted this action by way of a petition dated 03.05.2023 seeking the following reliefs:

- a) Issue notice on the Respondent;
- b) Call for and inspect the record;
- c) Grant a mandate in the nature of a writ of prohibition preventing the Respondent and/or any officer acting under his direction from arresting the Petitioner on the ground that she has committed any offence as set out/alleged in the B-Report filed in proceedings bearing No. B84731/01/23 in the Magistrates Court of Colombo produced marked X12 and/or any other offence in relation to the said sum of Rs 16,200,000/=.

- d) Grant an interim order restraining Respondent and/or any officer acting under his direction from arresting the Petitioner on the ground that she has committed' any offence as set out/alleged in the B-Report filed in proceedings bearing No. B84731/01/23 in the Magistrates Court of Colombo produced marked X12 and/or any other offence in relation to the said sum of Rs 16,200,000/-.
- e) Grant costs;
- f) Grant such other and further other reliefs as to Your Lordships' Court seems fit and meet

The factual matrix of this case is as follows:

According to the petition, in or around 2014, the Petitioner's expertise was sought by a group of people to find investors for a potential brick manufacturing project in Sri Lanka consequent to which the Petitioner introduced one Dr. Rahul Chaturvedi, the Chief Executive Officer of Moolex LLC to them. The Petitioner states that it was conveyed to her that the investment required for the said project would be approximately USD 10 to 15 Million. After discussions, Dr. Chaturvedi informed the parties that he would need a 'transaction fee' of USD 110,000 to be retained to find investors. Thereafter, the Petitioner was introduced to the 2nd Respondent who had agreed to pay the said transaction fee of USD 110,000 to Dr. Chaturvedi. However, since the 2nd Respondent could not remit the said amount to Dr. Chaturvedi, she had deposited a sum of Rs. 16,200,000/- which is equivalent to USD 110,000 to the Petitioner's account at NDB Bank. The Petitioner further states that the Petitioner's uncle from Australia, Mr. N.S. Jeganathan showed interest in the project when he was told about the project and its development who deposited various sums amounting to the sum of USD 110,000 to Dr. Chaturvedi's account as a part of his investment with Dr. Chaturvedi.

The Petitioner states that according to the correspondence between the parties, the 2nd Respondent with full knowledge deposited the said sum to the Petitioner to utilize it in securing investments. This was disputed by the 2nd Respondent.

The Petitioner states that since the project did not take off, the Petitioner sent an email to Dr. Chaturvedi giving information about the cancellation of the said project. By an email dated 15.03.2016, the Petitioner and the 2nd Respondent requested the immediate return of the funds. The Petitioner states that the parties agreed to an arrangement whereby Dr. Chaturvedi agreed to repay the said sum of USD 110,000 with an interest of 12% per annum on the said sum until it is paid to the 2nd Respondent. However, since Dr. Chaturvedi did not pay the said money and due to the consistent requests of the Petitioner, and the 2nd Respondent, on 07.10.2018, Dr. Chaturvedi created a WhatsApp group called 'Suranjani Update' with the Petitioner, 2nd Respondent and Dr. Chaturvedi himself. In the said group, the 2nd Respondent continuously demanded the money from Dr. Chaturvedi and not from the Petitioner. The Petitioner further states that due to the continuous neglect by Dr. Chaturvedi, the 2nd Respondent wrote to one of Dr. Chaturvedi's friends alleging that a fraud had been perpetrated on her by Dr. Chaturvedi.

Nevertheless, a complaint was lodged by the 2nd Respondent with the Criminal Investigation Department for which by letter dated 13.01.2023 the Petitioner was called upon to provide information on 18.01.2023. However, due to short notice, the Petitioner was unable to comply and instead, on 29.01.2023 promptly endeavored to provide the investigators with the full details of the transactions. Thereafter, as requested by the Petitioner, 24.03.2023 was granted to furnish the documentation. Anyhow, the Petitioner was unable to attend on that date and informed her inability to the Department by a letter. The Petitioner states that after this letter by the Petitioner, there was no communication from the said Department.

On 19.04.2023, persons claiming to be from the Bambalapitiya Police visited her house and the Petitioner found out after the inquiries that the facts have been reported to the Chief Magistrates Court of Colombo. The Petitioner later came to know that, on 13.03.2023 by a B report filed by the Criminal Investigation Department, the Chief Magistrates Court of Colombo was informed that the Petitioner was not assisting the investigations and a travel ban had been obtained against the Petitioner as a result.

The Petitioner further avers that due to the high likelihood of being arrested, she has filed an application for anticipatory bail before the Magistrates Court of Colombo bearing case No. 90290/01/23 by a Motion dated 21/04/2023. The Petitioner pleads that she cannot be made a suspect in proceedings in B84731/01/23 in the Magistrates Court of Colombo on the basis that she has not committed any criminal offence.

The Petitioner states that the Petitioner has reasons to believe that the 1st Respondent without any material would arrest the Petitioner on the allegation of cheating as alleged by the 2nd Respondent in the case bearing No. 90290/01/23.

The Petitioner's contention is that such arrest is unwarranted, unlawful and without any authority as there is no material whatsoever incriminating the Petitioner in any criminal offence.

In this context, the Petitioner has invoked the writ jurisdiction of this Court seeking inter alia a writ of Prohibition preventing the Respondent from arresting the Petitioner on the ground that she has committed any offence as alleged in the B-Report filed in proceedings bearing No. B84731/01/23 in the Magistrates Court of Colombo and or any other offence in relation to the said sum of Rs. 16,200,000/-.

On the other hand, the Respondents raised the preliminary objections that there is an alternative remedy available for the Petitioner and that the Petitioner has suppressed the material facts.

The question before this Court is whether the transaction between the Petitioner and 2nd Respondent is a commercial transaction or whether the said transaction falls under dishonest misappropriation. The main allegation made by the 2nd Respondent in her Written Submission dated 06.12.2024 is that she never agreed that the money would be paid as a transaction fee to Dr. Chaturvedi who was not named as a suspect in the B-report.

According to the 1st Respondent, the Respondents have filed a B report on the basis that the investigation regarding the Petitioner in respect of charges under Sections 403, 386 and 389 of the Penal Code in respect of an alleged financial fraud of Rs. 16,200,000/- by the Petitioner to the 2nd Respondent. The purpose of filing this writ application is to prevent the arrest on the basis that there is no incriminating evidence against the Petitioner and that she never had the dishonest intention to misappropriate the said fund.

This Court notes that this transaction has taken place in the year 2016. But the 2nd Respondent made a complaint only in 2022 stating that she was cheated by the Petitioner.

When we peruse the documents tendered by the Petitioner, there is no indication that the 2nd Respondent made a complaint that she was cheated by the Petitioner prior to the said complaint in 2022.

According to the Petitioner, the money from the 2nd Respondent was to secure investment. As per the documents marked X4(a), and X4(b), in 2016, the Petitioner and the 2nd Respondent have decided jointly to cancel the said project and requested Dr. Chaturvedi to return the transaction fee.

As per document marked X7, upon such request, Dr. Chaturvedi has assured that he will be back in Sri Lanka with a cheque to return the 2nd Respondent's money where the 2nd Respondent has acknowledged that the money has been sent to Dr. Chaturvedi.

This Court also notes that in the police complaint, the 2nd Respondent has not mentioned the so-called Dr Chaturvedi. The document marked X9 which was addressed to one of Dr. Chaturvedi's friends also indicates that the money was taken by Dr. Chaturvedi for an investment and the 2nd Respondent has requested him to return these funds. Therefore, it seems to me that, this money is involved with the investment of the project given to one Dr. Chaturvedi.

The question thus is whether the Petitioner had the intention to defraud the 2nd Respondent.

The Police have referred this transaction under the following Sections of the Penal Code.

Section 386

“Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both”

Section 389

“Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

Section 403

“Whoever cheats and there by dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

For all three offences, the prosecution needs to prove that there was a mental element of dishonesty and fraudulence. What is meant by ‘dishonestly’ and ‘fraudulently’ is defined in the following Sections of the Penal Code.

Section 22

“Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing “dishonestly”.”

Section 23

“A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise.”

In the instant case, there is no evidence to show that the Petitioner had an intention to dishonest the said transaction. The fact remains that the money is with a third party with the knowledge of the 2nd Respondent and she has not made a complaint against the said third party.

The gravamen of the submission of the counsel for the Petitioner is that there is no evidence to show that the Petitioner has the mental element to dishonest the 2nd Respondent. This was considered by His Lordship S.N. Silva J (as he was then) in Attorney-General V. Dewapriya Walgamage and another (1990) 2 Sri LR 212 at 222 it was held that;

“Dishonest intention is the element of mens rea of the offence of criminal misappropriation as defined in Section 386 of the Penal Code. The commission of the offence should be accompanied by such intention.

Further held that;

Furthermore, dishonesty is the element of mens rea in relation to all three offences of theft, cheating and criminal misappropriation. Lines of demarcation cannot be drawn in respect of these offences only with reference to the element of mens rea.”

(His Lordship has further held that there should be initial innocence taking for the purpose of constituting the offence of criminal misappropriation. The requirement of initial innocence was overruled by His Lordship Mark Fernando J in *Walgamage V. The Attorney General* (2000) 3 SLR 1 and held that “initial innocence taking was not necessary for the purpose of constituting the offence of criminal misappropriation of property.”)

This was followed by His Lordship L.T.B. Dehideniya J. (P.CA) (as he then was) in *Gotabaya Nandasena Rajapaksa V. Pujith Jayasundara and others*, Court of Appeal case No. 391/2017 Decided on 29.11.2017 and held that:

“The Petitioner’s contention is that there is no misappropriation of any money in the transaction. It is only a commercial transaction. Further the certificate on the face of it is wrong.

Further held that;

The learned President Counsel submits that this is a commercial transaction entered into by and between the corporation and the Foundation.... The learned President’s Counsel further argues that there is no dishonest misappropriation. Under Section 22 of the Penal Code, dishonesty is defined as “Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly”. In the instant case the Petitioner had not gained anything wrongfully and there is no wrongful loss to any person. The Counsel further argues that there is no misappropriation. Counsel argues that it to be a misappropriation, firstly there should be an appropriation of

the money for his own use, but in the instant case there is no appropriation by the Petitioner.

Further held that:

In the case of Attorney-General V. Dewapriya Walgamage and another (1990) 2 Sri LR 212 it was held that:

1. (a) There are two basic ingredients to the offence of criminal misappropriation under S. 386 of the Penal Code
 - i. A mental element of dishonesty, and
 - ii. An act of misappropriation or conversion of movable property to his own use by the accused.

In the present case there is evidence to establish that there was no mental element of dishonesty and no misappropriation.”

In the instant case, we observe that there is no dispute that the money was given to the person called Dr. Chaturvedi and there is no indication that was given without the consent of the 2nd Respondent. Further, there is no evidence to show that the Petitioner had the dishonest intention to deceive the 2nd Respondent fraudulently or dishonestly inducing the 2nd Respondent to deliver the money. We are mindful that the essential ingredient to constitute the offence of cheating was considered in the following judgment.

In Ram Jas v State of Uttar Pradesh 1974 AIR 1811, 1971 SCR (2) 178, the Supreme Court enumerated the essential ingredients required to constitute the offence of cheating as follows:

“(1) There should be fraudulent or dishonest inducement of a person by deceiving him; (2) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(3) in cases covered by (2) (b), the act or omission should cause or is likely to cause damage or harm to the person induced in body, mind, reputation or property.”

This was considered by His Lordship N. Bandula Karunarathna J. (as he was then) in Athputharaja Wijayarajan Vs. Attorney General, Court of Appeal Case No. CA 235/2011, decided on 22.11.2021 and held that;

“On evidence led in this case, it is abundantly clear that the main ingredient of the offence of cheating "deception" has not been practised by the accused-appellant towards the complainant.”

There is no evidence to show that the Petitioner has deceived the 2nd Respondent into parting with a sum of Rs. 16,200,000/-. On the other hand, the Petitioner’s position is that she has transferred the amount to a third party namely Dr. Chaturvedi. Therefore, the Petitioner has not gained anything wrongfully. To prove misappropriation, there should be evidence that the Petitioner has utilized such money for her own use. The documents speak that there is no intention of defrauding.

Thus, this Court is of the opinion that criminal liability cannot be imposed on the Petitioner as there is no evidence or material whatsoever to prove the intention of the Petitioner to cheat and thereby dishonestly induce the 2nd Respondent to credit the said transaction fee to the Petitioner’s bank account.

I am mindful of the principle of the Writ of Prohibition as discussed in the following authorities.

MP Jain and S N Jain, *Principles of Administrative Law*, 7th edition 2011, Volume 02, at page 2388;

“Similar is the case with prohibition. As Lord Denning observed in R v. Grater London Council;

“Just as the scope of Certiorari has been extended to administrative authorities, so also with prohibition. It is available to prohibit administrative authorities from exceeding their powers, or misusing them. In particular, it can prohibit a licencing authority from making rules or granting licences which permit conduct that is contrary to law.”

Further,

“On the other hand, the object of prohibition is prevention rather than cure. Prohibition is issued when the proceedings before the concerned body are still pending and the matter has not been disposed of but is still being considered by the concerned decision-making body. The function of prohibition is to prohibit the body concerned from proceeding with the matter further. If proceedings before the concerned body have come to an end then only certiorari can be issued as there remains nothing to prohibit.

For example, if a tribunal takes up for hearing a matter which lies outside its jurisdiction, the concerned person can seek a writ of prohibition from the High Court to prohibit the tribunal from continuing the proceedings further. If, on the other hand, the tribunal has already rendered its decision, then the party concerned seeks a certiorari to quash the decision of the tribunal. There may be a proceeding before an inferior body where both certiorari and prohibition may lie. If the tribunal has decided something without finally disposing of the matter, then the interested person can seek certiorari to quash what has been decided and prohibition to stop the tribunal from proceeding further in the matter. Thus, certiorari and prohibition differ from each other from a functional point of view.”

C.F. Forsyth and I.J. Ghosh, *Wade and Forsyth's Administrative Law*, twelfth Edition, page 483

“Although a prohibiting order was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective (and equally often used) to prohibit the execution of an already-taken, ultra-vires decision. As long as the tribunal or administrative authority still had some power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by a prohibiting order.”

In view of the reasoning provided above, we hold that the transaction involved in this application is purely a commercial transaction and there is no evidence incriminating the Petitioner of the offences alleged. We further hold that the Petitioner has established the grounds as prayed for in the petition. Therefore, this Court issues a writ in the nature of Prohibition as prayed for in prayer (c), prohibiting the 1st Respondent from arresting the Petitioner on the ground that she has committed any offence as set out/alleged in the B-Report filed in proceedings bearing No. B84731/01/23 in the Magistrates Court of Colombo produced marked X12 and/or any other offence in relation to the said sum of Rs 16,200,000/=.

JUDGE OF THE COURT OF APPEAL

N. BandulaKarunarathna (P/CA), J.

I AGREE

PRESIDENT OF THE COURT OF APPEAL