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

In the matter of an application under and in terms of Article 140 of the Constitution for Mandates in the nature of Writs of Certiorari and Prohibition.

CA Writ Application No: 285/2017

B. Deniswaran

2nd Cross Street,

Pettah, Mannar.

Petitioner

Vs.

01. Hon.Justice C.V.Wingneswaran.

Chief Minister, Northern Province,

26, Somasundaram Avenue,Jaffna.

02. Hon.K.Sarveswaran

Kaddaipirai Road,

Kopay South Kopay.

03. Hon.Ananthi Sasitharan

Valakamparai,

Chulipuam,Jaffna.

04. Hon. G.Gunaseelan

Field Street,Sinnakadai,

Mannar.

05. Hon.K.Sivanesan

Kanukerny East,

Mulliyawalai,Mullaitivu.

06. Hon. P.Sathiyalingam

Vairavapiliyankulam,Vavuniya.

07. Hon.Reginald Cooray,

Governor,Northern Province,

Governor's Secretariat, Old Park, Kandy,

Road,Chundukuli,Jaffna.

Respondents

AND NOW

In the matter of an application under and in terms of the Constitution of the Democratic Socialist Republic of Sri Lanka and especially Article 105(3) thereof

B. Deniswaran

2nd Cross Street,

Pettah, Mannar.

Petitioner-Petitioner

Vs.

01. Hon.Justice C.V.Wingneswaran.

Chief Minister, Northern Province,

26, Somasundaram Avenue,Jaffna.

02. Hon.Ananthi Sasitharan

Valakamparai,

Chulipuam,Jaffna.

03. Hon.K.Sivanesan

Kanukerny East,

Mulliyawalai,Mullaitivu.

1st, 3rd and 5th Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Suren Fernando with K. Wickremanayake and Shiloma David for the Petitioner-Petitioner

K. Kanag-Iswaran P.C. with L. Jayakumar and A. Weeraratne for the 1st Respondent-Respondent

K.V.S. Ganesharajan with Sarah George for the 2nd Respondent-Respondent

Saliya Pieris P.C. with Danushka Rahubaddha for the 3rd Respondent-Respondent

M.A. Sumanthiran P.C. with N.J. Anketell and J. Arulananthan for the 6th Respondent

Argued on: 18.09.2018 and 16.10.2018

Written Submissions filed on:

Petitioner-Petitioner on 07.11.2018 and 26.11.2018

1st Respondent-Respondent on 07.11.2018 and 26.11.2018

3rd Respondent-Respondent on 05.12.2018

6th Respondent on 07.11.2018

Decided on: 13.02.2019

Janak De Silva J.

On 29.06.2018 having heard parties we granted the Petitioner the interim reliefs prayed for in prayers b, c and d to the petition which reads as follows:

b. Issue an interim order restraining the Respondents from interfering with and/or prohibiting and/or preventing and/or the Petitioner functioning as Minister of Fisheries, Transport, Trade and Commerce, Rural Development, Trade & Commerce, Road Development and Motor Traffic of the Northern Province;

c. Issue an Interim order suspending operation of "P12";

d. Issue an interim order suspending "P13"to the extent that the portfolios of Fisheries, Transport, Trade and Commerce, Rural Development, Road Development and Motor Traffic have been allocated to persons other than the Petitioner.

The Petitioner-Petitioner (Petitioner) by petition dated 30.07.2018 alleged that the 1st, 3rd and 5th Respondents-Respondents (1st, 3rd and 5th Respondents) are guilty of the offence of contempt of the Court of Appeal and moved that notice and summons be issued on them in the first instance and they be directed to plead and show cause as to why this Court should not take steps to deal with them for the offences of contempt of the Court of Appeal as provided for by Article 105(3) of the Constitution. This Court having considered the averments in the petition and affidavit of the Petitioner issued summons on the 1st, 3rd and 5th Respondents.

They appeared in Court on 18.09.2018 and the learned Presidents Counsel for the 1st Respondent raised the following preliminary objection to the contempt proceedings:

> "No rules as to the proceedings in the ... Court of Appeal in the exercise of its contempt jurisdiction conferred on the Court of Appeal by the Constitution has been formulated under Article 136(1)(b) of the Constitution and therefore no proceedings could be had before the Court of Appeal pursuant to Article 105(3) of the Constitution, in the absence of a procedure established by law".

The 3rd and 5th Respondents associated themselves with the said preliminary objection. Having heard parties and after giving them an opportunity of filing written submissions as well as replying to the written submissions filed by the other parties, Court reserved order on the preliminary objection. We now deal with this preliminary objection.

Jurisdiction

Article 105(3) of the Constitution states that the Court of Appeal of the Republic of Sri Lanka shall be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere. The 1st, 3rd and 5th Respondents do not contest the jurisdiction of the Court of Appeal to punish for contempt of itself. The point urged is that in the absence of any rules of the Supreme Court made under Article 136(1)(b) of the Constitution for the exercise of the jurisdiction conferred by Article 105(3) of the Constitution, to continue a procedure which was hitherto used as a practice in the Supreme Court, i.e. the issue of a *Rule Nisi*, will be ultra vires the powers of the Superior Courts post the 1978 Constitution.

Power/Jurisdiction

Before I proceed to deal with the preliminary objection in detail, the following observation is apposite. Article 105(3) of the Constitution states that the Court of Appeal shall have the ***power*** to punish for contempt of itself, whether committed in the court itself or elsewhere. It is significant that the word used is ***"power"*** rather than ***"jurisdiction"***. The Constitution appears to make a distinction between ***power*** and ***jurisdiction*** and this is more clearly borne out by Article 138(2) of the Constitution which states that 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. There is no need to use both the terms in this Article if they have the same meaning. In fact, the Supreme Court in *Regent International Hotels Ltd. vs. Cyril Gardiner and others* [(1978-79-80) 1 Sri.L.R. 278 at 286] held that "The Supreme Court "being the highest and final Superior Court of Record in the Republic" and the Court of Appeal being a Superior Court of Record with appellate jurisdiction **have all the powers** of punishing for contempt, wherever committed in the island in facie curiae or ex facie curiae". (emphasis added)

On the contrary Article 136(1)(b) of the Constitution refers to the making of rules as to the proceedings in the Supreme Court and Court of Appeal in the exercise of the several ***jurisdictions*** conferred on such courts by the Constitution or by any law. On a plain reading it is not applicable to different ***powers*** vested in the Court of Appeal.

Furthermore, Article 118 of the Constitution in dealing with the general jurisdiction of the Supreme Court makes no reference to contempt of court as a jurisdictional matter. This is the same position in relation to the Court of Appeal.

Historical Context

A survey of the historical development of contempt of court in Sri Lanka is relevant to the preliminary objection as there are numerous cases where the superior courts of this country have dealt with contempt of court applications.

The Charter of 18th April 1801 established a "Supreme Court of the Judicature in the Island of Ceylon" which was vested with the power inter alia to correct "or punish any contempt thereof, or willful disobedience thereunto by fine and imprisonment". The Charter of 18th February 1833 having repealed the Charter of 1801 and established the "Supreme Court of the Island of Ceylon" and a District Court within every District of the Island to complement the existing Provincial Courts and sitting Magistrate's Courts which were designated as Inferior Courts.

The Supreme Court was recognized as a superior court of record and had all the powers for punishing for contempt, *ex facie* or *in facie curiae* while the District Court was also recognized as a court of record vested with the power to punish summarily contempt committed in the face of the court. The Provincial Courts did not have inherent power to punish for contempt [*The King v. Samarawira* (19 N.L.R. 433 at 435)].

The position was clearly set out *In the Matter of the Application of JOHN FERGUSON for a Writ of Prohibition against the District Court* (1 N.L.R. 181 at 183) by Morgan A.C.J. as follows:

> "A Court empowered like our District Courts to fine and imprison and to keep a record of its proceedings is a Court of Record (Hawkins' Pleas of the Crown, cap. I, section 14), and Courts of Record have undoubtedly the power to punish summarily contempt committed in the face of the Court. Such power is inherent in such Courts, and rests on the necessity of preserving for them that decent respect, without which they cannot carry on their proceedings or maintain their just authority."

Morgan A.C.J. (Supra. Page 185) identified a difference in the power between the superior courts and inferior courts in dealing with contempt and explained the power possessed by the Supreme Court as follows:

> "There is an obvious distinction between Inferior Courts created by statute, and Superior Courts of Law and Equity. In these Superior Courts the power of committing for contempt is inherent in their constitution, has been coeval with their original institution, and has been always exercised. The origin can be traced to the time when all the Courts were divisions of the Great Curia Regis-the Supreme Court of the Sovereign-in which he personally, or by his immediate representative, sat to administer justice. The power of the Courts in this respect was therefore an emanation from the royal authority, which, when exercised personally or in the presence of the Sovereign, made a contempt of the Crown punishable summarily, and this power passed to the Superior Courts when they were created".

In this context, the learned Presidents Counsel for the 1st Respondent submitted that our law recognizes the concept of Courts of Record and that Superior Courts of Record were recognized as having the power to punish contempt, whether it be *in facie* or *ex facie curiae*.

The position set out above was maintained by section 3 of the Courts Ordinance No. 1 of 1889 and section 7 declared that the Supreme Court shall continue to be the only Superior Court of Record in Sri Lanka. Furthermore section 47 of the Ordinance declared that the Supreme Court has the power and authority to take cognizance of and to try in a summary manner any offence of contempt committed against or in disrespect of the authority of itself or any offence of contempt committed against or in disrespect of the authority of any other Court which did not have jurisdiction under section 57 of the Ordinance to take cognizance and punish.

The Court of Appeal Act No. 44 of 1971 established a Court of Appeal as a Superior Court of Record with the power to punish for contempt of itself and shared the status of a Superior Court of Record with the Supreme Court.

With the enactment of the Administration of Justice Law No. 44 of 1973, which repealed the Court of Appeal Act No. 44 of 1971, the Supreme Court was once again recognized as the only Superior Court of Record.

1978 Constitution

Under the 1978 Constitution two Superior Courts of Records, the Supreme Court and the Court of Appeal were established and given the power to punish for contempt of itself.

The learned Presidents Counsel for the 1st Respondent submitted that up to the enactment of the 1978 Constitution the Superior Courts tried the offence of contempt of court in a "summary manner" and the procedure was the issue of a Rule Nisi, drafted by the Attorney General, which admittedly has been the *cursus curiae*. This is reflected in a long line of cases including *In the Matter of the Application of JOHN FERGUSON for a Writ of Prohibition against the District Court* (1 N.L.R. 181), *Kandoluwe Sumangala v. Mapitigama Dharmarakitta et al* (11 N.L.R. 195), *In the Matter of Armand de Souza, Editor of the Ceylon Morning Leader* (18 N.L.R. 33), *The King v. Samarawira* (19 N.L.R. 433), *The Attorney General v. Vaikunthavasan* (53 N.L.R. 558), *In RE S.A. Wickremasinghe* (55 N.L.R. 511), *The Queen v. D. Peris et al* (68 N.L.R. 372), *R.A. Jayaratne v. Mrs. Sirimavo R.D. Bandaranayake and others* (69 N.L.R. 181).

The learned Presidents Counsel for the 1st Respondent however submitted that this practice is ultra vires and unconstitutional since the enactment of Articles 105(3) and 136(1)(b) of the Constitution in the absence of rules framed by the Supreme Court.

However, several decisions of the Supreme Court after the enactment of the 1978 Constitution acknowledge the right of the superior courts under the 1978 Constitution to proceed with contempt of court applications although the issue of absence of rules under Article 136(1)(b) was not directly in issue [*Re Garumunige Tilakaratne* (1991) 1 Sri.L.R. 134, *A.M.E. Fernando v. The Attorney General* (2003) 2 Sri.L.R. 52, *In the Matter of D.M.S.B. Dissanayake, Member of Parliament and Minister* (S.C. Rule 1/2004, S.C. Minutes of 07.12.2004].

In fact, Wigneswaran J. in *Cornel & Co. Ltd. v. Mitsui & Co. ltd. and others* [(1998) Vol. VII Part II B.L.R. 39 at 43] held:

> "***The Court of Appeal cannot be said to be so impotent as not to be able to act in terms of the law merely because procedural rules have not been passed yet under Article 136 of the Constitution.*** The said Article refers to the Chief Justice and other judges nominated by him making rules regulating the practice and procedure of the Appellate Courts. The significant words are "may from time to time". ***If the rules are not made to regulate proceeding pertaining to any jurisdiction vested in the Appellate Courts it does not mean the Appellate Courts are to lie in hibernation until somebody wakes up. Slumbering should not stifle apposite action in appropriate instances. The inherent powers of courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Courts would be wide enough to allow the Court of Appeal to act according to convention and precedents laid down in this regard.*** Of course, the "audi alteram partem" rules and other such basic natural law principles would no doubt have to be followed when doing so." (emphasis added)

In this context the recent decision of the Supreme Court in *A.M.E.Fernando vs. The Attorney General* [(2003) 2 Sri.L.R. 52] is instructive. The Supreme Court summarily punished the Petitioner for committing contempt *in facie curiae* without a formal charge being read out and the Court held that such powers are necessary for the proper administration of Justice. S.N. Silva C.J. held (at page 60):

> "Learned counsel made his submission regarding the need to frame a charge ignoring this basic characteristic of exercising jurisdiction summarily in respect of contempt committed in the face of the Court. It would indeed make a mockery of judicial proceedings if a person who continues to disturb the proceedings in Court after being warned that he would be dealt with, is to have a charge read against him and questioned whether he pleads guilty or not guilty. It is for this reason that jurisdiction is exercised summarily. I would cite the words of Lord Denning referred to above, "to maintain law and order the Judges have and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without trial – but it is a necessary power"

Clearly the Supreme Court did not consider the need for any rules to be formulated before the Court could act for contempt of court *in facie*.

Even if it is accepted that the acts forming the subject matter of the contempt of court proceedings in the instant case amount to contempt *ex facie* yet the Supreme Court as well as this Court will have the power to act for contempt of court even in the absence of any rules framed under Article 136(1)(b) of the Constitution as Article 105(3) of the Constitution applies to both contempt of court *in facie* as well as *ex facie*.

Article 136(1) states that rules may be made *"regulating generally the practice and procedure of the Court"*. In the absence of "rules" the "practice and procedure of the Court" continues. It is only if and when rules are made that they regulate and replace the "practice and procedure of the Court". Hence having quite correctly accepted the existence of "practice and procedure of the Court" in so far as contempt of court proceedings are concerned the 1st Respondent cannot maintain that contempt of court proceedings are ultra vires and unconstitutional in the absence

of any rules made under Article 136(1)(b) of the Constitution. This position also finds support in the fact that Article 136(1) of the Constitution states that rules "may" be made.

The practice of the court as explained by the Supreme Court in *Mrs. Dilrukshi Dias Wickremasinghe, P.C. vs. Hon. Lakshman Namal Rajapaksha M.P.,* [S.C. Contempt No. 04/2016, S.C. Minutes of 15.09.2016] is as follows:

> 'The cases cited above amply demonstrate the manner in which the Court dealt with contemners. Before any action is taken, the Respondent must be issued with a Rule to show cause against the proposed action and his explanation must be sought. It is a *sine qua non* of the right of fair hearing. Fairness is a rule to ensure the wide power in the Court is not abused but properly exercised. Whatever procedure that is adopted, it must be fair and an opportunity be given to the Respondent to defend the case against him."

Article 13(4) of the Constitution

The learned Presidents Counsel for the 1st Respondent submitted that Article 13(4) of the Constitution states that "no person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law" and that in the absence of " a procedure established by law" for the exercise of this Courts power to deal with contempt, Court acted without jurisdiction in issuing process and that the Court should recall all processes issued. As explained earlier, there is a clear and established practice and procedure of the Superior Courts in dealing with acts of contempt. In any event, the 1st, 3rd and 5th Respondents have only been summoned to Court to meet the charges. As Wigneswaran J. held in *Cornel & Co. Ltd. v. Mitsui & Co. ltd. and others* (Supra. Page 44]:

> 'It is still to be decided as to whose liberty is at stake. If a subject obtains a valid order in his favour from a court of competent jurisdiction and order is alleged to have been flouted by another subject however powerful the latter may be the Court should be concerned not only with individual rights of these two parties but with regard to maintaining of the Court's proper authority and efficiency too since the credibility and efficiency of the entire judicial system is at stake. The contempt application in this instance is still to be heard

and determined. No steps have been taken touching on the liberty of the subject except to ensure the attendance of parties who may leave the territorial jurisdiction of this court."

In SC Contempt No. 04/2017 with 05/2017, S.C. Minutes 18.06.2018 the Supreme Court followed the earlier procedure by formulating a Rule.

For the foregoing reasons, I overrule the preliminary objection raised by the 1st, 3rd and 5th Respondents. This matter will in due course be taken up for inquiry into the contempt of court application.

The 3rd Respondent raised a preliminary objection that she is a person conversant in Tamil and requested a Tamil translation of the contempt papers in terms of Article 24 of the Constitution. The Petitioner countered by submitting that the 3rd Respondent had spoken in public fora in English and that she is seeking to mislead court and filed papers seeking to support his position. This objection is not a preliminary objection as the term is generally used. Tilakawardena J. in *Jathika Sevaka Sangamaya v. Sri Lanka Ports Authority and another* [(2003) 3 Sri. L. R. 146 at 148] stated that "the advantage of a preliminary objection is the possibility to dispose of a matter expeditiously which can lead to a resolution of the dispute between parties with a minimum amount of expense or delay, for the convenience of all parties including the Court". The 3rd Respondent is at liberty to urge this point at an appropriate stage and the Petitioner is at liberty to raise any objection to such an application if and when it is made.

Preliminary objection overruled.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal