

**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

The Attorney General

Revision Application No:

Attorney General's Department

CA (PHC) APN/0142/2023

Colombo-12

COMPLAINANT

High Court of Colombo No:

Vs.

HC 2415/21

1. Jeewaka Hemal Edirisinghe
2. Anjalee Deepa Edirisinghe
3. Nalaka Premalal Edirisinghe
4. Asanka srimal Edirisinghe
5. Swarnamahal Jewellers (Pvt) Ltd

ACCUSED

AND NOW

The Attorney General

Attorney General's Department

Colombo-12

COMPLAINANT-PETITIONER

Vs.

1. Jeewaka Hemal Edirisinghe
2. Anjalee Deepa Edirisinghe
3. Nalaka Premalal Edirisinghe
4. Asanka srimal Edirisinghe
5. Swarnamahal Jewellers (Pvt) Ltd

ACCUSED-RESPONDENTS

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

COUNSEL : **Suharshi Herath, DSG for the**
Complainant-Petitioner.
Shavindra Fernando, PC with Anil
Silva, PC, Anuja Premaratne, PC,
Amman Bandara and Natasha De Alwis
for the 1st to 4th Accused-
Respondents, instructed by Paul
Ratnayake Associates.

WRITTEN SUBMISSIONS ON : 15/09/2023.

DECIDED ON : 24/09/2024.

JUDGMENT**P.Kumararatnam,J.**

The Complainant-Petitioner (hereinafter referred to as the Petitioner) had filed an indictment before the High Court of Colombo against the Accused-Respondent (Hereinafter referred to as the Respondents) as follows:

1. Between 1st September 2008 and 31st December 2012, that the 1st to 4th Accused together with Soma Edirisinghe who is now deceased, conspired to aid, and abet the 5th Accused Swarnamahal jewellers (Pvt) Ltd to accept deposits without a valid license and thereby ran a finance business, and thereby committed an offence punishable under Section 56(1) of the Finance Business Act No. and read with Section 113(a) (1) of the Penal Code.
2. That the 5th Accused accepted deposits without being registered under the Central bank of Sri Lanka without the valid license issued by the Central Bank of Sri Lanka and thereby committed an offence punishable under Section 56 (1) of the Finance Business Act No. 42 of 2011 read with Sections 2(4), 53 (1) and 2 (4) of the Finance Business Act No. 42 of 2011.
3. That the 1st Accused accepted deposits without being registered under the Central Bank of Sri Lanka without the valid license issued by the Central Bank of Sri Lanka and thereby committed an offence punishable under Section 56 (1) of the Finance Business Act No. 42 of 2011 read with Sections 2(4), 53 (1) and 2 (4) of the Finance Business Act No. 42 of 2011.
4. That the 2nd Accused accepted deposits without being registered under the Central Bank of Sri Lanka without the valid license

issued by the Central Bank of Sri Lanka and thereby committed an offence punishable under Section 56 (1) of the Finance Business Act No. 42 of 2011 read with Sections 2(4), 53 (1) and 2 (4) of the Finance Business Act No. 42 of 2011.

5. That the 3rd Accused accepted deposits without being registered under the Central Bank of Sri Lanka without the valid license issued by the Central Bank of Sri Lanka and thereby committed an offence punishable under Section 56 (1) of the Finance Business Act No. 42 of 2011 read with Sections 2(4), 53 (1) and 2 (4) of the Finance Business Act No. 42 of 2011.
6. That the 4th Accused accepted deposits without being registered under the Central Bank of Sri Lanka without the valid license issued by the Central Bank of Sri Lanka and thereby committed an offence punishable under Section 56 (1) of the Finance Business Act No. 42 of 2011 read with Sections 2(4), 53 (1) and 2 (4) of the Finance Business Act No. 42 of 2011.

Upon service of the indictment, the Respondents raised several preliminary objections which are set out below:

- I. The first charge in the indictment is illegal as it has exceeded one year which contradicts Section 174 of the Code of Criminal Procedure Act No.15 of 1979.
- II. Under Alter Ego principle, directors cannot conspire with a company.
- III. The Court cannot apply the provisions of Finance Business Act No.42 of 2011 retrospectively to offences committed under the Finance Companies Act.

After calling written submissions from the parties, the Learned High Court Judge delivered his order on 06.10.2023. Upholding the 3rd preliminary objection of the Respondents, the Learned High Court Judge discharged the Respondents from the case. In his order the Learned High Court Judge had stated that proceeding for trial under defective

indictment is pointless. He further held that the impugned order is not a bar to file a fresh indictment against the Respondents.

Being aggrieved by the said order of the Learned High Court Judge of Colombo, the Petitioner had preferred this revision application before this Court.

Background of the case

The 5th Respondent was registered as private limited liability company on 21.05.2008. Among the other purpose, the said company was primarily established for the purpose of engaging in Jewellery Business. It was clearly mentioned in the Articles of Association and nowhere in the Articles of Association mentioned that the company would engage in Finance Business. In contrary, the company had engaged in Finance Business without being registered as a Finance Company.

As the company failed to pay interest nor the capital to the depositors, the matter was brought to the attention of His Excellency the President and His excellency after considering the fact that the large number of depositors and large amount of money had been defrauded, appointed a Presidential Commission of Inquiry to look into the matter.

Based on the outcome of the inquiry, an investigation was conducted by the Criminal Investigation Department and forwarded the same to the Hon. Attorney General for necessary action. After considering the investigation dossier, Hon. Attorney General forwarded an indictment against the Respondents in the High Court of Colombo on 29.01.2021.

Both parties had agreed to resolve this matter through their respective written submissions filed in this Court.

According to the Petitioner, Section 02 of Act No. 42 of 2011 requires a company engaging in Finance Business to be registered as Finance Business Company and accordingly licensed. Moreover, Section 02 of Act No. 78 of 1988 also states that company engaging in Finance Business needs to be registered as a Finance Company and accordingly

licensed. Hence, it is quite apparent that the two offences in the two enactments are identical.

Section 56 (1) of the Finance Business Act No.42 of 2011 states:

- (1) Any person who is guilty of an offence under subsection (4) of section 2 of this Act shall be liable on conviction after trial before the High Court to imprisonment of either description for a term not exceeding five years or to a fine not exceeding five million rupees or to both such imprisonment and fine and to settle liabilities of such person to depositors and other creditors under the supervision of court:

Section 38 of the Finance Companies Act No.78 of 1988 states:

Every person who is guilty of an offence under this Act shall be liable on conviction after trial before a Magistrate's Court to imprisonment of either description for a term not exceeding three years or a fine not exceeding one million rupees.

Section 71 of the Finance Business Act No.42 of 2011 states:

- (1) The Finance Companies Act, No 78 of 1988 is hereby repealed.
- (2) Notwithstanding the repeal of the Finance Companies Act, No 78 of 1988, every regulation, notice, order, rule, guideline or direction issued, requirement imposed, determination or delegation made under the repealed Act and in force on the day preceding the date of commencement of this Act shall in so far as such regulation, notice, order, rule, guideline, direction, requirement,

determination or delegation is not inconsistent with the provisions of this Act, be deemed to be a regulation, notice, order, rule, guideline, direction, requirement, determination or delegation issued, imposed or made, as the case may be, under the provisions of this Act.

Under both Acts, non-registering a company which engage in Finance Business need to registered and licensed. The outcome of violating this requirement would end up in a criminal prosecution under both Acts. Hence non-registering Finance Business has been criminalised under both acts. Therefore, the offences prescribed in the repealed Act and the new Act are identical and the new Act carry enhanced punishment than the repealed Act. Hence, the Petitioner before the High Court took up the position that, notwithstanding that with the enactment of Finance Business Act 42 of 2011, the Finance Companies Act No. 78 of 1988 got repealed, Section 71(2) of the Finance Business Act No. 42 of 2011 leaves an opening for the requirement of the registration of Finance Companies Act alive and thereby it had continued to be a requirement under the Finance Business Act No.42 of 2011. Accordingly, the offence which is committed under the Finance Business Act No. 42 of 2011 included any violation of the requirement under the Finance Companies Act No. 78 of 1988.

The Learned High Court Judge, not considering the Section 71(2) of Act No. 42 of 2011, held that Act No. 42 of 2011 does not specifically recognize a retrospective effect of its offences under Section 56 of the same. It was further held, that for an offence to have a retrospective effect, the Act which created the offence should specifically state the same in the Act.

But the Learned High Court Judge had failed to consider the very specific provision under Section 71(2) of Act No. 42 of 2011 which links the two laws in all instances where it is not inconsistent with the new law. Further, the change of laws should not pave way for the offenders

to be acquitted or not charged for the offence that they had wilfully committed.

Hence, I conclude that the failure to consider Section 71(2) of the Finance Business Act No. 42 of 2011 in the impugned order of the Learned High Court Judge is erroneous in law.

Therefore, I set aside the order of the Learned High Court Judge of Colombo dated 06.10.2023 and direct the Learned High Court Judge of Colombo to consider 1st and 2nd preliminary objections before proceed with the trial as per the indictment after issuing notice to the Respondents.

The Registrar of this Court is directed to send this judgment to the High Court of Colombo for necessary implementation.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL