

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC  
OF SRILANKA**

**In the matter of an Application for order in the  
nature of Writ of Certiorari, Prohibition and  
Mandamus under Article 140 of the Constitution  
of The Democratic Socialist Republic of Sri  
Lanka**

**Arthur Chamara Sampath Dassanayake Don,  
Ellawatta,  
Neluwa,  
Demodara.**

**PETITIONER**

**CA (WRIT) APPLICATION**

**NO.114/2015**

**Vs,**

1. **M.P. Jayasinghe,  
Governor of the Uva Province,  
Office of Governor- Uva Province,  
King's Street,  
Badulla.**

**And 79 others**

**RESPONDENTS**

**Before : Vijith K. Malalgoda PC J (P/CA) &**

**H.C.J. Madawala J**

**Counsel : Faizer Musthapha PC with Shantha Jayawardena with  
Charaka Jayaratne, P. Rupasinghe and Sara Fazal for the  
Petitioner,  
Suren Fernando for the 3<sup>rd</sup> Respondent,  
Ali Sabry PC with Samhan Munzil for 8<sup>th</sup> Respondent,  
Kushan de Alwis PC with Chamath Fernando for 36<sup>th</sup>  
Respondent,  
Indika Deumini de Silva DSG for the 1<sup>st</sup> Respondent.**

**Supported On : 30.03.2015**

**Written Submission On : 20.04.2015**

**Order On : 21.05.2015**

## **Order**

### **Vijith K. Malalgoda PC J**

This court decided to take up both CA/114/2015 and CA/138/2015 for notices together since both these applications were filed challenging the appointment of the 3<sup>rd</sup> Respondent as the Chief Minister Uva Province. The above decision of the 2<sup>nd</sup> Respondent Produced marked X-9 by the Petitioner.

Petitioner in the present application was elected as a member of the Uva Provincial Council during the Provincial Council Elections held on **20.09.2014** from United People's Freedom Alliance (UPFA) securing 34,337 preferential votes. According to the Petitioner, UPFA obtained 349,906 votes at the said election which was 51.246% from the total votes polled at the said election.

Appointment of the Chief Minister and the board of Ministers are entrusted with the Provincial Governor of the respective province by the constitution. **Article 154 F (4) and (5)** refers to the appointment of the Chief Minister and board of Ministers as follows.

154F (4) The Governor shall appoint as Chief Minister, the member of the Provincial Council constituted for that Province who, in his opinion, is best able to command the support of a majority of the members of that Council:

Provided that where more than one half of the members elected to a Provincial Council are members of a one political party, the Governor shall appoint the Leader of that Political Party in the Council as the Chief Minister.

(5) The Governor shall, on the advice of the Chief Minister, appoint from among the member of the Provincial Council constituted for that Province, the other Ministers.

Second Respondent acting under the above provisions of the constitution appointed the 8<sup>th</sup> Respondent who was the leader of UPFA group as the Chief Minister. This appointment was announced by Gazette Notification bearing No **1882/44 dated 02.10.2014 (X-5a)**. Under and Virtue of Gazette Notification bearing No. **1884/54 dated 16.10.2014 (X-6)** the Petitioner was

appointed by the 2<sup>nd</sup> Respondent as the Minister of Sports and Youth Affairs, Power and Energy, Textile and Small Industries and Co- operatives.

The Petitioner alleges that, subsequent to the 2015 Presidential Election, the 3<sup>rd</sup> Respondent who was interested in becoming the Chief Minister Uva Province, has procured affidavits from several members of the Uva Provincial Council and submitted them before the 2<sup>nd</sup> Respondent claiming that he has the support of majority of members in the Uva Provincial Council.

Thereafter the 8<sup>th</sup> Respondent was removed from the office of the Chief Minister by the 2<sup>nd</sup> Respondent by Gazette Notification bearing No. **1897/11 dated 14.01.2015(X-8)** and appointed the 3<sup>rd</sup> Respondent as the Chief Minister Uva Province by Gazette Notification bearing No. **1897/10 dated 14.01.2015**. The Petitioner further submitted that, the 1<sup>st</sup> Respondent by Gazette Notification bearing No. **1899/41 dated 30.01.2015** has appointed the 3<sup>rd</sup> and 4<sup>th</sup> to 7<sup>th</sup> Respondent as the board of Ministers of Uva Provincial Council.

The Respondents raised several preliminary objections before the main matter was supported before us. However at that stage the court decided to consider both, the preliminary objection for the maintainability of this application and the objections for the main application together.

The main preliminary objection raised on behalf of the 3<sup>rd</sup> Respondent was that the matter should be dismissed in Limine, there being no proper application before court, since the Petitioner has not complied with **Rule 3(1) (a)** of the Court of Appeal (Appellate Procedure) **Rules 1990**.

According to Rule 3(1) (a), every application made to the Court of Appeal shall be by way of Petition together with an affidavit in support of the averments in the Petition.

Proviso to **section 12(2)** of the Oaths and Affirmation Ordinance Provides;

Provided that a Commissioner for Oaths shall not exercise the powers given by this Section in any proceeding or matter in which he is Attorney -at -Law to any of the Parties, or in which he is otherwise interested.

Based on the above provision, on behalf of the 3<sup>rd</sup> respondent it was raised that, The registered Attorney -at- Law in the present case (**CA 114/2015**) is Sureni Dikkumbura and the Commissioner for Oath who has attested the affidavit is Mary T. Dickman.

The registered Attorney -at- Law in **CA (writ) 138/2015** is Mary T.Dickman and the Commissioner for Oaths who has attested the affidavit is Sureni Dikkumbura.

At the inception, parties have agreed to support both matters together, since both applications related to the identical factual background and relief and therefore the 3<sup>rd</sup> Respondent argued that the Commissioner for Oath in this matter is a person who has an interest in this matter since she is the Registered Attorney -at- Law in **CA (writ) 138/2015** which is the other matter, supported along with this case.

In support of his contention 3<sup>rd</sup> Respondent relied upon the Supreme Court decision in *Air Port and Aviation Services (Sri Lanka) Limited V. Buildmart (Lanka) Pvt. Ltd. (2010) 1 Sri L.R 292 (supra)*.

I would like to refer to the following passage of the said decision which clearly indicates the difference between two cases;

“being the Assistant Legal Officer of the Petitioner company and the Attorney -at- Law for the Petitioner at the Arbitration Proceeding and the High Court, is a Person, who has an interest in the leave to appeal application before the Supreme Court, Accordingly the affidavit filed along with the petition is not in compliance with the proviso to section 12(2) of the Oaths and Affirmation Ordinance.”

I cannot agree with the contention of the 3<sup>rd</sup> Respondent since in my view, Registered Attorney-at-Law in a similar matter where the factual background and relief are the same cannot be considered as a person who has an interest, in the other matter since the relationship of the Attorney-at-Law is to provide professional services. On the other hand the interest of each petitioner in **114/15** and **138/15** are different to each other, even though the reliefs claimed by both the petitioners are the same. Petitioner in **114/15** was a Provincial minister who lost his position as a Minister with the decision he is canvassing before us, but the Petitioner in **138/15** is the Secretary of the Political Party which got more than one half of the members elected to the Provincial Council.

However in the Air Port and Aviation Services Case the Commissioner for Oaths who attested the affidavit was an employee of the same Company and was the Registered Attorney -at-Law at the arbitration proceeding and in the High Court. For the reasons set out above I over rule the above preliminary objection.

The next objection raised on behalf of the 3<sup>rd</sup> Respondent refers to Laches. As 3<sup>rd</sup> Respondent submitted, it is an accepted fact that the impune decision of the 2<sup>nd</sup> Respondent to remove the 8<sup>th</sup> Respondent (**X-8**) and to appoint 3<sup>rd</sup> respondent as the Chief Minister Uva Province was taken on **14<sup>th</sup> January 2015**. However the Petitioner has come before this court **9<sup>th</sup> March 2015** almost 2 months later and therefore the petitioner is guilty of laches warranting the dismissal of the Petition in limine.

In the case of *Urban Department Authority V. Wejaya Luxmi (2006) 3Sri LR 62* it was decided

“when there is a satisfactory explanation with regard to the delay and the period of delay is not excessive, the court shall not dismiss the application on the ground of delay alone.”

In this regard the petitioner submitted that, even though his rights were affected with the alledged decision of the 2<sup>nd</sup> Respondent to remove the 8<sup>th</sup> Respondent and to appoint 3<sup>rd</sup> Respondent as the Chief Minister Uva Province and subsequent appointment of Board of Minister, he did not want to file writ application, since the 8<sup>th</sup> respondent had filed an application before the Court of Appeal making Petitioner the 4<sup>th</sup> Respondent to the said application. When the said application was dismissed by the Court of Appeal on a preliminary objection without going to the merits of

the application, he decided to file this action. This court is well aware of the above facts and is of the view that the petitioner has sufficiently explained his delay before this court and therefore decides to overrule the objection.

The Argument of the Petitioner was mainly based on the decision in *Premachandra, Dodangoda and others V. Jayawickrama Perera, Baker Makar and others (1993) 2 Sri LR 294*. Which describes the Sub Article and the proviso to **Article 154F (4)** of the Constitution (13<sup>th</sup> Amendment) as, (at page 306).

“This Sub Article cast a specific duty on the Governor to appoint a Chief Minister for the Province. The proviso and the main Sub Article regulate two distinct situations viz.

- i. The proviso regulates a situation where a single party has more than one half of the members of the Council. Here, it is mandatory on the Governor to appoint the Leader of such party as Chief Minister.
- ii. The main Sub Article regulates where a single party does not have more than one half of the members of the council. Here the Governor is required to appoint the member who “in his opinion is best able to command the support of that council.”

It was conceded that in situation (i) the Governor has no discretion. But, the argument at the initial hearing was that the appointment in situation (ii) is wholly within the discretion of the Governor and is not subject to judicial review. This argument has been considered by their Lordship of the Supreme Court (in the order of Court dated **16.08.1993** made upon a reference by this Court) from the perspective of two basic principles of Public Law. They are firstly, the rule of Law and secondly, the purposes for which statutory power are conferred on public authorities.

Upon a consideration of these principles their Lordships opined that

“There are no absolute of unfettered discretion in Public Law; discretions are conferred on public functionaries in trust for the public good and the priority of the exercise of such discretions is to be judged by reference to the purpose to which they were so entrusted. We have no doubt what so ever as to the purpose for which **Article 154F (4)** gave the Governor a discretion. By the exercise of the franchise the people of each Province elect their representatives, for the purpose of administering their affairs. The Governor is given discretion in order to enable him to select as the Chief Minister the representative best able to command the confidence of the Council, and thereby to give effect to the wishes of the people of the Province. That discretion is not given for any other purpose, personal or political.”

In the above decision the Court of Appeal has very clearly said that the proviso regulates, a situation where single party has more than one half of the members and in such situation the

Governor has no discretion but it is mandatory for him to appoint the leader of such party as the Chief Minister.

However the argument of the 3<sup>rd</sup> Respondent was that, even though the Governor has no discretion immediately after a provincial council election, when single party has more than one half of the members, but, if the situation changes during the tenor of a provincial council, in such a situation he has to use his discretion in deciding the Chief Minister. This argument itself establishes an important matter to be decided by us, that is to say, whether the Governor has got discretion in such situation and there by whether he is bound to give effect to the wishes of the People of the Province, as discussed in Premachandra's Case.

Under these circumstances this court is of the opinion that this is a fit and proper case for us to issue notices on the Respondents.

I will now discuss the next issue before us; i.e. the question of issuing an interim relief as prayed by the petitioner in paragraph (h)-(k) of the petition and whether he is entitled for such a relief at present.

Circumstances under which interim reliefs are granted by our courts were discussed in number of cases such as *Billimoria V. Minister of Lands (1978-1979)*, *Duwearachchi and another V. Vincent Perera and others (1984) 2 Sri LR 94*, *Mahindasoma V. Maithripala Senanayake and Others (1996) 1 Sri LR 364*.

In the case of *Duwearachchi and another V. Vincernt Perera*, and others the Court of Appeal whilst stressing that the interim orders are made in the excise of inherent or implied power of court, laid down the following guide line when issuing interim relief;

- i) Will the final order rendered nugatory if the Petitioner is successful
- ii) Where does the balance of convenience lie
- iii) Will irreparable and irremediable mischief or injury be caused to either party

Petitioner is no longer a member of the Board of Ministers to the Uva Provincial Council. By **X-8** the 8<sup>th</sup> Respondent was removed from the post of Chief Minister by the 2<sup>nd</sup> Respondent and appointed the 3<sup>rd</sup> Respondent as the Chief Minister by **X-9** and by **X-10** 1<sup>st</sup> Respondent has appointed the 3-7<sup>th</sup> Respondents as the Board of Ministers of the said Provincial Council.

The main relief the petitioner has prayed from this court is to quash the above three Gazette notifications. Interim relief (h)-(j) refer to the suspension of the above three Gazette notifications until the final determination of this case

We observe that the effect of the interim relief the petition is seeking from this court is similar to the final relief he has prayed for. If the petitioner is successful in this application he is entitled for the relief he has prayed including the quashing of the said Gazette notifications. Therefore the final order will not become nugatory if no interim relief is issued at this stage but on the other hand if the petitioner is unsuccessful, the issuance of interim relief will cause irreparable and irremediable mischief or injury to 3-7<sup>th</sup> Respondents.

For the reasons setout above this court is not inclined to grant interim relief as prayed for in paragraph (h)-(k) of the Petition.

**PRESIDENT OF THE COURT OF APPEAL**

**H.C.J. Madawala**

I agree,

**JUDGE OF THE COURT OF APPEAL**