

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

In the matter of an application in the
nature of Writs of *Certiorari*, *Mandamus*
and *Prohibition* under article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

Meditek Devices (Private) limited.
142. Vipulasena Mawatha,
Colombo 10.

Petitioner

CA (WRIT) 99/2014

Vs,

1. Director
Medical technology and supplies,
120, Norris canal Road,
Colombo 10

2. Director of Health Services,
'Suwasiripaya', 385,
Rev, Baddegama Wimalawansa
Thero Mawatha
Colombo 10.

3. Dr. Rajitha Senarathna,
Minister of Health,
Ministry of Health,
'Suwasiripaya', 385,
Rev, Baddegama Wimalawansa
Thero Mawatha
Colombo 10.

4. The Secretary,
Ministry of Health,
'Suwasiripaya', 385,
Rev, Baddegama Wimalawansa
Thero Mawatha
Colombo 10.

5. The Hon. Attorney General
Attorney General's Department,
Hulftsdorp,
Colombo 12

Respondents

AND NOW BETWEEN

India Meditronic Pvt Ltd.
Solitaire Corporate Park,
Bldg No. 12, 4th Floor,
Andheri-Ghatkopar Link Road,
Andheri (East), Mumbai- 400093
India

Intervient - Petitioner

Vs.

Meditek Devices (Private) limited,
142, Vipulasena Mawatha,
Colombo 10.

Petitioner- Respondent

1. Director
Medical technology and supplies,
120, Norris canal Road,
Colombo 10

2. Director of Health Services,
'Suwasiripaya', 385,
Rev, Baddegama Wimalawansa
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5. The Hon. Attorney General
Attorney General's Department,
Hulftsdorp,
Colombo 12

Respondent-Respondents

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

Counsel : Bashra Hashim for the Petitioner
Ikram Mohamed PC with Diluni de Alwis for the Intervient Petitioner
Janaka de Silva, SDSG for the State

Order on : 26.01.2017

Order

S. Thurairaja PC J

For the purpose of clarification, certainty and easy reference, the Petitioner and the Respondent of the original application will be cited as "Petitioner" and "Respondent". Intervient Petitioner will be referred as "Intervient Applicant".

In addition, to the interim relief prayed by way of the original petition, the Petitioner sought the following:

- a) Issue a Writ of Certiorari quashing the decision of the 1st Respondent to terminate and/or withdraw the registration of the license to import '*Drug Eluting Coronary Stent System (Endeavour Resolute)*' device, presently in favour of the Petitioner as contained in letter dated 18/03/2014 hereinbefore annexed hereto marked **P11a**;
- b) Issue a Writ of Prohibition preventing the 1st Respondent from terminating and/or withdrawing the licence to import '*Drug Eluting Coronary Stent System (Endeavour Resolute)*' device, hereinbefore marked **P5b** presently in the name of the Petitioner, without following the due process of law;

- c) Issue a Writ of Certiorari quashing the decision of the 1st Respondent to terminate and/or withdraw the certificate of registration of the 'Drug Eluting Coronary Stent System (Endeavour Resolute)' device presently in favour of the Petitioner as contained in letter dated 18/03/2014 hereinbefore annexed hereto marked **P11a**:

The Petitioner filed the petition on 1st April, 2014, subsequently after being served a Notice for interim relief. Following other processes, formal Notices were marked by the Respondents on 22nd May, 2014 and after obtaining several dates Respondents filed their Counter Objections on 10th April, 2015. The Petitioners obtained several dates to file Counter Objections on 15th February, 2015 and in the meantime, the matter was fixed for argument on 02nd February, 2016.

However, on 28th February, 2016, the Intervening Applicant filed an application to intervene in this matter. When the matter was taken up for determination on 2nd February, 2016 the Petitioner raised an objection for the intervention but the DSG who is appearing for the Respondents informed the Court that he has no objection for the aforementioned application for intervention. The Counsel for the Intervening Applicant as the Petitioner moved Court to make a relevant decision based on the strength of the application and the written submission.

The Intervening Applicant states that, (Quoted from the written submissions of the Intervening - Petitioner)

Para [3] "...it a company incorporated in India and is a fully owned subsidiary of Medtronic Inc. U.S.A(hereinafter "Medtronic Inc"), which is the sole manufacturer of all "Medtronic" range of medical equipment and devices distributed and sold all over the world."

Para [5] "The termination of the registration of licence to import the said Device by the Petitioner – Respondent which is challenged by the Petitioner – Respondent in these proceedings are devices manufactured and supplied by Medtronic Inc. for the importation of which the Intervening – Petitioner had appointed the Petitioner – Respondent as the agent in Sri Lanka."

Para [6] "The Intervening - Petitioner terminated the Agency Agreement in respect of the said Device with the Petitioner – Respondent on or about 14th February 2012."

Para [8] "Notwithstanding the same, the Petitioner – Respondent had illegally distributed and stored the said Device without a certificate of registration or a License to import the said product in blatant violation of the applicable laws and regulation. The Petitioner – Respondent is currently prosecuted by the Cosmetics, Devices and Drugs Authority in the Magistrates Court of Maligakanda under Case No.82308/2012 in connection with the said offence."

Para [14] "The Petitioner – Respondent has thus wilfully left out the Intervenient - Petitioner in order to misinterpret material facts to Your Lordships' Court and is attempting to mislead Your Lordship's Court by submitting fabricated material purportedly in support of its case."

Para [19] "The Intervenient - Petitioner submits that the Petitioner – Respondents has deliberately refrained from making the Intervenient - Petitioner and/or Medtronic Inc. a party to this action, knowing full well that the Intervenient - Petitioner was a party having sufficient interest to the issue before Court in an attempt to deprive Your Lordships' Court of being fully appraised of the facts surrounding the dispute at hand."

The Petitioner vehemently objecting the application of intervention by the Intervenient Applicant and states as following (Quoted from the written submissions of the Petitioner):

Para [5] "It is submitted that there is no provision in law which permits the intervention of a party to an application for the issuance of prerogative Writs before Your Lordships' Court"

Para [6] "It is submitted that this position is extremely clear in that the Court of Appeal (Appellate Procedure) Rules 1990 drafted under and in terms of Article 138 of the constitution which deal with the procedure of Court for the dealing with applications including, inter alia, prerogative Writs, do not provide for the intervention of third parties."

Para [18] "The necessary parties for this purpose are the Petitioner and the 1st Respondent and no other."

Para [28] "The Petitioner further pleads that in any event that the parties seeking to intervene are not aggrieved parties."

Para [40] It is submitted that ex facie the papers filed it is evident that the said parties are seeking intervention for mala fides/ extraneous reasons in that, the said parties in the said Petition have pleaded, inter alia, that:

- (1) they had certain contracts with the Petitioner*
- (2) the said contracts have been breached by the Petitioner*
- (3) thus, they have suffered extensive financial loss as a result*

Basic legal provision for issuance of Writ is governed by Article 138 of the Constitution

(1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance : Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

(2) The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain.

CA (Appellate Procedure) Rules 1990 provides for the procedure to be adopted by Court when dealing with an application including *inter alia* prerogative Writs, and does not expressly provide for the intervention by third parties and disallows such.

However, time and time again, Court had allowed intervention and thus, there are judgments in favour of and against such interventions. When analysing the previous discussions, there exists a liberal and a strict approach adopted by the judges.

In **Government School Dental Therapist Association V Director General of Health Services and Others (CA Writ Application No. 861/93)** wherein Court allowed the intervention sought on the following basis:

"Each of the Interventient Petitioners in the present case cannot be said to be a different "meddlesome busybody" or a "meddlesome interloper" who do not have a sufficient interest in the pending application. I would therefore adopt the liberalized rules in regard to the standing of a party entitled to seek a remedy, to the case of an intervenient who similarly has a sufficient interest in the subject matter of a pending writ application, and on that basis to permit the intervention,"

In **Jayawardena V. Ministry of Health and Others (CA Writ Application No. 978/2008, decided on 21.05.09)** where the courts allowed the intervention sought on the following basis:

"What the court at this point of time needs to consider is whether the intervenient party is a necessary party and having such party in the case would in all circumstances assist court in considering the merit and demerits of the application before court"

In **In Indrani Dewalage Ranasinghe and Others Vs. Commissioner General of (CA Writ Application No. 127/10 decided on 11.05.2011)** where the court allowed Ceylon tobacco company and two other parties who sought to intervene in an application challenging the tax imposed on white beedi to intervene into the said proceedings. In allowing the intervention, court observed that;

“There is specific rule of law in the court of appeal rules In Sri Lanka which governs the issue of intervention applications by third parties in Writ applications. However, our courts have considered the issues of sufficient cause and interest of affected parties in exercising the inherent and discretionary power of the court to allow the intervention applications.”

But in **Weerakoon and Another V. Banadaragama Pradeshiya Sabhawa (CA Writ Application No. 586/2007 decided on 2011.11.22) 2012 BLR 310** the Divisional Bench upheld the decision of **M.D Chandrasena and Two Others V S.F. De Silva 63 N.L.R at page 143**

“.... that in an application for a writ in the nature of Mandamus or ‘Certiorari persons other than those who are parties to the application are not entitled to take part in the proceedings as Interveniens. It was further held in that case that the English common law has been adopted by our courts to determine the principles that should guide the court in either granting or refusing these Writs but it had never been the practice of this court to allow persons other than those who are parties to the application for Writs to intervene in the proceedings. Their lordships’ further held in that the English rules made by the courts in England permitting the court to allow an Interveniens to take part in proceedings initiated by way of a writ of Mandamus clearly have no application in Sri Lanka and that although the courts ordinance empowered the Supreme court to make rules governing its own procedure, no rules have yet been framed to enabling an Interveniens to take part in proceedings for the issue of Writs of Mandamus or Certiorari to which he is not a party.”

Further, the divisional bench considered in the case of **Harold Peter Fernando Vs the Divisional Secretary Hanguranketha and Two Others reported in 2005 B.L.R at page 120** Saleem Marsoof.J citing with approval the judgment of Dr.H.W.Thambiah.J in **M.D Chandrasena and Two Others V S.F. De Silva(supra)** held *inter alia* that:

- I. *The court of appeal rules, 1990 made under article 136 of the constitution of the democratic socialist republic of Sri Lanka setting out the procedure to be followed this court in dealing with applications inter alia for prerogative Writs, do not provide for third-party interventions in proceedings,*
- II. *There is no corresponding provision in the constitution or any other law seeking to confer on a third party of audience in the court of appeal in the lines of article 134(3) of the constitution, as it illustrates the restraint that is exercised by the apex court of the country in dealing with applications for third party intervention in the context of the supervisory jurisdiction of court which*

is exercised with the view to keeping administrative authorities within their lawful bounds.

It appears that the relationship between the Petitioner and the Intervening Applicant is based upon a contract and it will not come within the ambit of jurisdiction of Writs and parties may advise themselves the appropriate cause of action to be followed. Furthermore, the Intervening Applicant has the capacity to make appropriate representations to the Hon. Attorney General, who is the Chief Legal Officer and holds Quasi-Judicial office.

When considering the law, it is clear now that there is no express provision to allow the intervention in Writ matters as per the rules of Court of Appeal. Therefore, the view of the Court is to strictly follow the order of the divisional bench in **Weerakoon and Another V. Banadaragama Pradeshiya Sabhawa (CA Writ Application No. 586/2007 decided on 2011.11.22).**

In conclusion, after careful consideration of all the available facts, law and the decided authorities, the Court is of the view that, intervention will not be permitted accordingly.

Application for intervention is disallowed.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J (P/CA)

I agree,

PRESIDENT OF THE COURT OF APPEAL