

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

*In the matter of an Application for an
order in the nature of Writ of Certiorari
in terms of Article 140 of the
constitution*

C A (Writ) Application No. 335/ 2015

NatWealth Securities Ltd.,
Prince Alfred Tower,
No. 10-1/ 1, Alfred House Gardens,
Colombo 03.

PETITIONER

-Vs-

1. The Monetary Board of the Central Bank,
No. 30, Janadhipathi Mawatha,
Colombo 01.
2. C M D N K Seneviratne
Superintendent of Public Debt,
The Monetary Board of the Central Bank,
No. 30, Janadhipathi Mawatha,
Colombo 01.
3. Arjun Mahendran
The Governor of the Central Bank,
Central Bank of Sri Lanka,
No. 30, Janadhipathi Mawatha,
Colombo 01.

4. Trillion Securities (Pvt) Ltd.,
100/9, Independence Avenue,
Colombo 07.
5. Virtual Investments and Trading Lanka
(Pvt) Ltd.,
32/8, Jayasinghe Road,
Colombo 06.
6. P. Samarasiri
Deputy Governor of the Central Bank of
Sri Lanka,
Central Bank of Sri Lanka,
No. 30, Janadhipathi Mawatha,
Colombo 01.

RESPONDENTS

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

P. Padman Surasena J

Counsel: Ronald Perera PC for the Petitioner

Arjuna Obeysekara DSG for the 1st, 2nd, 3rd and 6th Respondents

Ali Sabri PC for the 4th Respondent

Suren de Silva for the 5th Respondent

Argued on: 2016-02-08 and 2016-02-10

Written submissions on: 2016-02-15

Decided on: 2016-03-29

ORDER PERTAINING TO THE APPLICATION TO EXTEND THE OPERATION
OF THE INTERIM RELIEF

P Padman Surasena J

The petitioner in this application has sought from this court inter alia:

- I. a Writ of Certiorari to quash the directive issued by the 2nd Respondent for and on behalf of the 1st Respondent, directing the Petitioner to honour the Repurchase Transactions entered into with the 5th Respondent and the Master Repurchase agreement entered into with the 4th Respondent. (These directives are contained in the document marked **P 29**)
- II. an interim order restraining the 1st – 3rd and 6th Respondents from suspending the Petitioner from carrying on the business and activities of a Primary Dealer, and/ or cancelling the appointment of the Petitioner as a Primary Dealer until the final hearing and determination of this application.

When this Petition was supported in this court on 2015-08-21, on an ex parte application made to this court by the Petitioner, this court has granted the interim order as per prayer (e) of the petition for a limited period of time. The said stay order was made valid only up to 2015-09-04 on which date learned counsel for the Respondents having appeared in court had objected to the extension of the said interim order issued by this court at the first instance.

Thereafter this court having afforded the opportunities for all the parties to file objections and counter objections with regard to a limited scope of the

inquiry to be held to decide on the objection raised against the extension of the said stay order, fixed the said inquiry for 2016-02-08 and 2016-02-10.

Learned counsel for all the parties extensively made submissions before this court on those two days, filed written submissions thereafter in support of their respective arguments and then concluded the said inquiry.

Learned President's Counsel who appeared for the Petitioner relied on two grounds in the course of his oral submissions as to why this court should extend the operation of the said interim order until the final determination of this application.

Those two grounds are:

- (i) that the 2nd Respondent has failed to hold an inquiry before he decided to issue the directives contained in the document marked **P 29**.
- (ii) that the 2nd Respondent cannot and should not have issued such directives in **P 29** as this matter is in the hands of the 'Commercial High Court' in a case filed by the 4th Respondent.

In addition to the above two grounds learned President's Counsel for the Petitioner in his written submissions has taken up two more grounds as to why he insist that the said stay order should be extended. They are set out below as (iii) and (iv).

- (iii) that there is a strong *prima facie* case made out by the Petitioner for the issuance of a writ of Certiorari.

- (iv) that the Petitioner will have to face an irreparable loss and damage to his reputation in case this court decides not to extend the said stay order.

At this moment the task before this court is only to decide whether this court should extend the stay order until the final determination of this application.

This court in the case of Duwearachchi Vs Vincent Perera (1984 (2) SLR 94) has laid down three principles which courts should consider when they are called upon to decide the issuance or non-issuance of a stay order. This has been followed in the case of Ceylon Tobacco Company PLC Vs Maithripala Sirisena and others (C A Writ Application No. 336/2012- C A Minutes 22.02.2013) also.

These principles are as follows:

- (a) Will a final order be rendered nugatory if the petitioner is successful ?
- (b) Where does the balance of convenience lie ?
- (c) Will irreparable or irremediable mischief or injury be caused to either party ?

As has been mentioned before, the Petitioner has relied upon five grounds. Out of these five grounds, ground (ii) can stand alone without having any considerable link to the other grounds. The other three grounds namely grounds (i), (iii) and (iv) are somewhat interwoven with each other. They revolve around the facts of this case. Hence, consideration of ground (ii) first would be convenient.

The pending Commercial High Court of Colombo case No. HC (Civil)/155/2015/MR, is an action filed by the 4th Respondent to recover the money due to him from the Petitioner, under the Master Repurchase Agreement marked **P 6**. A copy of the plaint filed in that case has been submitted to this court by the Petitioner marked **P 20**. Perusal of the document marked **P 20** clearly shows that other than the 4th Respondent there is no other party to that action. Indeed the 4th Respondent is the plaintiff and the Petitioner is the defendant in that case. It is clear that the 4th Respondent, whenever he wishes, can at any stage withdraw that action. It is important to remember at this stage that what the Petitioner has challenged in the instant proceedings before this court is a directive issued by the 2nd Respondent marked **P 29**. It is equally important to remember that it is only against the 1st to 3rd and 6th Respondents that the Petitioner had asked for the interim order in the prayer (e) of his petition. Accordingly, interim order issued by this court operates only against those Respondents. Be that as it may, it is prudent to pause this discussion at this point and proceed to consider the rest of the grounds at this juncture.

Although this court has to limit the scope of this order only to the question whether or not the interim order should be extended or not, it has become necessary for this court to touch on at least some of the major facts pertaining to this case as learned counsel for all the parties had not only extensively addressed this court but also heavily relied upon those grounds in this inquiry. Further, consideration of the above facts has become necessary particularly to find an answer to the question as to where the

balance of convenience lies and also to ascertain whether there would be any irreparable loss and damage caused to any party in this case.

The impugned transactions had taken place in the Government Securities Market. The Government Securities Market in treasury bills and bonds consists of the primary market and the secondary market. In the primary market the public debt department of the Central Bank auctions treasury bills and bonds through a competitive bidding process to primary dealers in government securities. The secondary market for government securities is open to all investors who can purchase or sell securities through primary dealers.

No party can elect to be a primary dealer. It is the Central Bank which decides who should be given a license to operate as a primary dealer. Therefore the primary dealers are specialized institutions, licensed and appointed by the Monetary Board to deal with Government Securities under the Local Treasury Bills Ordinance and the Registered Stocks and Securities Ordinance.

Section 5 of the Monetary Law has established the Central Bank of Sri Lanka as the authority responsible for the administration, supervision and regulation of the monetary, financial and payments system of Sri Lanka. It is the duty of the Central Bank to secure and maintain economic and price stability and financial system stability. In order to achieve this the Central Bank has been entrusted the responsibility to issue from time to time regulations and directions and codes of conduct with the view of having a close supervision of the conduct of primary dealers. It is in the course of

performing that duty that the 2nd Respondent has issued the directive marked **P 29** which is sought to be quashed by the petitioner.

It is important to bear in mind

- (i) that the 1st to 3rd and 6th Respondents are obliged to regulate the primary dealers in terms of the law to ensure that they act with integrity at all times.
- (ii) that neither this aspect nor the role played by 1st to 3rd and 6th Respondents appear to be in issue in the Commercial High Court case referred to above.

The petitioner and the 4th and 5th Respondents have entered into repurchase and reverse repurchase agreements marked **P 6** and **P 9(a)**. Pursuant to the said agreements the 4th and 5th Respondents have invested a large amount of money with the Petitioner for the purpose of purchasing treasury bills and bonds. When a dispute had arisen between the parties with regard to the returns promised, the Petitioner had unilaterally withdrawn/unallocated the treasury bills and bonds purchased in the name of the 4th and 5th Respondents. It is appropriate at this juncture to note that what the 2nd Respondent has asked the Petitioner in the document marked **P 29** is, to honour the repurchase transactions entered into with the 4th and 5th Respondents.

Learned counsel for the Respondent drew the attention of this court to the relevant provisions of law in both the Local Treasury Bills Ordinance and the regulations made there under to highlight the importance of maintaining a close supervision by the Central Bank over the Primary

Dealers who have been appointed by the Central Bank to deal with the transactions relating to local treasury bills.

As mentioned earlier it is not the wish of this court to decide at this moment whether to quash **P 29** or not. However, if the allegation against the Petitioner is true, "restraining the 1st to 3rd and 6th Respondents from suspending the Petitioner from carrying on the business and activities of a primary dealer, and/or cancelling the appointment of the Petitioner as a primary dealer until the final hearing and determination of this application" would only encourage other primary dealers also to refuse to honour their obligations also to their customers. This will eventually lead to the general public losing their confidence in the government securities market. That will in turn make things difficult, if not impossible for the Government to borrow the finances and cash requirements it needs to bridge its budget deficits. This could in the long run even result in the collapse of the entire economy of the country.

On the other hand there can't be an irreparable loss or damage to the Petitioner because the dispute between the 4th Respondent is in the Commercial High Court. If there is any money due to the Petitioner from the 4th or 5th Respondent, such issues can always be sorted out in courts by way of an appropriate action as has been done by the 4th Respondent.

Although in view of the above conclusions it may not be necessary for this court to consider grounds (i) and (iii) relied upon by the Petitioner as set out before, it would be relevant for this court to move on to make the following observations. They are:

- i. that there is no statutory requirement cast on the 1st to 3rd and 6th Respondents to grant the Petitioner a hearing prior to issuing a direction.
- ii. that in any case the Petitioner was in fact given a hearing and an opportunity of placing its side of this dispute, as has been demonstrated by paragraph 52 of the written submission filed by the learned DSG on behalf of the 1st to 3rd and 6th Respondents.
- iii. that the Petitioner's grievance before this court is that the 1st to 3rd and 6th Respondents did not conduct a 'proper inquiry' as opposed to 'failure to conduct any inquiry'.

In view of the above observations it will suffice to state here that this court has to restrain itself and be slow to accept and act upon the grounds (i) and (iii) relied upon by the Petitioner. Indeed the arguments contained in these grounds are grounds which this court need and should consider when it is called upon to decide whether the directive in **P 29** should be quashed or not. That stage in this case is yet to arrive.

Submissions have been made by learned counsel for the 4th and 5th Respondents that the Petitioner has suppressed material documents from this court in order to abuse the court process in obtaining this interim relief ex parte. There are sufficient other reasons for refusing to extend the stay order. They have been already set out above. Therefore no necessity arises for this court to move on to consider this aspect of the case at this stage.

In these circumstances this court is of the considered view that there is no irreparable loss or damage which would be caused to the Petitioner in the

absence of the interim order of this court and the balance of convenience of the parties to this dispute is clearly tilted in favour of the Respondents and hence points to the vacation of the interim order. Further this court is also of the view that it is to the economy of this country that any possible irreparable loss or damage would be caused, if this interim order is permitted to stand.

The Court of Appeal (Appellate Procedure Rules 1990 in its Rule 2(6), states that upon sufficient cause being shown an order for interim relief may be varied or set aside by the same or another bench or Judge, as the case may be of the Court.

For the foregoing reasons we conclude that the interim order issued by this court as per prayer (e) of the Petition should not be extended. The said stay order must be vacated and dissolved forthwith. Registrar of this Court should take steps to inform this decision to the 1st to 3rd and 6th Respondents immediately.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL