

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

**In the matter of an application for
Mandates in the nature of Writs of
Certiorari and Prohibition under
and in terms of Article 140 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.**

C.A. Writ. 834/2010

Bharti Airtel Lanka (private) Limited
No. 598, Elvitigala Mawatha,
Colombo 5.

Petitioner

Vs

1. Prasantha Sampath,
Chairman, Biyagama Pradeshiya Sabha,
Delgoda.
2. Biyagama Pradeshiya Sabha,
Delgoda.
3. Telecommunication Regulatory
Commission of Sri Lanka,
No.276, Elvitigala Mawatha,
Colombo 8.
4. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before : SATHYA HETTIGE, PCJ, PCA
UPALY ABEYRATHNE, J.

Counsel : Rias Ammen for the Petitioner
Sumathi Darmawardene SSC for the 3rd and
4th Respondents
G.R.D. Obeysekera with Dilan Perera for
the 2nd Respondent

Supported on : 25.05.2011
Written Submissions on: 27.05.2011

Decided on : 01.06.2011

UPALY ABEYRATHNE, J.

This application has been made by the Petitioner seeking mandates in the nature of a writ of certiorari to quash the decision of the 1st and/or 2nd Respondents contained in the letter dated 11.09.2009 marked P 6 and a writ of prohibition restraining the 1st and/or/2nd Respondents from preventing the petitioner from constructing the base station at Dhewamitha place Obawattha Heiyanthuduwa Biyagama.

The petitioner is a limited liability company incorporated under the Act. He is a 100% owned subsidiary of Bharathi Airtel Ltd of India. The Petitioner was issued a Cellular Mobile License by H.E president of Sri Lanka under the Sri Lanka Tele communication Act No 25 of 1991 as amended. Accordingly the Petitioner became the 5th Mobile operator in Sri Lanka. The petitioner's company was incorporated in Sri Lanka in 2007 with the objective of providing GSM

Mobile Tele communication services throughout Sri Lanka. The Petitioner state that for this purpose the Petitioner was required to make and investment of US \$ 200 million (approximately Rs 23 billion) and the Petitioner has already invested Rs 13.5 billion.

The petitioner state that base stations (sometimes referred to as Tele communication towers) are essential for Mobile phone users to have mobile Tele communication connectivity. Accordingly the Petitioner has entered into an agreement with Board of Investment of Sri Lanka. According to the terms of the said agreement the Petitioner is required to set up and operate a digital Cellular Mobile Communication system and for that purpose the Petitioner has already erected about 861 base stations throughout Sri Lanka.

Accordingly the petitioner has commenced to construct a base station at Dhewamitha place, Obawattha , Heiyanthuduwa, Biyagama. The Petitioner stated that prior to commence the construction of the said base station he obtained approvals from the Civil Aviation Authority, Central Environment Authority, Urban Development Authority, Ministry of Defense Public Security Law and Order and the 1st, 2nd and the 3rd Respondents. The said letters of approval has been produced with the petition to this Court marked P 3 (a) to P 3 (i).

Accordingly the Petitioner has commenced constructions of the said base station and has completed construction up to the stage of erection of concrete foundations for the said base station. In the meanwhile the petitioner has received a letter dated 11.09.2009 sent by the 1st and/or the 2nd Respondent requesting the petitioner to suspend the construction of the said base station. Said letter has been produced to this court with the petition marked P6.

The petitioner submitted to this court that the decision contained in P 6 is *ultra vires* and contrary to the Urban Development Authority Law. The Petitioner contended that there is no provision in the Urban Development Authority Act to suspend such permit granted under said law. Hence the Petitioner sought a mandate in the nature of writ of Certiorari quashing the said decision contained in the letter P 6.

The learned counsel for the 3rd and the 4th Respondents did not raise any objections to the application made by the Petitioner. He submitted that the 3rd and the 4th Respondents have given their approvals to the constructions of the said base station.

The learned counsel for the 2nd Respondent objected to the Petitioner's said application and prayed for a dismissal of the application. Learned counsel submitted that since all the approvals/ observations made by the relevant Authorities have expired, this court has no jurisdiction to permit the Petitioner to have and maintain this application. He further submitted that this court cannot go into the matter since the necessary parties are not before court. The learned counsel for the 2nd Respondent further submitted that a public officer who issues an order has the authority to amend, vary, rescind or revoke such order under section 18 of the Interpretation Ordinance.

It is important to note that the 3rd and/or the 4th Respondent had failed to hear the Petitioner prior to the issuance of P 6. It is apparent from P 6 that the decision contained in P 6 is not a decision of the 3rd and/or the 4th Respondent. P 6 has been sent upon an order given by a politician. It is apparent from the P 6 that

the 3rd and/or the 4th Respondent has merely carried out the order of the politician. Hence it is apparent from the decision contained in P 6 that it is not valid decision of the 3rd and/or the 4th Respondent. Therefore the decision contained in P 6 is illegal and *ultra vires* the provisions of the Urban Development Authority Act.

The learned counsel for the Petitioner further submitted that since the permit has been granted under section 8J (1) of the Urban Development Authority Act, the 3rd and/or the 4th Respondent has no jurisdiction to suspend such permit without hearing the Petitioner. The learned counsel further submitted that there is no provision in the Urban Development Authority Act to suspend a development permit which has been issued under the said law. The learned counsel for the 2nd Respondent submitted that since the 3rd and/or the 4th Respondents have acted within their power and authority, the said order is not amenable to writ jurisdiction of this court.

I have carefully considered the said submissions of the learned counsels. When I consider P 6 it appears to me that the 3rd and/or the 4th Respondents have failed to adhere to the rules of natural justice. The 3rd and/or the 4th Respondents have failed to hear the petitioner before the issuance of the letter dated 11.09.2009 marked P 6. On this ground alone the Petitioner is entitled for the relief claimed for. In the said circumstances I am of the view that the said document P 6 is illegal and *ultra vires* the powers of the 3rd and/or the 4th Respondent.

For the aforesaid reasons I make order to issue a mandate in the nature of a Writ of Certiorari quashing the decision of the 1st and the 2nd Respondents contained in the letter dated 11.09.2009 marked P 6. Further I make order to issue a mandate in the nature of a Writ of Prohibition restraining the 1st and the 2nd

Respondents from preventing the Petitioner from constructing the aforesaid base station at Dhewamitha place Obawattha Heiyanthuduwa Biyagama. The petitioner's application for a writ of Certiorari and a writ of Prohibition is allowed with costs.

Application for writ allowed.

Judge of the Court of Appeal

SATHYA HETTIGE, PCJ, PCA

I agree.

President of the Court of Appeal